

RESTORING STUDENT PRESS FREEDOMS: WHY EVERY STATE NEEDS A “NEW VOICES” LAW

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INTRODUCTION

Scholastic journalists across America have long provided vital reporting, commentary, and fresh perspective on issues of public concern. In the current age of dwindling print media,¹ student journalists play an ever-increasing role in investigating and reporting the news.² For instance, during the 2020 coronavirus pandemic, students called attention to the public health failings of their school systems and documented the pandemic’s impact on their communities.³ Students are also at the heart of many of today’s social change movements, speaking out on issues of gun violence, global warming, and racial justice.⁴ Students are thus well-positioned to provide both on-the-ground

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¹ See, e.g., Penelope Muse, *The Expanding News Desert* 1, 8-13 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf; Victor Pickard, Editorial, *American Journalism Is Dying. Its Survival Requires Public Funds*, *GUARDIAN* (Feb. 19, 2020, 8:34 PM), <https://www.theguardian.com/commentisfree/2020/feb/19/american-journalism-press-publishing-mcclatchy>.

² See, e.g., Taylor Blatchford, *As Local Newsrooms Shrink, College Journalists Fill in the Gaps*, *POYNTER* (July 16, 2018), <https://www.poynter.org/tech-tools/2018/as-local-newsrooms-shrink-college-journalists-fill-in-the-gaps>.

³ Jonathan Peters, *The Legal Landscape for Frontline Student Journalists*, *COLUM. J. REV.* (Oct. 20, 2020), https://www.cjr.org/covering_the_pandemic/covid-19-pandemic-student-journalists.php (noting that during the COVID-19 pandemic student journalists “have exposed campus outbreaks and questioned reopening plans. They have documented social-distancing violations at fraternity and sorority houses. They have tracked and explained fast-breaking changes to instructional modes and commencement events. They have demanded transparency from school administrators. And through it all they have boldly told the story of the human experience.”).

⁴ Brenda Gonzalez, *Youth Activism Is Creating Lasting Change*, *USC ANNENBERG RELEVANCE REP.* (Nov. 11, 2020, 2:20 PM), <https://annenberg.usc.edu/research/center-public-relations/usc-annenberg-relevance-report/youth-activism-creating-lasting>.

reporting and editorial opinion about news-worthy issues of our time, filling the gaps created by a shrinking professional journalism market.

Yet scholastic journalists around the country operate with varying degrees of speech and press freedom depending on whether their state has enacted legislation safeguarding their expression in the context of school-sponsored media. This patchwork of protection, or more often the lack thereof, is a direct result of the Supreme Court's 1988 decision in *Hazelwood School District v. Kuhlmeier*.⁵ The Court's ruling in that case bestowed on school officials the broad discretion to censor expression in school-sponsored forums like student newspapers.⁶

Prior to *Hazelwood*, scholastic journalism, like other school-affiliated student speech, was protected from administrative interference under *Tinker v. Des Moines Independent Community School District*.⁷ In *Tinker*, the Supreme Court held that school officials can neither censor nor punish student speech unless it creates, or is reasonably forecast to create, "material interference" or "substantial disruption" of school activities, or interferes with the rights of others.⁸ For two decades, *Tinker* was the First Amendment standard for all students, including those participating in school-sponsored media.⁹

Hazelwood, however, largely eviscerated First Amendment protection for scholastic journalists. Unlike the *Tinker* standard, *Hazelwood* requires no showing of likely substantial disruption or interference with school activities before school officials can censor student journalists' speech.¹⁰ Instead, *Hazelwood* permits schools to censor so long as the restriction can be claimed to relate to a "legiti-

⁵ 484 U.S. 260 (1988).

⁶ *Id.* at 273.

⁷ 393 U.S. 503 (1968).

⁸ *Id.* at 514 (noting that the *Tinker* plaintiffs "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.").

⁹ See, e.g., *Reineke v. Cobb Cnty. Sch. Dist.*, 484 F. Supp. 1252, 1256-58 (N.D. Ga. 1980); *Bayer v. Kinzler*, 383 F. Supp. 1164, 1165 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975); *Zucker v. Panitz*, 299 F. Supp. 102, 105 (S.D.N.Y. 1969). For non-school sponsored student publications distributed at school, see *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 967-70 (5th Cir. 1972); *Fujishima v. Bd. of Educ.*, 460 F.2d 1355, 1357-58 (7th Cir. 1972). For student publications on a university campus, see *Thonen v. Jenkins*, 491 F.2d 722, 723 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570, 573 (5th Cir. 1973), *aff'd as modified en banc per curiam*, 489 F.2d 225 (5th Cir. 1973); *Lee v. Bd. of Regents*, 441 F.2d 1257, 1260 (7th Cir. 1971).

¹⁰ See *Hazelwood*, 484 U.S. at 271-76.

mate pedagogical purpose.”¹¹ In the 33 years since *Hazelwood* was decided, lower courts have applied the “legitimate pedagogical purpose” standard so generously that students raising First Amendment concerns in cases where *Hazelwood* applies almost always lose.¹² As First Amendment scholar Sonja West observes, “Schools are essentially free to censor the student press even when the speech at issue is truthful, legally obtained, non-disruptive, and about matters of public concern.”¹³

In response to *Hazelwood*, fourteen states have enacted legislation codifying the free-speech rights of student journalists and restoring the *Tinker* standard for when school administrators can interfere with scholastic media.¹⁴ Half of these laws were adopted as part of a “New Voices” movement that started with the adoption of the New Voices of North Dakota Act in 2015 and has since been championed by the Student Press Law Center.¹⁵ And in July 2021, New Jersey was the fifteenth state to pass a “New Voices” bill in both houses of the legislature. That bill was awaiting signature by the governor at the time this article went to press.¹⁶ An additional nine states have introduced, but not yet passed, “New Voices” laws: Hawaii, Kentucky, Missouri, Nebraska, New York, Iowa, Tennessee, West Virginia, and Texas.¹⁷

This article explains why “New Voices” legislation is needed in every state. Part I provides an overview of First Amendment law in the K-12 school setting, including the highwater mark of *Tinker*, followed twenty years later by the low point of *Hazelwood*. Part II,

¹¹ *Id.* at 273.

¹² See Dan V. Kozlowski, *Unchecked Deference: Hazelwood’s Too Broad and Too Loose Application in the Circuit Courts*, 3 U. BALT. J. MEDIA L. & ETHICS 1, 6 (2012).

¹³ Sonja R. West, *Student Press Exceptionalism*, 2 EDUC. L. & POL’Y REV. 130, 132 (2015).

¹⁴ State laws protecting the expression of student journalists were passed in the following chronology: California in 1977; Massachusetts in 1988; Iowa in 1989; Colorado in 1990; Kansas in 1992; Arkansas in 1995; Oregon in 2007; North Dakota in 2015; Maryland and Illinois in 2016; Vermont, Nevada, and Rhode Island in 2017; Washington in 2018. *New Voices*, STUDENT PRESS L. CTR., <https://splc.org/new-voices> (last visited July 28, 2021).

¹⁵ See Steven Francis Listopad & Elizabeth Crisp Crawford, *The Origins of New Voices USA: A Lesson in Teaching Advocacy to Improve Teaching and Learning*, 73 JOURNALISM & MASS COMM’N EDUCATOR 469, 471 (2018); *History of the Student Press Law Center*, STUDENT PRESS L. CTR., <https://splc.org/history/> (last visited August 28, 2021).

¹⁶ *New Voices in New Jersey*, STUDENT PRESS L. CTR., <https://splc.org/new-voices-new-jersey-2/> (last visited Sept. 26, 2021).

¹⁷ See *New Voices*, STUDENT PRESS L. CTR., <https://splc.org/new-voices> (last visited July 28, 2021).

using Georgia as a case study, discusses the persisting detrimental impact of *Hazelwood* on student journalists, their advisers, and the broader community. Part III then analyzes the fourteen state statutes enacted to date that restore the *Tinker* standard for when schools can censor or suppress scholastic journalism. Part III specifically highlights core areas of overlap among the state statutes and noteworthy provisions adopted by a minority of the states, while synthesizing relevant case law interpreting these existing statutes. Part IV sets forth recommended provisions for future "New Voices" Acts informed by the fourteen-state survey and SPLC's model "New Voices" statute (hereinafter "SPLC Model"). This article concludes with a call to all states without existing state-level protections for student journalists and their advisers to join the "New Voices" movement.

I. SUPREME COURT PRECEDENT GOVERNING STUDENT PRESS FREEDOMS

Under the First Amendment, private individuals in the United States enjoy broad protection against government infringement of their speech and expression.¹⁸ These First Amendment safeguards apply not only to actions taken by the federal government, but also to actions taken by the states.¹⁹ As state institutions, public schools must therefore comply with the requirements of the First Amendment.²⁰

A. *West Virginia State Board of Education v. Barnette* and *Tinker v. Des Moines Independent Community School District*

Public school students' First Amendment rights were first recognized in the mid-20th century when, in the case of *West Virginia State Board of Education v. Barnette*, the Supreme Court held that students could not be compelled to engage in the expressive conduct of saluting the flag and reciting the pledge of allegiance.²¹ This decision overturned the Supreme Court's ruling from just three years earlier where the Court had upheld a school district's policy requiring students to salute the American flag as a means of furthering the government's

¹⁸ See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . .").

¹⁹ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²⁰ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

²¹ 319 U.S. 624, 642 (1943).

interest in creating national unity.²² Striking down mandatory flag salute and allegiance pledging in *Barnette*, the Court famously proclaimed that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²³

Thirty years later, the Supreme Court recognized students’ First Amendment right to engage in political speech at school in the seminal *Tinker* case, which arose from the following facts. In December 1965, junior high school students in Des Moines, Iowa planned to wear black armbands to school during the December holiday season in protest of the Vietnam War.²⁴ When school officials learned of this, they preemptively banned wearing armbands in school.²⁵ Three students, including siblings Mary Beth and John Tinker, defied the ban and were sent home until they agreed to return without their armbands.²⁶ The Tinkers appealed the school’s prohibition of the armbands all the way to the Supreme Court.²⁷ In 1969, the Court ruled against the school district, explaining that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁸ Writing for the majority, Justice Fortas announced that schools can only punish or censor student speech if it is reasonably forecast to cause “substantial disruption of or material interference with school activities,” or if the speech invades the rights of other students.²⁹ This *Tinker* standard, which the Supreme Court recently affirmed in *Mahanoy Area Sch. Dist. v. B.L.*,³⁰ remains the keystone principle for when schools can regulate or punish student speech.³¹

²² *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595-98 (1940); *Barnette*, 319 U.S. at 642.

²³ *Barnette*, 319 U.S. at 642.

²⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 504-05.

²⁸ *Id.* at 506.

²⁹ *Id.* at 513-14.

³⁰ 141 S. Ct. 2038, 2047-48 (2021).

³¹ The Supreme Court recognizes the following exceptions to the *Tinker* standard where schools may punish or prohibit in-school student expression without first showing a reasonable forecast of substantial disruption: (1) vulgar or lewd speech, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); (2) speech in the context of school-sponsored expressive activities such

B. Hazelwood School District v. Kuhlmeier

Almost twenty years after *Tinker*, students' First Amendment rights suffered a serious and lasting blow when the Supreme Court handed down its decision in *Hazelwood School District v. Kuhlmeier*.³² There, a Hazelwood School District principal censored two articles in a pending issue of the student newspaper: the first focused on the effects of parents' divorce on students and the second focused on teen pregnancy at the school.³³ Three student journalists from the newspaper sued for violation of their First Amendment rights.³⁴ Although their claims succeeded in the United States Court of Appeals for the Eighth Circuit, on review the Supreme Court ruled in favor of the school district.³⁵ The Court held that a school acting as the publisher of a student newspaper or the producer of a school play has the right to "disassociate itself" from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students."³⁶ Thus, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."³⁷ Additionally, the *Hazelwood* Court authorized a school to disallow speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."³⁸ Justice Byron R. White, writing for the majority, further urged:

A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling

as school media and school plays, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988); and (3) speech promoting illegal drug use, *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

³² *Hazelwood*, 484 U.S. at 260.

³³ *Id.* at 263-64.

³⁴ *Id.* at 264.

³⁵ *Id.* at 265-66.

³⁶ *Id.* at 271 (quoting *Tinker*, 393 U.S. at 509).

³⁷ *Id.* at 273.

³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.³⁹

Hazelwood thereby grants school officials expansive discretion to censor student journalism on any number of politically or socially relevant topics, and to veto satire, parody, or other creative writing styles, if the student expression is “reasonably” deemed to be “inconsistent with the shared values of a civilized order.”⁴⁰

II. THE DETRIMENTAL IMPACT OF *Hazelwood*

Hazelwood’s gift to school administrators of broad censorial authority promptly curtailed student press freedoms⁴¹ and continues to negatively affect scholastic journalists and their advisers today.⁴² The “legitimate pedagogical concerns” requirement has proven ineffective in cabining schools’ discretion to censor.⁴³ This is illustrated by the fact that post-*Hazelwood*, school officials have restricted or prohibited scholastic journalism on a wide range of newsworthy topics including: HIV/AIDS, teenage sexuality, student alcohol and drug

³⁹ *Id.* at 272 (internal quotations and citations omitted).

⁴⁰ *Id.* *Hazelwood* left open whether its holding applies to school-sponsored student expression at the college and university level. *Id.* at 273-74, n. 7. Multiple circuit courts of appeal hold that it does. *See, e.g.,* Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012) (applying *Hazelwood* to graduate student’s speech about her practicum assignment); Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (en banc) (“*Hazelwood*’s framework applies to subsidized student newspapers at colleges”); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (at the university level, *Hazelwood* allows regulation of curriculum-related student speech); Brown v. Li, 308 F.3d 939, 949-51 (9th Cir. 2002) (applying *Hazelwood* to section of graduate student’s master’s thesis); Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (*Hazelwood* applies to collegiate speech); Ala. Student Party v. Student Gov’t Ass’n, 867 F.2d 1344, 1347 (11th Cir. 1989) (applying *Hazelwood* in upholding “reasonable restrictions” that university placed on students campaigning for student government).

⁴¹ In the five years following the 1988 *Hazelwood* decision, legal assistance requests to the Student Press Law Center from student journalists and their advisers almost tripled, from 548 in 1987 to 1,473 in 1993. *See* Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 463, 466-67 (Oct. 2000).

⁴² *See* West, *supra* note 13; *see also, e.g.,* Sommer Brugal, ‘Growing Hostility’ Between Student Media and Administrators, INVESTIGATIVE REPORTING WORKSHOP (Sept. 16, 2019), <https://investigativereportingworkshop.org/news/growing-hostility-between-student-media-and-administrators/>; Danny Gallagher, *Prosper High’s Newspaper Staff Says New Principal Censored Stories, Ousted Adviser*, DALL. OBSERVER (June 8, 2018), <https://www.dallasobserver.com/news/censorship-at-ponder-high-riles-student-journalists-leads-to-advisers-ouster-10764146>.

⁴³ *See* Dan V. Kozlowski, *supra* note 12, at 6.

use,⁴⁴ embezzlement by a school principal, inadequate school restrooms, student sexual orientation and gender identity, birth control, tattoos,⁴⁵ educational disparity between white students and students of color, and depictions of flag burning.⁴⁶

A. *Societal Harm of School Censorship*

Mark Goodman and Frank LoMonte, both former executive directors of SPLC in the post-*Hazelwood* era, have voiced concerns about the negative social impact of school censorship.⁴⁷ First, in an age where people increasingly seek their news through online forums and social media, it is more important than ever to equip students with the skills to identify reliable sources of information and to teach them to value reporting that is ethical, well-sourced, and fact-checked.⁴⁸ School administrators sanitizing scholastic media of sensitive or controversial topics denies students the opportunity to learn how to responsibly and ethically investigate and write about multi-perspective, often highly relevant issues.⁴⁹ Limiting student journalists to writing only about “safe” and “non-offensive” subject matter not only deprives student journalists of having a voice on salient topics but also deprives readers of their First Amendment right to receive the information, opinions, and ideas that student journalists would otherwise

⁴⁴ Bailey McGowan, *25 Years Later, a Look at One Generation Under Hazelwood*, STUDENT PRESS L. CTR. (Jan. 24, 2013), <https://splc.org/2013/01/25-years-later-a-look-at-one-generation-under-hazelwood>.

⁴⁵ Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 167 (2006).

⁴⁶ Lahontan Valley News Editorial Board, *New Voices Allows Student Journalists to Be Heard*, NEV. APPEAL (May 16, 2017), <https://www.nevadaappeal.com/news/2017/may/16/new-voices-allows-student-journalists-to-be-heard>.

⁴⁷ See Frank LoMonte, *Censorship Makes the School Look Bad: Why Courts and Educators Must Embrace the “Passionate Conversation,”* 65 WASH. U. J. L. & POL’Y 91, 116-18 (2021); J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 722 (1988).

⁴⁸ See Dan Gillmor, *Introduction: Toward a (New) Media Literacy in a Media Saturated World*, JOURNALISM AND CITIZENSHIP: NEW AGENDAS IN COMM. 1, 9-11 (2009) (advocating for teaching critical thinking skills based on concepts of thoroughness, accuracy, fairness, independence, and transparency, without which young people will be left “adrift amid an onslaught of media or so cynical that they will disbelieve trustworthy sources”).

⁴⁹ See LoMonte, *supra* note 47, at 117-18; Piotr S. Bobkowski & Genelle I. Belmas, *Mixed Message Media: Girls’ Voices and Civic Engagement in Student Journalism*, 10 GIRLHOOD STUD. 89, 95-97 (2017) (A survey of 453 high school journalists in North Carolina found that 41% of female students and 28% of male students reported being told that certain topics were off-limits, including legalizing marijuana and same-sex marriage).

be imparting.⁵⁰ This, in turn, limits readers' ability to exercise their own expressive freedoms.⁵¹ Thus, *Hazelwood* impacts the greater community in addition to the student journalists who are most directly affected.

Second, *Hazelwood*-based censorship conflicts with effectively preparing youth to engage in participatory democracy.⁵² As one commentator notes, "schools create citizens to sustain our democracy by training students to know and exercise their First Amendment rights."⁵³ Yet, teaching students about the importance of free speech and a free press becomes a hollow and hypocritical lesson when, under *Hazelwood*, the same students are deprived of their autonomy to exercise those rights.⁵⁴ Similarly, a report by the American Bar Association calling for state-level protections against censorship of student journalists observes that "[m]eaningful civic education requires that students feel safe and empowered to discuss issues of social and political concern in the responsible, accountable forum of journalistic media."⁵⁵ However, these are the very learning opportunities that *Hazelwood* authorizes schools to remove from public education.

In some instances, administrators' efforts to ban or punish student expression, including in scholastic press publications, only serve to amplify the speech – a phenomenon known as the Streisand

⁵⁰ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the First Amendment protects the right to receive information and ideas.").

⁵¹ *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) ("the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom") (emphasis in the original).

⁵² See LoMonte, *supra* note 47, at 118 ("[P]olitical competency is best acquired by practicing the messy, often difficult, process of democracy. Students are less apt to gain political skills, values, and knowledge from sitting on the sidelines."); Joseph Kahne et al., *Redesigning Civic Education for the Digital Age: Participatory Politics and the Pursuit of Democratic Engagement*, 44 THEORY & RESEARCH IN SOCIAL EDUCATION 1, 4 (2016).

⁵³ Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 212 (2013).

⁵⁴ See LoMonte, *supra* note 47, at 116 ("Teaching the Constitution in the abstract, but devaluing it in practice, breeds cynicism and creates a sense of civic futility . . . at a formative time in [students'] development").

⁵⁵ 2017 ABA Res. 119B & Rep. to the House of Delegates, https://splc.org/wp-content/uploads/2018/08/1570_aba_resolution_119b_and_reporto.pdf (calling for enactment of state and local legislative policies protecting student journalists' right "to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal").

effect.⁵⁶ This is precisely what happened in August 2020 when two North Paulding High School students in Georgia were suspended for posting images of mask-less students crowding their school hallways during the COVID-19 pandemic to bring attention to the public health risk.⁵⁷ Word of the school's retaliatory action rapidly spread, generating national media coverage that was highly critical of the school's response. In the face of this negative publicity, North Paulding administrators rescinded the suspension of at least one of the students.⁵⁸ However, many more instances of school censorship, including student journalists' self-censorship for fear of administrative reprisal, never receive such curative sunshine.

B. *Georgia Case Study: Student Press Freedoms Before and After Hazelwood*

Decided eight years before *Hazelwood*, the Georgia case of *Reineke v. Cobb County School District* demonstrates the *Tinker* standard's efficacy in protecting scholastic media from administrative censorship.⁵⁹ Yet if adjudicated post-*Hazelwood*, the court in *Reineke* would necessarily have afforded far more deference to school officials' editorial choices regarding the school newspaper. *Reineke* is therefore a useful case study for comparing student press freedoms before and after *Hazelwood*.

Reineke involved multiple acts of censorship by both the McEachern High School principal and journalism adviser concerning two issues of the "Arrowhead" school newspaper. In the first issue, the adviser deleted content about new instructors' attitudes towards

⁵⁶ Mario Cacciottolo, *The Streisand Effect: When Censorship Backfires*, BBC (June 15, 2012), <https://www.bbc.com/news/uk-18458567> (reporting that media headlines resulted when a school tried to prohibit a student from posting photographs of school meals and rating their nutritional value online). The Streisand Effect is named after American entertainer Barbara Streisand whose 2003 attempt to suppress photographs of her residence in Malibu, California resulted in increased public attention. *Streisand Effect*, WIKIPEDIA, https://en.wikipedia.org/wiki/Streisand_effect (last visited Jan. 30, 2021).

⁵⁷ Dahlia Lithwick, *In the Pandemic, Students' Free Speech Rights Are More Important Than Ever*, SLATE (Aug. 7, 2020), <https://slate.com/technology/2020/08/north-paulding-corona-virus-suspension-free-speech.html>.

⁵⁸ Lateshia Beachum, *Georgia School Reverses Suspension of Teen Who Shared Viral Photo of Hallway Packed with Students*, WASH. POST (Aug. 7, 2020), <https://www.washingtonpost.com/education/2020/08/06/georgia-teens-shared-photos-maskless-students-crowded-hallways-now-theyre-suspended/>.

⁵⁹ 484 F.Supp. 1252, 1255-58 (N.D. Ga. 1980).

“homosexual teachers,” and replaced a single use of the word “damn” with the word “darn.”⁶⁰ The principal then confiscated the entire newspaper issue out of concern that it contained photographs reprinted without permission, a potentially libelous article, and alleged errors in statistics, spelling, and grammar.⁶¹ The principal was also uncomfortable with the content of several other pieces in the issue.⁶² In the following issue of the “Arrowhead,” the journalism adviser deleted two articles: one about the principal’s confiscation of the prior issue, and one deemed to be improper editorialization on the paper’s sports page.⁶³ After the student co-editor-in-chief’s father threatened litigation over the “Arrowhead” issue that had been confiscated, the principal suspended the paper’s publication entirely and replaced it with a literary magazine.⁶⁴

Based on this series of events, the “Arrowhead” co-editor-in-chief sued for violation of his First Amendment rights. The federal district court for the Northern District of Georgia agreed with him.⁶⁵ The court’s analysis relied heavily on “[t]he *Tinker* standard of material and substantial disruption as has been applied by . . . this circuit, in cases involving student publications.”⁶⁶ The court found that the *Tinker* standard did not justify the adviser’s “excis[ing] possibly controversial material in the name of improving an article’s appearance” and removing a single use of the word “damn.”⁶⁷ Errors in statistics, grammar, or spelling were held to be insufficient reasons to permit infringement of students’ free speech rights as “these faults are not the sort which would lead to a significant disruption of the educational process.”⁶⁸ The court further reasoned that concerns of potential copyright infringement or libel did not justify discarding the entire news-

⁶⁰ *Id.* at 1258.

⁶¹ *Id.*

⁶² *Id.* at 1259-60. As just one example, the principal forecasted that one article referencing the previously segregationist stance of a current Board of Education member would adversely affect race relations in the school. The court held that this prediction lacked supporting evidence. *Id.* at 1260.

⁶³ *Id.* at 1260.

⁶⁴ *Id.* at 1261.

⁶⁵ *Reineke v. Cobb Cnty. Sch. Dist.*, 484 F.Supp. 1252, 1262-63 (N.D. Ga. 1980).

⁶⁶ *Id.* at 1256-57.

⁶⁷ *Id.* at 1258 (“[S]tudent expression may not be prohibited solely because of disagreement with its content”); see also *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (“[T]he school itself has an interest in protecting a student’s unpopular expression. . .”).

⁶⁸ *Reineke*, 484 F.Supp. at 1258.

paper issue but could instead be addressed by delaying publication to consult with legal counsel.⁶⁹

Meanwhile, the court rejected the school's desire to suppress controversial content, noting that "it should be axiomatic at this point in our nation's history that in a democracy 'controversy' is, as a matter of constitutional law, never sufficient in and of itself to stifle the views of any citizen."⁷⁰ The court further criticized deleting the article about the principal's confiscation of the prior "Arrowhead" issue because it constituted "straightforward news reporting of an incident which would be of no small importance to the faculty and students" at the school and there was "no reasonable basis . . . to predict that a substantial disruption of school activities would be caused by its publication."⁷¹ Finally, the court found no justification for the principal replacing the paper with a literary magazine when faced with the possibility of a First Amendment lawsuit.⁷² The court therefore enjoined the principal and journalism adviser from prohibiting or interfering with the future publication or distribution of the paper, and from censoring or imposing prior restraint on its content.⁷³

Georgia courts have not subsequently disavowed *Reineke's* full-throated defense of student press freedoms. However, post-*Hazelwood*, at least some of the McEachern High School administrators' rationales for editing or deleting student articles would necessarily have been accepted by the court. This is because *Hazelwood* specifically allows a school, acting as a publisher of a student newspaper, to disassociate itself from speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced"⁷⁴ and to "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities."⁷⁵ *Hazelwood* even goes so far

⁶⁹ *Id.*

⁷⁰ *Id.* at 1259 (quoting *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 971 (5th Cir. 1972)).

⁷¹ *Id.* at 1260-61.

⁷² *Id.* at 1261 ("The court fails to understand how the plaintiff's actions in resorting to the courts in an attempt to vindicate his First Amendment rights would justify a further abridgement of those rights by the school authorities.").

⁷³ *Id.* at 1262-63 (noting the following exceptions where prior restraint would be allowed: obscene to minors, libelous, reasonably likely to cause substantial disruption or material interference with school activities or student or faculty rights, and where no other means could be employed to prevent such disruption or interference).

⁷⁴ *Hazelwood*, 484 U.S. at 271.

⁷⁵ *Id.* at 273.

as to identify “political controversy” as a legitimate reason for schools to disassociate from and censor their students.⁷⁶

Moreover, unlike *Tinker*, which requires proof of reasonably predicted or actual disruption or material interference before a school can censor, *Hazelwood* provides no appreciable check on administrators’ editorial whim.⁷⁷ Thus, if *Reineke* were decided today, the school would likely be permitted to delete articles with spelling, grammatical, and statistical errors as well as articles relating to new instructors’ general attitudes about “homosexual teachers,” race relations, and the principal’s confiscation of an entire prior issue of the “Arrowhead” paper. The *Reineke* court repeatedly relied on *Tinker*’s “material disruption” standard in rejecting these actions by school administrators, but *Hazelwood* strips away that protection.⁷⁸

Hence, legislative action is urgently needed at the state level to restore the *Tinker* standard for student journalists.⁷⁹ Until such protections are passed, administrators will continue to exercise their discretion to prevent students from reporting on timely and relevant issues that the school deems too political, controversial, or unflattering to the school. For instance, in January 2021, several Georgia high school journalists from different schools reported being censored from writing about the Black Lives Matter movement.⁸⁰ Moreover, interviews we conducted with two Georgia high school journalists during the Fall 2020 semester revealed that, in the absence of free-speech protections, they were voluntarily self-censoring to avoid ruffling administrative feathers. Specifically, one student from an Atlanta

⁷⁶ *Id.* at 272 (“A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived . . . to associate the school with any position other than neutrality on matters of political controversy.”).

⁷⁷ Kozlowski, *supra* note 12 (finding that in the twenty-five years following *Hazelwood*, First Amendment claimants almost always lost once *Hazelwood* was found to apply, because “legitimate pedagogical concerns” is interpreted so loosely as to be meaningless).

⁷⁸ *Hazelwood*, 484 U.S. at 272-73 (“[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).

⁷⁹ Cf. Christine Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America’s Schools Through Legislative Protections for Journalism Students and Advisors*, 2014 B.Y.U. EDUC. & L.J. 71 (2014) (advocating for federal legislative protections for the speech rights of student journalists).

⁸⁰ These accounts were contained in entries submitted for the 2021 Georgia Scholastic Press Association’s First Amendment essay contest, for which the authors of this article served as judges.

suburb stated that he and his peer journalists “try to please” administrators and that avoiding offense is generally “an unspoken rule,” reinforced by a “very hands on” adviser.⁸¹ He stated that it was understood that subjects to be avoided included flags, politics, Bible quotes, and “anything contentious.”⁸² Likewise, a student editor-in-chief from a different Georgia high school reported that she and her student colleagues choose to self-censor rather than risk reprisal for covering hot button issues, like politics or race. She noted that it would be a concern to publish a story “if it reflects poorly on the [school’s] administration.”⁸³

Despite the classic muckraking role of journalists to challenge institutional leaders, neither of the foregoing students evinced anything but respect and acceptance of their school administrators’ authority. This is not surprising given that school officials in Georgia and the majority of other states have wielded final editorial control over scholastic media for longer than the students we interviewed have been alive. However, their lived experiences illustrate that student journalism post-*Hazelwood* is being shaped more by a desire to keep the peace than by a commitment to robust reporting.⁸⁴ Ultimately, these students’ experiences highlight the need for statutory free-speech protections if scholastic journalists are to have their own voice, particularly when they seek to express minority viewpoints.⁸⁵ For instance, the aforementioned student editor-in-chief described that “[b]eing in a majority liberal leaning school, when we present opposing viewpoints . . . things can become slightly controversial and our publication can receive backlash for the published content.”⁸⁶ State-level speech and press protections are essential to help empower student journalists to candidly express and explore under-represented

⁸¹ Interview with Anonymous Student No. 2, over Zoom (Sept. 29, 2020).

⁸² *Id.*

⁸³ Interview with Anonymous Student No. 1, over Zoom (Sept. 23, 2020).

⁸⁴ See *Hazelwood*, 484 U.S. at 284 (Brennan, J., dissenting) (allowing schools to censor student media “in no way furthers the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors”).

⁸⁵ See LoMonte, *supra* note 47, at 117 (“[s]tudent media provides an outlet for people with minority perspectives and contrarian views to feel heard” yet *Hazelwood* allows schools to suppress this “counter-majoritarian ethic”).

⁸⁶ Interview with Anonymous Student No. 1, over Zoom (Sept. 23, 2020).

positions and perspectives, be they conservative, liberal, or otherwise.⁸⁷

C. *Media Advisers at Risk of Retaliatory Employment Action*

Public school teachers who serve as media advisers to scholastic journalists are also adversely impacted by *Hazelwood* because it limits advisers' ability to advocate for their students' rights. This phenomenon was displayed in California where, prior to 2008, the state's student-press-freedom law did not cover scholastic media advisers. School administrators would then "lean on" the advisers to control the content of their students' work which the administrators themselves could not directly censor.⁸⁸ In marshalling support to amend California's law to encompass advisers, advocates pointed to examples of teachers who had been terminated after their students' published articles that were critical of their school's administration.⁸⁹ These cautionary tales exemplify the very real employment risks that media advisers face post-*Hazelwood* when they refuse to acquiesce in censoring student press freedoms.

The Supreme Court's public-employee-speech doctrine further compounds the risks for public school media advisers who stand up for their students' speech and press rights. As announced in *Garcetti v. Ceballos*, public employees receive no constitutional protection if they are fired or otherwise retaliated against for their job-related speech because the First Amendment does not "shield[] from discipline the expressions employees make pursuant to their professional duties."⁹⁰ Thus, a media adviser who speaks out against administrative censorship of her students has no recourse under the First Amendment if she is subjected to adverse employment action, including termination, for taking this position.

⁸⁷ See Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critics in Public Schools*, 62 AM. U. L. REV. 253, 259 (2012) (urging protection of students' freedom of speech because "respect for social critics ensures that minorities participate in self-governance, incorporating potentially alienated outsiders into the body politic and diversifying the knowledge base for public decision-making").

⁸⁸ Jeff Peline, Opinion, *Retaliation Against Teachers a Concern*, UNION (Mar. 28, 2008), <https://www.theunion.com/opinion/jeff-peline-retaliation-against-teachers-a-concern>.

⁸⁹ *Id.* (citing examples of California advisers being removed for: allowing a paper to publish an editorial criticizing random searches on campus; publishing content critical of the administration's not letting students stand up in the bleachers during basketball games; and running editorials critical of school bathrooms, food, and an unavailable teacher).

⁹⁰ 547 U.S. 410, 426 (2006).

Garcetti theoretically left some breathing room for public-employee speech to the extent it intersects with concepts of academic freedom, but this has proven of little use to public school teachers in Georgia and other states where courts have chosen not to recognize this exception. Specifically, the Supreme Court noted in *Garcetti* that it was not then deciding whether its newly announced rule excluding job-related speech from the First Amendment's ambit "would apply in the same manner to a case involving speech related to scholarship or teaching."⁹¹ This judicial caveat has led to inconsistent lower court decisions on whether to recognize an academic-freedom carve out to *Garcetti*'s holding that official-duty, public-employee speech is unprotected by the First Amendment.⁹²

But state and federal courts in Georgia have yet to recognize such a carve out in the K-12 context. For instance, in *Lamar v. Clayton County School District*,⁹³ the federal district court comprehensively summarized *Garcetti* without referencing any possible exception for academic freedom, and relied on *Garcetti* in finding that a special education teacher's speech was unprotected.⁹⁴ In *Atwater v. Tucker*, the Georgia Court of Appeals quoted *Garcetti* for the proposition that a middle school teacher could be suspended so long as her speech "has some potential to affect the [school's] operations," with no mention of any special consideration for academic freedom.⁹⁵ Thus, at the end of the day, public school teachers in Georgia and elsewhere who act in their official role as media advisers have no First Amendment

⁹¹ *Id.* at 425.

⁹² Compare, e.g., *Blasi v. N.Y. City Bd. of Educ.*, No. 00-CV-5320 (RRM) (MDG), 2012 U.S. Dist. LEXIS 113798, at *98-99 (E.D.N.Y. Mar. 12, 2012) (acknowledging that the academic-freedom exception is an "open question" but finding that the Second Circuit applies *Hazelwood* to advisers anyway), with *Johnson v. Poway Unified Sch. Dist.*, No. 07cv783 BEN (LSP), 2008 U.S. Dist. LEXIS 107665, at *16 (S.D. Cal. Sep. 4, 2008) (stating that "*Garcetti* by its own terms does not extend to the public school setting" due to the academic-freedom exception).

⁹³ No. 1:13-CV-1600-HLM, 2014 U.S. Dist. LEXIS 186886 (N.D. Ga. 2014).

⁹⁴ *Id.* at *50.

⁹⁵ 343 Ga. App. 301, 308 (Ga. Ct. App. 2017). See also *Battle v. Bd. of Regents*, 468 F.3d 755, 761-62 (11th Cir. 2006) (applying *Garcetti* without mentioning a potential academic freedom exception; financial aid counselor alleged retaliation for speaking about potential fraud within her department but claim failed because she was acting pursuant to her official responsibilities). Cf. *Hubbard v. Clayton Cnty. Sch. Dist.*, 756 F.3d 1264, 1266 (11th Cir. 2014) (denying application of *Garcetti* because the plaintiff assistant principal was speaking in his capacity as a union leader); *Leslie v. Hancock Cnty. Sch. Dist.*, 994 F. Supp. 2d 1339, 1351 (M.D. Ga. 2014) (finding that school administrators were speaking in their private capacity, with no reference to a *Garcetti* academic-freedom exception).

recourse if they suffer retaliation for defending their students' speech and press freedoms.⁹⁶

Advisers are all too aware that their advocacy on behalf of students may be futile and may also result in adverse employment consequences. One Georgia adviser interviewed during the Fall 2020 semester recounted that she endured backlash in the form of cold-shoulder treatment and negative regard from school administrators after she voiced opposition to the principal's censorship of the 2020 April Fool's edition of the student newspaper.⁹⁷ She reported that the April Fool's edition had been published in prior years with a "fake news" banner at the top. But in 2020, the issue was abruptly cancelled a week before going to press because the principal felt it was inappropriate given the seriousness of the then-unfolding COVID-19 pandemic.⁹⁸ The adviser believed that only her high degree of professionalism and expertise as a former working journalist prevented the administration from engaging in more overt retaliation against her.⁹⁹

The adviser explained that this was not the first time the administration had censored her students' work.¹⁰⁰ Previously, a student's opinion piece was cut that focused on officials' investigation into students' use of cloud-based storage to share non-consensual pornography of other students.¹⁰¹ The adviser also relayed that her students had experienced administrative pressure to put a positive spin on events they reported.¹⁰² She expressed frustration at her inability to shield her students from this editorial interference.¹⁰³

⁹⁶ Indeed, the Georgia State Board of Education's Standards of Excellence implicitly endorse adviser censorship by calling on journalism advisers to guide their students in producing "content that meets professional and community standards (as defined by *Hazelwood v. Kuhlmeier* 1988)." Ga. Dept. of Educ., *Georgia Standards of Excellence: Teacher Guidance Document Journalism*, Standard ELAGSEJ.RW2 (Aug. 2019), <https://www.georgiastandards.org/Georgia-Standards/Documents/Journalism-Teacher-Guidance-for-Research-and-Writing.pdf> (last visited August 13, 2021). Thus, advisers who object to curtailing their students' press freedoms to the full extent authorized by *Hazelwood* may find themselves sanctioned for poor job performance.

⁹⁷ Interview with Anonymous Adviser No. 1, over Zoom (Sept. 23, 2020).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Interview with Anonymous Adviser No. 1, over Zoom (Sept. 23, 2020).

As astutely observed by one former student journalism adviser-come-lawyer, protecting the First Amendment rights of student journalists will remain “an imperfect solution if school officials can still take advantage of the loophole in the law and censor indirectly by threatening and pressuring faculty advisors [sic] to influence and control content.”¹⁰⁴ It is therefore essential that legislative safeguards for scholastic press freedoms extend to scholastic media advisers as well as student journalists.

ANALYSIS

I. STATE LAWS REDRESSING *HAZELWOOD*’S HARMS

Before *Hazelwood*, California presciently enacted a law in 1977 that protected student speech and press rights at public high schools.¹⁰⁵ In reaction to *Hazelwood*, five additional states enacted similar laws between 1988 and 1995.¹⁰⁶ A relative drought in new legislation followed. In 2000, SPLC introduced its model student-press-freedoms statute (hereinafter “SPLC Model”).¹⁰⁷ Between 2007 and 2018, the number of states with protective legislation doubled to fourteen.¹⁰⁸ Although none of the fourteen state statutes are identical, there are many common elements between them, especially those informed by the SPLC Model. This section considers the core provisions of the fourteen statutes, as well as some of their notable variations, and examines how courts have interpreted and applied them.

¹⁰⁴ Snyder, *supra* note 79, at 98.

¹⁰⁵ CAL. EDUC. CODE § 48950. Also, in 1977, California enacted protections for speech on community college campuses. CAL. EDUC. CODE § 76120. In 1992, California adopted what is known as “Leonard’s Law” that expanded protections to students at private high schools, and was later amended to include students at both public and private colleges and universities. CAL. EDUC. CODE §§ 66301, 94367.

¹⁰⁶ MASS. GEN. LAWS ch. 71, § 82 (1988); IOWA CODE ANN. § 280.22 (West 1989); COLO. REV. STAT. ANN. § 22-1-120 (1990); KAN. STAT. ANN. § 72-7211 (1992); and ARK. CODE ANN. § 6-18-1201 (West 1995).

¹⁰⁷ *SPLC Model Legislation to Protect Student Free Expression Rights*, STUDENT PRESS L. CTR., <https://splc.org/2000/07/student-press-law-center-model-legislation-to-protect-student-free-expression-rights/> (last updated February 2020).

¹⁰⁸ OR. REV. STAT. § 336.477 (2007); NEV. REV. STAT. § 388.077 (2017); N.D. CENT. CODE § 15.1-19-25 (2021); ILL. COMP. STAT. 80/1 *et seq.* (2016); MD. CODE ANN., EDUC. § 7-121 (West 2016); 16 R.I. GEN. LAWS § 16-109-1 *et seq.* (2017); WASH. REV. CODE ANN. 28A.600.027 (West 2018); VT. STAT. ANN. tit. 16 § 1623 (2020).

A. *Public vs. Private Schools*

Twelve of the fourteen state statutes protect student speech and press freedoms only in public secondary schools (i.e., middle and high schools) and sometimes in public post-secondary institutions (i.e., colleges and universities), but not in private schools. The SPLC Model includes private school students in its definition of “student journalist,”¹⁰⁹ but only Rhode Island and California have similarly taken this approach.¹¹⁰ California, however, exempts private schools controlled by religious organizations.¹¹¹ The other twelve state statutes are limited in application to public schools.

B. *Defining What Expression Is Protected*

1. Student Speech Generally vs. Student Journalism in Specific

With minor variations, thirteen of the fourteen state statutes explicitly protect student press freedoms in school-sponsored media, meaning media that is created under the direction of a school-employed media adviser and/or that is supported financially by the school or created through the use of school resources.¹¹² California, Colorado, and Rhode Island go even further to explicitly protect student speech in *non-school-sponsored media*.¹¹³

Twelve of the fourteen state statutes designate student journalists as responsible for determining the content of their media, with Massachusetts and Arkansas being the only two exceptions.¹¹⁴ And ten of

¹⁰⁹ SPLC Model, *supra* note 107, at Definitions Section (2).

¹¹⁰ CAL. EDUC. CODE §§ 48950(a); 66301; 94367(a); 16 R.I. GEN. LAWS § 16-109-2. Rhode Island also uniquely protects elementary school students.

¹¹¹ CAL. EDUC. CODE §§ 48950(c); 66301; 94367(c).

¹¹² Massachusetts is the one state whose statute does not specifically mention student media or student journalists. However, it does state that student’s general “[f]reedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually . . . (b) to write, publish, and disseminate their views.” See MASS. GEN. LAWS ANN. ch. 71, § 82. Arguably, this language is broad enough to also protect student press freedoms. Meanwhile, in addition to Massachusetts, four other statutes also contain protections for students’ free speech generally, independent of whether it occurs in the context of student media: California, Iowa, Colorado, and Nevada.

¹¹³ See CAL. EDUC. CODE § 48950(a); COLO. REV. STAT. ANN. § 22-1-120(1); 16 R.I. GEN. LAWS § 16-109-3(a); accord SPLC Model, *supra* note 107, at Operative Section (a). Nevada’s statute refers only to “pupil publications” without specifying whether they are school-sponsored or not. NEV. REV. STAT. § 388.077(3).

¹¹⁴ See ARK. CODE ANN. § 6-18-1201 *et seq.*; MASS. GEN. LAWS ANN. ch. 71, § 82.

the fourteen statutes provide that school boards must adopt rules and regulations consistent with the statute, typically in the form of a written policy that is distributed to students and sets forth reasonable time, place, and manner provisions for students engaging in school-affiliated expressive activities.¹¹⁵

2. Specific Forms of Expression and Topics That Are Enumerated as Protected

California's statute, which is the oldest, enumerates specific forms of protected student expression – i.e., “the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications.”¹¹⁶ Massachusetts, which has the second oldest statute, takes a more general approach declaring that its students have the right “(a) to express their views through speech and symbols, [and] (b) to write, publish, and disseminate their views.”¹¹⁷

The later SPLC Model more narrowly protects “freedom of speech and freedom of the press *in school-sponsored media*” and, in turn, defines “school-sponsored media” to include “any material that is prepared, substantially written, published or broadcast, in any media, by a student journalist.”¹¹⁸ Multiple states mirror this model language¹¹⁹ while Nevada simply protects all “expression” by student journalists.¹²⁰

Colorado provides a cautionary tale regarding the need to define the protected forms of school-sponsored media with some specificity. Colorado's 1990 statute contained broad language declaring that students in public schools “shall have the right to exercise freedom of speech and of the press.” This provision was narrowly construed by the Tenth Circuit Court of Appeals in 2009 to apply only to *written* student publications.¹²¹ The court reasoned that: (1) various provi-

¹¹⁵ All but Massachusetts, North Dakota, Kansas, and Illinois. See MASS. GEN. LAWS ANN. ch. 71, § 82; N. D. CENT. CODE § 15-10-55; KAN. STAT. ANN. § 72-7211; 105 ILL. COMP. STAT. 80/1 *et seq.*

¹¹⁶ CAL. EDUC. CODE § 48907(a).

¹¹⁷ MASS. GEN. LAWS ANN. ch. 71, § 82.

¹¹⁸ SPLC Model, *supra* note 107, at Definitions Section (1); Operative Section (a).

¹¹⁹ See, e.g., 105 ILL. COMP. STAT. 80/5 *et seq.*; WASH. REV. CODE ANN. §§ 28A.600.027(7)(a), 28B.10.037(1).

¹²⁰ See, e.g., NEV. REV. STAT. § 388.077(1)-(2).

¹²¹ *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1235 (10th Cir. 2009).

sions of the statute referenced written publications, and (2) the legislative history indicated an intent to undo the impact of *Hazelwood* on student newspapers.¹²² To cure this restrictive interpretation, the Colorado statute was subsequently amended to protect students' freedom of speech and press "whether printed, broadcast, or online."¹²³

As for enumerated topics of protected speech, Kansas and Vermont both prohibit suppression of political or controversial content in school media, and Vermont further prohibits suppression of content that is critical of the school's administration.¹²⁴ Kansas's content-based protection was upheld in *M.C. ex rel. Chudley v. Shawnee Mission Unified School District No. 512*.¹²⁵ There, the school district singled out student journalists for disparate treatment, requiring them to return to the school building during a walkout protest over school gun violence, while other students were generally permitted to remain outside.¹²⁶ A school official also confiscated one student journalist's school-issued camera.¹²⁷ The court found that the plaintiff students had pled a viable private-right-of-action claim against the school district for violating Kansas's student-press-freedom statute because the statute specifically protects student journalists who are reporting on controversial or political subject matter.¹²⁸

3. Prior Restraint

The SPLC Model prohibits "prior restraint" of student publications, meaning that students cannot be prohibited in advance of publication from writing about a particular topic based on school administrators' dislike or discomfort with it.¹²⁹ The fourteen state statutes are evenly divided seven-to-seven as to whether they explicitly prohibit prior restraint.¹³⁰

¹²² *Id.* at 1235-36.

¹²³ COLO. REV. STAT. ANN. § 22-1-120(1).

¹²⁴ See KAN. STAT. ANN. § 72-7211(a); VT. STAT. ANN. tit. 16 § 1623(f).

¹²⁵ 363 F.Supp.3d 1182 (D. Kan. 2019).

¹²⁶ *Id.* at 1192.

¹²⁷ *Id.* at 1192-93, 1202.

¹²⁸ *Id.* at 1210-12.

¹²⁹ SPLC Model, *supra* note 107, at Operative Section (c). See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").

¹³⁰ Iowa, Colorado, North Dakota, Maryland, California, Illinois and Vermont all prohibit prior restraint. See IOWA CODE ANN. § 280.22(3); COLO. REV. STAT. ANN. § 22-1-120(1); N.D.

C. *Statutory Grant of Authority and Protection for Media Advisers*

Eleven of the fourteen state statutes authorize scholastic media advisers to teach or supervise student journalists, and to "maintain" or "encourage" professional standards of English and journalism.¹³¹ Only Massachusetts, Arkansas, and Vermont lack any grant of authority to advisers.¹³²

In addition to defining advisers' general scope of authority, several states charge advisers with the affirmative duty of protecting their students' free expression. For instance, California mandates that advisers "maintain" (i.e., uphold) the student-speech protections set forth in the California statute.¹³³ Iowa requires media advisers to ensure "compl[iance]" with its "New Voices" law.¹³⁴ Maryland, meanwhile, prohibits advisers from influencing student journalists to promote the official position of the county board or public school.¹³⁵ Such provisions empower advisers to prioritize the free-expression rights of their students over the edicts of school administrators. However, even with a statutory mandate to defend students' speech rights, media advisers are not always free agents. For example, a California court held that a school district could require a journalism adviser to censor profane content in a student publication, against the adviser's will, because the adviser had a concomitant statutory duty to uphold "professional standards of English and journalism."¹³⁶

Nine of the fourteen state statutes prohibit school administrators from retaliating against advisers based on their students' speech, and Rhode Island uniquely grants advisers a right to sue if this protection

CENT. CODE § 15.1-19-25(4); MD. CODE ANN., EDUC. § 7-121(f)(1); CAL. EDUC. CODE § 48907(d); 105 ILL. COMP. STAT. 80/10; VT. STAT. ANN. tit. 16 § 1623(f).

¹³¹ See CAL. EDUC. CODE § 48907(c); COLO. REV. STAT. ANN. § 22-1-120(1); 105 ILL. COMP. STAT. 80/10; IOWA CODE ANN. § 280.22(5); KAN. STAT. ANN. § 72-7211(d); MD. CODE ANN., EDUC. § 7-121(c)(2); NEV. REV. STAT. § 388.077(3)(c)(2); N.D. CENT. CODE § 15.1-19-25(2); OR. REV. STAT. § 336.477(3); 16 R.I. GEN. LAWS § 16-109-3(a); WASH. REV. CODE ANN. § 28A.600.027(1); accord SPLC Model, *supra* note 107, at Operative Section (a).

¹³² See ARK. CODE ANN. § 6-18-1201-1205; MASS. GEN. LAWS ch. 71, § 82; VT. STAT. ANN. tit. 16 § 1623.

¹³³ CAL. EDUC. CODE § 48907(c).

¹³⁴ IOWA CODE ANN. § 280.22(5).

¹³⁵ MD. CODE ANN., EDUC. § 7-121(e).

¹³⁶ *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal.App.4th 1302, 1306 (Cal. Ct. App. 1995).

is violated.¹³⁷ In contrast, Iowa, Massachusetts, Arkansas, Oregon, and Illinois do not explicitly protect scholastic media advisers against retaliation.¹³⁸ However, this does not necessarily mean that advisers in those states have *no* recourse.

For instance, the Iowa Court of Appeals in *Lange v. Diercks* ordered that an adviser's personnel file be expunged of reprimands that resulted from allowing students to publish an April Fool's edition of the school paper over the administration's objection.¹³⁹ Even though the Iowa statute does not prohibit retaliation against advisers, the court reasoned that statutory protections for student speech would be eroded if the school district could punish an adviser for allowing student expression that is protected by the statute to proceed.¹⁴⁰ *Lange* reinforces that effective legislative protections for student journalists require complementary protections for their advisers, and weighs in favor of making those protections explicit in any student-press-freedoms statute.

D. *Students' Remedies if Rights Are Violated*

Only four of the fourteen state statutes grant students a right to sue if their speech rights are violated: California, Oregon, Rhode Island, and Washington.¹⁴¹ All four states authorize declaratory and injunctive relief, and Oregon also allows for a paltry \$100 in money damages.¹⁴² While the Kansas statute contains no explicit right-to-sue, a court nonetheless found this right to be implied where: (1) there were no other enforcement mechanisms outlined in the statute, (2) the legislative history demonstrated support for the protection of student

¹³⁷ See CAL. EDUC. CODE § 48907(g); COLO. REV. STAT ANN. § 22-1-120(9); KAN. STAT. ANN. § 72-7211(d); MD. CODE ANN., EDUC § 7-121(h)(2); NEV. REV. STAT. § 388.077(3)(c)(2); N.D. CENT. CODE § 15.1-19-25(2); 16 R.I. GEN. LAWS § 16-109-3(e), (h); VT. STAT. ANN. tit. 16 § 1623(h); WASH. REV. CODE ANN. § 28A.600.027(1).

¹³⁸ See ARK. CODE. ANN. § 6-18-1201-1205; 105 ILL. COMP. STAT. 80 *et seq.*; IOWA CODE ANN. § 280.22; MASS. GEN. LAWS ANN. ch. 71, § 82; OR. REV. STAT. § 336.477. While Arkansas has no direct protection against retaliation, it requires school boards to work with advisers to adopt rules and regulations consistent with the Act. ARK. CODE. ANN. § 6-18-1202. This may provide advisers the opportunity to negotiate for their own protection under the school boards' rules.

¹³⁹ 2011 WL 5515152, at *12 (Iowa Ct. App. 2011).

¹⁴⁰ *Id.*

¹⁴¹ See CAL. EDUC. CODE § 48950(b); O.R.S. § 336.477(5); 16 R.I. GEN. LAWS § 16-109-3(h); WASH. CODE REV. ANN. § 28B.10.037(4).

¹⁴² *Id.*; OR. REV. STAT. § 336.477(5).

journalists, and (3) “other states with similar statutes have allowed for private rights of action to proceed.”¹⁴³

Additionally, California and Washington authorize a court to award attorneys’ fees to a prevailing plaintiff.¹⁴⁴ Such fee-shifting increases the likelihood that private attorneys will be willing to litigate to enforce the rights created by the student-press-freedoms statute, and makes it possible for non-wealthy plaintiffs to obtain legal assistance.

E. *Disclaiming School Responsibility*

Half of the fourteen state statutes disclaim school responsibility for protected student speech. For example, Massachusetts declares: “[1] No expression made by students in the exercise of [their] rights shall be deemed to be an expression of school policy and [2] no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.”¹⁴⁵ Similar disclaimers are found in Nevada, Vermont, Iowa, Arkansas, North Dakota, and Illinois.¹⁴⁶ In *Lange v. Diercks*, the Iowa Court of Appeals emphasized the need for schools to distance themselves from student speech, observing that “[i]n its rebuff of *Hazelwood*, our legislature wanted to ensure student publications in Iowa were free to convey a position at odds with the school’s official stance.”¹⁴⁷ Clearly articulating that the views expressed by the students are not the school’s views paves the road for school officials to take an appropriately hands-off approach to scholastic media.

F. *Categories of Unprotected Speech*

Categories of student expression that are commonly unprotected under the existing state statutes include: (1) libel or slander; (2) obscenity; (3) unwarranted invasion of privacy; (4) harassment or bullying; and (5) expression that causes or creates danger of “material

¹⁴³ M.C. ex rel. Chudley v. Shawnee Mission Unified Sch. Dist. No. 512, 363 F.Supp.3d 1182, 1211 (D. Kan. 2019).

¹⁴⁴ See CAL. EDUC. CODE § 48950(b); WASH. REV. CODE ANN. § 28B.10.037(4).

¹⁴⁵ MASS. GEN. LAWS ch. 71, § 82.

¹⁴⁶ ARK. CODE ANN. § 6-18-1203(b)(2)(A); 105 ILL. COMP. STAT. ANN. 80/20; IOWA CODE ANN. § 280.22(6); NEV. REV. STAT. § 388.077(3)(d); N.D. CENT. CODE § 15.1-19-25(6); VT. STAT. ANN. tit. 16, § 1623(j).

¹⁴⁷ 2011 WL 5515152, at *1, *8 (Iowa Ct. App. 2011) (internal quotations omitted).

and substantial disruption of the orderly operation of the school” (the *Tinker* standard).¹⁴⁸ While most states grant school administrators discretion to censor expression falling within these unprotected categories if they so choose,¹⁴⁹ California and Iowa go a step further by affirmatively prohibiting speech that falls within any of the exempted categories.¹⁵⁰

Drilling down further on these commonly exempted categories, every state exempts libel or slander except for Massachusetts and Nevada.¹⁵¹ Ten of the fourteen states also exempt obscenity,¹⁵² with Vermont further allowing prohibition of content that is “gratuitously profane.”¹⁵³

Arkansas was the first state to exempt unwarranted invasions of privacy in 1995.¹⁵⁴ With the exception of Nevada,¹⁵⁵ every subsequent state to adopt a student-press-freedoms law has followed Arkansas’s lead (i.e., Oregon, North Dakota, Washington, Illinois, Vermont, Maryland, and Rhode Island).

In 1992, California exempted student speech that constitutes harassment, threats, or intimidation, unless it is otherwise constitutionally protected.¹⁵⁶ Every subsequent state to adopt a protective statute followed suit except for Oregon and Illinois.¹⁵⁷ Nevada also excludes from protection expression that amounts to “cyber-bullying or intimidat[ion]” as those terms are defined by the statute.¹⁵⁸

And, of course, each of the fourteen state statutes incorporate some version of the *Tinker* standard, allowing schools to punish or prohibit student speech if school authorities reasonably forecast that it will cause substantial disruption or material interference with school

¹⁴⁸ See, e.g., N.D. CENT. CODE ANN. § 15.1-19-25(3)(d).

¹⁴⁹ See, e.g., KAN. STAT. ANN. § 72-7211(c) (“Publication or other expression that is libelous, slanderous or obscene or [breaks or promotes breaking the law] or [disrupts] school activity is *not protected* by this act.”) (emphasis added).

¹⁵⁰ See CAL. EDUC. CODE § 48907(a) (“[E]xpression *shall be prohibited* which is obscene, libelous, or slanderous. Also prohibited shall be material that so incites pupils.”); IOWA CODE ANN. § 280.22(2) (“*Students shall not express, publish, or distribute any of the following:* [listing prohibited categories]”).

¹⁵¹ Compare, e.g., MD. CODE ANN., EDUC. § 7-121(d)(1), with NEV. REV. STAT. § 388.077.

¹⁵² See, e.g., KAN. STAT. ANN. § 72-7211(c).

¹⁵³ VT. STAT. ANN. tit. 16, § 1623(e)(3).

¹⁵⁴ See ARK. CODE ANN. § 6-18-1204(3).

¹⁵⁵ See NEV. REV. STAT. §§ 388.077(2), (5).

¹⁵⁶ CAL. EDUC. CODE § 48950(d).

¹⁵⁷ See OR. REV. STAT. § 336.477; 105 ILL. COMP. STAT. ANN. 80/15.

¹⁵⁸ NEV. REV. STAT. ANN. § 388.077(2), (5).

activities.¹⁵⁹ Kansas and Vermont's laws most closely mirror the *Tinker* standard.¹⁶⁰ In contrast, Massachusetts dilutes the *Tinker* standard, allowing schools to intervene if student expression causes "any disruption or disorder."¹⁶¹ The Massachusetts Supreme Court interprets "any disruption" to require more than "trivial or merely negative reactions to an unpopular viewpoint," but to also include, as *Tinker* does, "prospective" disruption that is reasonably forecast.¹⁶²

The other eleven state statutes strengthen the *Tinker* standard, treating it as a floor for protection, rather than a ceiling. California and Nevada remove "material interference" and only exempt speech or scholastic journalism content that substantially disrupts.¹⁶³ The remaining nine states¹⁶⁴ exempt speech or expression only if it causes both "material" and "substantial disruption," or "clear and present danger" of the same.¹⁶⁵ Echoing the Supreme Court's language in *Tinker*, Oregon, Rhode Island, and Washington require administrators to base any forecast of disruption "on specific facts . . . and not on undifferentiated fear or apprehension."¹⁶⁶

Finally, some states include additional categories of unprotected expression. For example, Colorado's statute declares that "[n]othing in this section shall be construed to limit the promulgation or enforcement of lawful school regulations designed to control gangs."¹⁶⁷ Rhode Island includes an exception for advertising products that are

¹⁵⁹ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1988).

¹⁶⁰ KAN. STAT. ANN. § 72-7211(c) ("creates material or substantial disruption of the normal school activity"); VT. STAT. ANN. tit. 16, § 1623(e)(6) ("creates the imminent danger of materially or substantially disrupting the ability of the school to perform its educational mission").

¹⁶¹ See MASS. GEN. LAWS ANN. ch. 71, § 82.

¹⁶² *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98, 111 (Mass. 2003) (finding no reasonable likelihood that disruption would result if religious student group was allowed to distribute candy canes at school with an accompanying religious message, during non-instructional time); see also *Pyle v. Sch. Comm.*, 667 N.E.2d 869, 872-73, 873 n.3 (Mass. 1996) (violating dress code by wearing a vulgar T-shirt was not sufficient to show "disruption or disorder" under the state statute).

¹⁶³ CAL. EDUC. CODE § 48907(a); NEV. REV. STAT. ANN. § 388.077(3)(c)(1).

¹⁶⁴ Rhode Island, Washington, Oregon, North Dakota, Maryland, Colorado, Arkansas, Iowa, and Illinois.

¹⁶⁵ See, e.g., COLO. REV. STAT. ANN. § 22-1-120(3)(d). The phrase "clear and present danger" that some states have adopted appears in the SPLC Model and strengthens *Tinker*'s requirement that predictions of disruption be reasonably forecast. SPLC Model, *supra* note 107.

¹⁶⁶ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1988); OR. REV. STAT. § 336.477(4)(d)(C); 16 R.I. GEN. LAWS § 16-109-3(b)(4); WASH. REV. CODE ANN. § 28A.600.027(2)(f)(iii).

¹⁶⁷ COLO. REV. STAT. ANN. § 22-1-120(8).

unlawful for minors to purchase.¹⁶⁸ And Washington uniquely exempts from protection expression that violates the Federal Communications Act and related regulations.¹⁶⁹

In sum, the great majority of the fourteen existing state statutes explicitly protect the speech and press rights of student journalists in school-sponsored media at public schools and many also protect student media advisers. The existing statutes largely require that students control the content of school-sponsored media and half prohibit school administrators from engaging in prior restraint of media content. Half of the statutes also disclaim school officials' endorsement of or liability for the content of school-sponsored media. The statutes almost all recognize that certain categories of student speech are not protected, or are even prohibited. And most importantly, they all restore a version of the *Tinker* standard for when student journalists' speech can be censored or punished.

II. RECOMMENDED PROVISIONS FOR ANY STATE CONSIDERING A "NEW VOICES" LAW

The SPLC Model provides a blueprint that many states have adopted, in whole or in part, to safeguard student journalists and advisers from administrative censorship. Drawing on the SPLC Model's success, as well as innovative variations in individual state statutes and the case law interpreting them, we endorse the following components for future "New Voices" legislation.

A. *Preamble*

An introductory preamble ensures that those who will later be interpreting and applying the statute correctly construe both the letter and spirit of the law. The preamble should recognize the importance of free expression for all students, and declare the legislature's intent to restore and protect student journalists' right to free speech and a free press that were stripped away by *Hazelwood v. Kuhlmeier*. The preamble should also specify the legislature's intent to safeguard media advisers from employment retaliation when they act in support of student journalists' rights codified by the bill. Finally, the preamble

¹⁶⁸ See 16 R.I. GEN. LAWS § 16-109-3(c).

¹⁶⁹ See WASH. REV. CODE ANN. § 28A.600.027(2)(g).

should state that the bill is not to be construed as narrowing the already-existing protections under the United States Constitution, and the state's own constitution if applicable, for student expression in contexts outside of school-sponsored media.

B. Scope: Which Schools Are Covered

A "New Voices" bill must specify which schools are covered including, at a minimum, public high schools, and preferably also public middle schools, colleges, and universities. Ideally, the bill would extend to private schools as well, but to date only two states have adopted this approach.

C. Definitions

A "New Voices" bill should define its key operative terms such as "school-sponsored media," "student journalists," and "student media adviser," making sure that the terms capture not only print publications but broadcast and digital media as well. We also recommend defining "school officials" who are subject to the law to include any district or school employee. This makes clear that not only top administrators are prohibited from infringing student speech and press rights, but also all other school employees. We further recommend defining the terms "censor" and "prior restraint" for purposes of the operative sections of the bill.

D. Operative Sections

The operative sections of a "New Voices" bill should clearly enumerate the rights it protects; the exceptions to those rights; obligations it creates for school officials; and enforcement mechanisms.

1. Enumerated Rights

The bill should declare protection for students' exercise of freedom of speech and of the press in school-sponsored media. It should state that student journalists cannot be punished for exercising their rights under the bill.

The bill should provide that student journalists are responsible for determining the content of school-sponsored media and that school officials, including media advisers, may not censor or engage in

prior restraint of content, unless it falls within one of the limited exceptions set forth in the bill. We also recommend following the examples of Kansas and Vermont in stating that student journalists' expression cannot be suppressed based solely on the content being political, controversial, or critical of the school or its administration. This will put school officials explicitly on notice that such topics are protected and also provide affirmative assurance to students that they need not self-censor. However, the bill should include a disclaimer that no student expression in school-sponsored media shall be deemed to be an expression of school or district policy, and that no school officials shall be liable for student journalists' protected expression in school-sponsored media except to the extent that the expression has been altered by the school officials.

The operative sections should also provide that student media advisers may teach professional standards of English and journalism to student journalists but may not be retaliated against in their employment for acting to protect, or for refusing to infringe upon, the free-speech and free-press rights of student journalists that are codified by the bill.

2. Exceptions to Enumerated Rights

Limited exceptions to student journalists' protected speech and expression should include: (1) libel or slander, (2) obscenity, (3) unwarranted invasions of privacy, (4) expression intended to threaten, harass, haze, or bully another student; and (5) expression that creates a "clear and present danger" of commission of: an unlawful act, violation of a lawful school policy, or a "material and substantial disruption" of school operations. As several states have already done, the bill should require school officials to base any prediction of "disruption" on specific facts rather than on "undifferentiated fear or apprehension."

3. Obligations and Enforcement

The bill should require school officials who interfere with the content of school-sponsored media to clearly identify, in writing, which of the bill's enumerated exceptions for protected speech they are invoking. Proponents of the bill should consider whether to also

require that school officials provide censored students with a timely opportunity to appeal any administrative interference.

The bill should require school districts to work with student media advisers to adopt written student-speech and student-press policies in accordance with the bill, and to make copies of those policies readily available to students, parents, and school officials. Finally, the bill should include a private right of action authorizing students and advisers to seek declaratory or injunctive relief for violation of their rights created by the bill. We also recommend authorizing a court to award attorneys' fees to a prevailing plaintiff, which two states have already done. Otherwise, enforcement will largely be limited to plaintiffs who can afford to retain an attorney.

An example bill that includes each of these elements – i.e., preamble, definitions, scope, and operative provisions – is included at the end of this article.

CONCLUSION

Student journalists play a vital role both in their school communities and in the broader world of investigative and editorial journalism, where the number of professional news outlets continues to shrink. Participating in scholastic journalism also prepares students to be critical thinkers capable of wide-ranging, open discussion of contemporary political and social issues. It requires that they learn to recognize, and hopefully value, reliable sources of information that are well-sourced and fact-checked. It provides students with opportunities to practice responsible and ethical investigation and to write about complex and sensitive issues. And it gives students a forum for articulating under-represented positions and perspectives, across the political spectrum. All of this, in turn, equips student journalists to be civically engaged adults in our participatory democracy.¹⁷⁰ Additionally, when students are free to report and editorialize on events and issues they care about, this enriches the free flow of information to readers. The public benefits from hearing what students, who will be our future leaders and policy makers, have to say.¹⁷¹

¹⁷⁰ See 2017 ABA Res. 119B & Rep. to House of Delegates, https://splc.org/wp-content/uploads/2018/08/1570_aba_resolution_119b_and_reporto.pdf; Nicholas V. Longo, Christopher Drury & Richard M. Battistoni, *Catalyzing Political Engagement: Lessons for Civic Educators from the Voices of Students*, 2 J. POL. SCI. EDUC. 313, 315 (2006).

¹⁷¹ LoMonte, *supra* note 47, at 120-21.

But student journalists' freedom of expression has been tenuous, at best, since *Hazelwood*. While student speech outside of school-sponsored media continues to receive First Amendment protection under *Tinker*, a student writing for the school paper has no constitutional recourse if half their article is cut, or if their school-sponsored news broadcast is cancelled, because the school does not like what they have to say. *Hazelwood* and the public-employee-speech doctrine leave media advisers with no recourse if they are retaliated against for encouraging student speech or for objecting to its suppression. To counter these harms, the national "New Voices" movement advocates for statutory protections at the state level to ensure that neither student journalists nor their advisers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁷² Fourteen states, to date, have passed legislation codifying these protections and restoring student press freedom, with active campaigns in many others.¹⁷³ We encourage all states to join these ranks by passing a "New Voices" Act that protects scholastic journalists and their advisers from censorship and retaliation, and once again places student journalists' speech on equally protected footing with other student expression.

¹⁷² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1988).

¹⁷³ See *New Voices*, STUDENT PRESS L. CTR., <https://splc.org/new-voices> (last visited July 28, 2021).

Example "New Voices" Bill.

Short title.

This act shall be known and may be cited as the "[State] New Voices Act."

Preamble.

- (1) The legislature finds that:
 - (a) freedom of expression, including freedom of speech and freedom of the press, is a fundamental principle in our democratic society granted by the First Amendment to the United States Constitution [and by State Constitution, if applicable];
 - (b) a robust and free student press is critical to the development of informed and civic-minded adults;
 - (c) since the Supreme Court's decision in *Hazelwood v. Kuhlmeier* (1988), students in [State] who participate in school-sponsored media are denied the right to full and free expression;
 - (d) public-school teachers in [State] who defend student journalists' freedom of expression do so at great professional risk; and
 - (e) [State] public-school students, teachers, and administrators benefit from the clear delineation of student journalists' speech and press rights.
- (2) It is the intent of the legislature to restore and protect freedom of expression for student journalists at public middle schools, high schools, and secondary charter schools, and at public institutions of higher education in this state, and to protect the employment of the teachers who appropriately support these rights.
- (3) This Act focuses on protecting students and advisors' speech in the context of school-sponsored media. Nothing in this Act shall be construed as narrowing the protections that exist under the United States and [State]'s constitutions for student speech and expression in contexts outside of school-sponsored media.

Definitions.

As used in this Act:

- (1) "School-sponsored media" means any material that is prepared, substantially written, published or broadcast, in any media, by a student journalist at a public middle school, high school, secondary char-

ter school, or institution of higher education where the material is created under the direction of a student media advisor and distributed or generally made available to members of the student body. School-sponsored media does not include media intended for distribution or transmission for classroom purposes only.

(2) “Student journalist” means a student at a public middle school, high school, secondary charter school, or institution of higher education, who gathers, compiles, writes, edits, photographs, records, or prepares information for inclusion in school-sponsored media.

(3) “Student media adviser” means an individual employed, appointed, or designated to supervise or provide instruction relating to school-sponsored media.

(4) “School official” means any district or school employee or administrator.

(5) “Censor” means to alter or remove the content of school-sponsored media.

(6) “Prior restraint” means to prohibit publication, distribution, or broadcast of school-sponsored media.

Student journalists’ freedom of expression.

(a) Except as provided in subsection (c) of this Act, a student journalist has the right to exercise freedom of speech and freedom of the press in school-sponsored media. This includes the right to convey information and ideas through the use of words, images, and symbols in print, broadcast, online, and other forms of school-sponsored media. Subject to subsection (c) of this Act, student journalists are responsible for determining the content of school-sponsored media. Student media advisers may teach professional standards of English and journalism to student journalists consistent with this subsection, but shall not censor or engage in prior restraint of students’ expression except as consistent with subsection (c).

(b) A student journalist may not be disciplined for exercising his or her rights in accordance with this Act.

(c) This Act does not authorize or protect expression by a student journalist that:

- (1) Is libelous, slanderous, or obscene;
- (2) Constitutes an unwarranted invasion of privacy;
- (3) Is intended to threaten, harass, haze, or bully another student; or

- (4) Creates a clear and present danger of: the commission of an unlawful act on or off school premises; the violation of a lawful school or district policy; or material and substantial disruption of school operations. School officials must base any forecast of material and substantial disruption on specific facts and not on undifferentiated fear or apprehension.
- (d) School officials shall not censor or engage in prior restraint of material prepared by student journalists for school-sponsored media except as consistent with subsection (c).
- (e) School officials shall have the burden of identifying, in writing, their justification consistent with subsection (c) for any censorship or prior restraint of material prepared by a student journalist for school-sponsored media [and must afford students a timely opportunity to appeal the officials' decision].
- (f) Student journalists' expression in school-sponsored media shall not be censored or subjected to prior restraint solely because it involves political or controversial subject matter or is critical of the school or its administration.
- (g) A student media adviser may not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against for:
 - (1) Refusing to infringe on conduct that is protected by this Act or the First Amendment to the United States Constitution [or State Constitution, if applicable]; or
 - (2) Acting to protect a student journalist engaged in permissible conduct under subsection (a) of this Act or the First Amendment to the United States Constitution [or State Constitution, if applicable].
- (h) Each school board and institution of higher education subject to this Act shall work with one or more student media advisers from their respective school district or institution to adopt a written policy that is in accordance with this Act for student journalists' exercise of the right of free speech and free press in school-sponsored media. [The policy must include a provision allowing for the timely appeal of decisions made by school officials pursuant to subsection (c) of this Act.] Copies of the policy must be made reasonably known and available to students, parents, and school officials.
- (i) No expression made by student journalists in the exercise of their free speech and free press rights codified by this Act shall be deemed to be an expression of school, school district, or institutional policy.

No school official shall be held responsible in any civil or criminal action for any expression made or published by student journalists, unless the school official has interfered with or altered student expression, and then such official shall only be responsible to the extent of the interference or alteration.

(j) Students and student media advisors afforded rights under this Act may enforce those rights by commencing a civil action for declaratory and/or injunctive relief. Individuals who prevail in seeking to enforce their rights under this Act may recover from their opponent(s) reasonable attorneys' fees and costs.

