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Senate Bill 18 (Sen. White)
Vermont House Judiciary Committee
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Thank you for the invitation to share some information about the workings of student press-rights statutes with the committee. This testimony is drawn from my 17 years of experience as a practicing attorney, the last nine spent as executive director of the Student Press Law Center, a nonprofit legal-services organization serving the needs of student journalists and educators nationwide. I have studied and written about these laws for many years, including authoring two editions of a textbook, "Law of the Student Press," that is the most widely used reference manual in the field of scholastic journalism.

The legal protection that is afforded to student journalists today under federal law is imbalanced and is widely recognized as inadequate for the effective teaching of sound journalistic values and practices. The Supreme Court's 1988 *Hazelwood* ruling has effectively removed all federal protection for the rights of students in journalistic media. After nearly 30 years of experience under *Hazelwood*, every leading authority in the field of journalism education – both educators and professional practitioners alike – is in agreement that the right amount of press freedom in educational institutions cannot be "zero." The Society of Professional Journalists, the American Society of News Editors and many other educational, journalistic and civics groups have called on states to reform *Hazelwood*, because young people are graduating unprepared to have educated conversations about the social and political issues that *Hazelwood* restrains them from discussing.

This growing consensus has fueled a national movement to enact statutes that bring the governance of student media back to the sensible middle ground that existed before *Hazelwood* was decided. Ten states now have laws comparable to SB 18 protecting the ability of students to publish the lawful and non-disruptive editorial content of their choice. Pennsylvania and the District of Columbia offer the same level of protection by way of State Board of Education rule. One-third of all high-school students in American today already have the level of legal protection contemplated by Senate Bill 18. The combined experience of these jurisdictions covers more than 180 years, and in those 180 years, no "horribles" whatsoever have materialized. Indeed, there is not a single publicly available case in which a school has been ordered to pay anyone a dollar for harmful material published by student journalists. And New Voices laws strengthen, not weaken, the liability protection for schools by clarifying that the speech of students is not the speech of their schools.

The Student Press Law Center operates an attorney referral hotline that, for decades, has fielded some 2,000 calls a year from students across the country. Many hundreds of times a year, we receive calls from students whose articles have been withheld, or whose publications have been impounded, with no more explanation than "you are making the school look bad." While there are legitimate safety reasons for which publications might be altered or withheld – and Senate Bill 18 fully incorporates those reasons – "making the school look bad" can never be a legitimate justification for censorship. The lesson that students take away from that experience – that government agencies can intimidate citizens who blow the whistle on the shortcomings of public agencies – un-teaches a lifetime of civics.

New Voices statutes do not put the rights of student journalists on par with those of professionals at *The Wall Street Journal*. The Supreme Court has said that nothing short of leaking military battle plans during wartime could justify restraining a professional newspaper. New Voices protection is much more limited. New Voices statutes simply restore the modest level of protection that existed before *Hazelwood* under the principles set forth by the Supreme Court in its 1969 ruling, *Tinker v. Des Moines*. *Tinker* is the standard ("substantial disruption") that applies today to students' baseball caps, T-shirts and other non-journalistic communications. It is a standard schools are comfortable with administering, because they have a rich history of a half-century of well-developed caselaw to guide them.

New Voices laws simplify and expedite the resolution of censorship disagreements between students and their schools. By creating a clear checklist of unprotected speech that school authorities are free to remove if they choose, New Voices laws take the guesswork out of identifying where the line between authority and autonomy exists. These laws have not resulted in burdensome litigation against schools or colleges; a 2013 study published in the *Maine Law Review* found only six instances (three in California, two in Massachusetts, one in Iowa) in which a New Voices law has been cited in a published judicial ruling (and there is a subsequent seventh one in Illinois). There is no reason to expect any deluge or outpouring of litigation as a result of statutorily clarifying students' rights.

Hazelwood is a relic of a time when it might have been possible to keep students from learning about teenage pregnancy by tearing pages out of paper newspapers. Of course, that is not the world we live in today. Today's young people are bombarded with online rumor and fabrication. By welcoming the

discussion of political and social issues into newsroom, those issues can be debated in a verified, supervised way – with fact-checking, balance and accountability, none of which exists if censorship pushes the discussion onto social media. Journalism is not a problem for schools, it is a solution. New Voices laws recognize this new reality.

Research by University of Kansas journalism professors Genelle I. Belmas and Piotr B. Bobkowski documents that high-school journalists are prone to "self-censor" in anticipation of adverse reaction from school administrators, and that the toll of school censorship falls disproportionately on female students. In a survey of 461 high-school students attending journalism workshops during the fall of 2015, 38 percent of students (41 percent of girls and 28 percent of boys) reported having been told that certain topics were categorically off-limits in student media, and 47 percent of students (53 percent of girls and 27 percent of boys) reported that they refrained from pursing an article because they anticipated a negative reaction from school authorities. Responding to the survey, one student wrote: "We were told not to write about standardized tests that would make the school look bad." Another said: "We are asked to refrain from discussing any topic that would shed negative light on our school even if it is honest and important."

It bears emphasizing that there is no "constitutional problem" with a state choosing to give its citizens more than the bare minimum of rights recognized under federal law; indeed, states do this routinely. For instance, many recognize privacy rights beyond the rather limited ones that the Supreme Court has inferred exist in the Bill of Rights, and many recognize a statutory right to be protected against discrimination based on LGBT status

beyond what the Supreme Court has found to exist in the Constitution. In a 2013 case (*McBurney v. Young*), the Supreme Court held that there is no constitutionally based right to obtain public records. Nevertheless, that ruling did not invalidate state public-records statutes. It simply means that an aggrieved party must seek recourse in the state rather than federal courts. The same is true of Senate Bill 18 and its analogs.

To illustrate, if the Supreme Court were to say that "police must wait five seconds after knocking before they may batter down a homeowner's door," it would of course be permissible for a legislature to say "no, our police will wait 10 seconds." The police do not have an affirmative constitutional right to break down doors upon the sixth second – just as principals and superintendents do not have an "affirmative right to censor." No right is violated, and no conflict exists, when a state elects to give its citizens more than the federally recognized "floor" of individual liberties.

The SPLC has consulted with the Senate sponsors and staff on the wording of Senate Bill 18, and we find it to be the most thorough and carefully drafted of all proposals of its kind. Were Senate Bill 18 to become law, we would offer it nationally as our "model" of an effective press-freedom statute that accommodates all of the legitimate concerns of school and college authorities.

For more information:
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