

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN**

CHERYL REED and
MICHAEL WILLIAMS,

Plaintiffs,

v.

STEVEN NEIHEISEL, in his official and individual capacity, AUBREY KALL, in her official and individual capacity, PEARL GAIDELIS, in her official and individual capacity, ERIC LAKSONEN, in his official and individual capacity, and TROY MORRIS, in his individual and official capacity,

Defendants.

Case No. 2:15-cv-57

**EXPEDITED CONSIDERATION
AND ORAL ARGUMENT
REQUESTED**

**MOTION FOR PRELIMINARY INJUNCTION, EXPEDITED CONSIDERATION,
REQUEST FOR ORAL ARGUMENT AND SUPPORTING BRIEF**

Plaintiffs Michael Williams and Cheryl Reed, by and through their counsel, hereby invoke the equitable jurisdiction of this Court and move pursuant to Federal Rule of Civil Procedure 65(a) for entry of a preliminary injunction against Defendants to prevent imminent and irreparable injury to their constitutionally protected rights under the First and Fourteenth Amendments, for which no adequate remedy at law exists. Pursuant to Local Civil Rule 7.1(e), Plaintiffs respectfully request that the Court expedite consideration of this Motion because the relief sought would likely be rendered moot under the Court's standard briefing schedule. Plaintiffs also respectfully request that oral argument be held on the Motion pursuant to Local Civil Rule 7.2(d). In support of their Motion, Plaintiffs incorporate by reference their Complaint and Notice of Filing Declarations of Michael Williams and Cheryl Reed, which are being filed in conjunction with this Motion. Plaintiffs further show and allege as follows:

On April 15, 2015, Plaintiffs filed a Complaint against Defendants setting forth in detail the factual and legal basis establishing that Defendants violated their constitutionally protected rights. Contemporaneously with this Motion, Plaintiffs have also filed a Notice of Filing for the Declarations of Plaintiff Michael Williams (“Williams”) and Cheryl Reed (“Reed”) in support of both this Motion and the Complaint. Defendants are a quorum of the Board of Directors of *The North Wind* (the “Board”), the student newspaper at Northern Michigan University. (Compl. ¶ 8.) In the Complaint, Plaintiffs show that on April 3, 2015, Defendants, acting under color of state law, violated Plaintiffs First and Fourteenth Amendment rights by, among other things dismissing Reed as the Journalistic Advisor to *The North Wind*, contrary to established protocol and in retaliation for Reed’s role in assisting the staff of the student newspaper in obtaining public records for use in investigative news stories about critical of NMU. This dismissal was a culmination of a months-long brewing controversy involving the newspaper, the Board, and the University’s administration that resulted in the infringement of Plaintiffs’ free speech rights.

Rule 65 exists for the purpose of maintaining the relative position of the parties to avoid irreparably compromising the interests of the Plaintiffs while resolution of the case on the merits is pending. As shown *infra*, preserving the status quo in this case inflicts no injury on Defendants, while refusing to do so risks putting Plaintiffs in a position of forfeiting once-in-a-lifetime opportunities and risks chilling the exercise of constitutionally protected free-expression rights, an injury that, in and of itself, is irreparable.

Expedited consideration is requested for this Motion pursuant to Local Civil Rule 7.1(e) because a new Journalistic Advisor is likely to be appointed by the Defendants at their April 17, 2015 meeting, which is the last one until the fall semester begins in August. Such an appointment would almost certainly begin at the conclusion of the current semester for NMU,

which ends May 2, 2015. Otherwise, *The North Wind* would be without an advisor for its summer edition. Once a new Journalistic Advisor begins serving, the bell will be more difficult, if not impossible, to un-ring. As a result, Plaintiffs respectfully request that this Court consider this Motion so that a decision could be rendered prior to May 2, 2015.

BRIEF

BACKGROUND FACTS

Plaintiffs' Complaint and the Declarations of Cheryl Reed and Michael Williams provide evidentiary support for this Motion. As shown in the Complaint, the Defendants, as a quorum of the members of the Board of Directors of *The North Wind*, a student-run newspaper operated under the auspices of Northern Michigan University, an agency of the State of Michigan, punished, intimidated, and retaliated against Plaintiffs for engaging in constitutionally protected expression in a public forum.

The North Wind is a newspaper staffed by students of NMU that provides, in print and online, coverage of news and events affecting the NMU community. (Compl. ¶ 13.) Plaintiff Williams has worked on the newspaper in various writing and editing capacities since the Fall 2013 semester (with the exception of a break in service during He took a break during the Fall 2014 semester). (Williams Decl. ¶ 2.) Since Jan. 30, 2015, he has served as Managing Editor of the newspaper, the second-in-command to the Editor-in-Chief over all decisions made in creating and selecting the newspaper's content. (*Id.*) Students make all content decisions, in consultation with the Journalistic Advisor. (Compl. ¶ 14.) Since joining the faculty of NMU in August 2014 as an Assistant Professor in the Department of English, Reed has served as Journalistic Advisor to *The North Wind*. (*Id.* ¶ 2; Reed Decl. ¶ 2.)

The North Wind is funded by student activity fees and advertising. (Compl. ¶ 14.) The newspaper is subject to the administrative management and oversight of a nine-member Board of Directors (“Board”), which is governed by a set of Bylaws enacted and periodically updated by the Board. (Compl. ¶ 15.) The Bylaws reserve one of the nine voting seats for the University’s Associate Provost for Student Services and Enrollment or that person’s designee; Defendant Neiheisel holds that seat. (Compl. ¶¶ 3, 16; Reed Decl. Ex. A-13.) Five seats are designated for students, two of whom are appointed by the Associated Students of NMU, NMU’s student government association. (Compl. ¶ 16; Reed Decl. Ex. A-13.) Northern Michigan University has delegated its authority to oversee the operations of *The North Wind* to the Board, authority that devolves from and would otherwise reside with the Board of Trustees and President of the University. (Compl. ¶ 17.)

The Bylaws designate *The North Wind* as “an open forum for expression of ideas and opinions(.)” (Compl. ¶ 18; Reed Decl. Ex. A-12.) The Bylaws purport to give the Board, a governmental agency, control over the editorial content of *The North Wind*. (Compl. ¶ 20.) Specifically, the Bylaws provide: “The Editor shall be responsible to the Board for the editorial content and tone of the newspaper and for the selection, direction and supervision of the editorial staff.” (*Id.*; Reed Decl. Ex. A-12.) Although it is not constitutionally permissible for a government body to dictate the content of a journalistic student publication, Defendants repeatedly have relied on their purported authority over “tone” to overstep their constitutional boundaries. (*E.g.*, Compl. ¶ 21.)

As the Journalistic Advisor, Reed provides feedback and guidance to the student staff of *The North Wind*. (Compl. ¶ 22; Reed Decl. ¶ 5, Ex. A-1.) This role is designed to allow the student editors to exercise and maintain editorial control over the content of the newspaper.

(Compl. ¶ 22.) Reed has drawn on her journalistic background to train and encourage her students in using the Michigan Freedom of Information Act (“FOIA”) to obtain public records for use in formulating journalistic work product. (*Id.* ¶ 23; Reed Decl. ¶ 5.) Reed receives compensation for her position as Journalistic Advisor in the form of paid “release time” that enables her to earn the full salary for the position of Assistant Professor without carrying the full teaching load that would otherwise be required.¹ (Compl. ¶ 25; Reed Decl. ¶ 8.) Reed also teaches a Practicum for reporters at *The North Wind*. (Compl. ¶ 24; Reed Decl. ¶ 7.)

Reed is an experienced journalist who served as editorial page editor, columnist, book critic and investigative reporter at the *Chicago Sun-Times* and several other newspapers. (Compl. ¶ 26; Reed Decl. ¶ 3.) Drawing on that experience, Reed has coached and guided her students in making FOIA requests for public records enabling the students to report more aggressively and in more depth than *The North Wind* traditionally had on the University’s financial and management practices. (Compl. ¶ 28; Reed Decl. ¶ 9; Williams Decl. ¶ 3.)

During Reed’s year as advisor, *The North Wind* has published several articles of legitimate public interest and concern that have provoked the ire of Neiheisel and his fellow NMU administrators because those articles reflected unflatteringly on the University. These included:

(1) A story published on the front page of the newspaper on Oct. 16, 2014, under the headline, “Sexual assault cases high, dropping.” The article cited recently released crime

¹ Shortly after *The North Wind* began investigating the Starbucks story, Reed was told by the NMU administration that her release time would be cut in half unless the English Department voted to permit the full, promised release. (Compl. ¶ 30; Reed Decl. ¶ 11.) After the English Department approved the full release, the administration overrode the Department’s vote. (Compl. ¶ 30; Reed Decl. ¶ 11.) After Reed filed a grievance through her union, a settlement of the dispute resulted in the full release for this academic year. (Compl. ¶ 30; Reed Decl. ¶ 11.) The new acting department head has informed Reed that her release time will once again be cut for the 2015-2016 academic year. (Compl. ¶ 30; Reed Decl. ¶ 11.)

statistics showing that, while NMU reported three straight years of declining sexual assaults on campus, the aggregate numbers were “relatively high in comparison to other colleges in the state.” (Compl. ¶ 35; Reed Decl. 14, Ex. A-4.)

(2) An article published Oct. 30, 2014, headlined, “NMU signed secret Starbucks deal,” which described the terms of an exclusive contract for coffee concessions between NMU and Starbucks – whose chairman and CEO is a heralded alumnus and benefactor of the University. (Compl. ¶ 31; Reed Decl. ¶ 12, Ex. A-2.) The article criticized the University’s failure to promptly produce a copy of the contract in response to the newspaper’s FOIA request, and quoted attorneys knowledgeable about the law of public records who questioned the legality of a confidentiality clause that the University initially invoked. (Compl. ¶ 31; Reed Decl. ¶ 12, Ex. A-2.) The tone of the article was skeptical of the merits of the NMU agreement, quoting students who preferred a competing brand of coffee. (Compl. ¶ 32; Reed Decl. ¶ 12, Ex. A-2.)

(3) A follow-up article in the Nov. 6, 2014, edition of *The North Wind*, “University Defends Its Beans,” which contained comments from a University vice president defending the merits of the Starbucks agreement and also quoted several critics of the contract and of the University’s initial reluctance to produce a copy of it, including a professor of history at NMU, who was quoted as stating in relation to the confidentiality clause: “Obviously they were trying to hide something or they wouldn’t have done this.” (Compl. ¶¶ 33-34; Reed Decl. ¶ 13, Ex. A-3.)

(4) A first-person article by *North Wind* staff member Heather McDaniel describing her sexual assault at the hands of a male student, and how she felt violated and misled by the University’s student conduct process when she pursued a disciplinary complaint against the assailant. (Compl. ¶ 39; Reed Decl. ¶ 17, Ex. A-5.)

(5) A front-page article published in March 19, 2015 (“The ‘suite’ life of NMU Board of Trustees”), which questioned the expenses for which members of the Board of Trustees of NMU had billed the University and received reimbursement, highlighting board members’ practice of staying in suites and flying on private jets while doing University business. (Compl. ¶ 58; Reed Decl. ¶ 30, Ex. A-8.)

The final edition of *The North Wind* before Reed’s removal, in large part, also took aim at NMU’s administration, but this time through the use of parody and satire in the newspaper’s April Fool’s edition that was published on April 2, 2015, one day before Defendants voted to not renew Reed as the Journalistic Advisor. (Compl. ¶ 60; Reed Decl. ¶ 36, Ex. A-12.)

Publication of each of these articles in a college student media outlet, including the April fool’s edition – *particularly* in one that is explicitly designated a forum for student expression – is constitutionally protected expression under the First and Fourteenth Amendments. Nevertheless, the University reacted to each article with hostility and at times outright harassment. At one point, the head of the Communications Department, James Cantrill, summoned current Editor-in-Chief Emma Finkbeiner to his office and told her that continued investigative reporting reflecting unfavorably on the University put the newspaper’s funding and Finkbeiner’s own career opportunities at risk. (Compl. ¶ 37; Reed Decl. ¶ 15.) Finkbeiner was so shaken by what she perceived as a threat from the NMU administration that she filed a harassment complaint, which the University dismissed without taking any action. (Compl. ¶ 38; Reed Decl. ¶ 16.) Reed promptly reported the threat to Defendant Neiheisel after Finkbeiner told her about it, but Neiheisel took no action. (Compl. ¶ 38; Reed Decl. ¶ 16.)

At several Board meetings, Defendant Neiheisel asserted that student journalists are not afforded the same rights under the First Amendment as “corporate journalists” at mainstream newspapers. (Reed Decl. ¶ 6.) Reed, in her capacity as Journalistic Advisor, presented the Board with the Society of Professional Journalists’ code of ethics and several times tried to alert the Board that they were infringing upon The North Wind students’ freedom of speech. (*Id.*)

From its highest levels, the University has created a hostile climate for journalism on campus fostering an “us-against-them” mentality manifested in the way that the Defendant Board members view *The North Wind*’s reporting. Under Defendant Neiheisel’s influence, the Board has given effect to that mentality. The Board’s hostility first came out when Finkbeiner, seeking to find out what was behind Cantrill’s threat, submitted a FOIA request asking for emails exchanged among NMU administrators, including Neiheisel and President Fritz Erickson, that mentioned the newspaper, its editors or Reed. (Compl. ¶ 40; Reed Decl. ¶ 18.) The University responded with an estimated cost \$613 (later reduced to \$300) to fulfill the FOIA. (Compl. ¶ 41; Reed Decl. ¶ 19.) In a meeting with Defendant Neiheisel that included Finkbeiner, Reed stated that she would try to raise the money independently through an online donation campaign and alumni– Neiheisel forbade her from doing so and said the Board would block her from raising outside funds. (Compl. ¶ 41; Reed Decl. ¶ 19.) When Finkbeiner asked the Board to approve paying the bill, the Board – overstepping its proper boundaries as a government oversight body – sharply quizzed Finkbeiner about why she wanted the records and whether they were necessary for a story that some on the Board did not consider journalistically meritorious. (Compl. ¶ 43; Reed Decl. ¶ 20.) The Board voted to deny the expenditure. (Compl. ¶ 42; Reed Decl. ¶ 20.) In other words, the Board’s objective was not to save money but to prevent the editors from obtaining the emails. Neiheisel voted against the

expenditure despite his personal stake in the outcome, without disclosing the conflict. (Compl. ¶ 42; Reed Decl. ¶ 20.)

Unbeknownst to Finkbeiner, Reed or the newspaper's staff at the time, Neiheisel had met one-on-one with each of the five student Board members the week before the Board meeting where the vote was taken. (Compl. ¶ 44; Reed Decl. ¶ 21.) According to student Board member Mary Malaske (the only one of the student members who has not voted in lockstep with Neiheisel), Neiheisel used the meeting to enlist the members in joining him in preventing *The North Wind* from making further FOIA requests, which he termed "wasteful" – not disclosing that his own emails were the subject of the pending request he was instructing the Board to obstruct. (Compl. ¶ 44; Reed Decl. ¶ 22, Ex. A-6.) Neiheisel used the meeting to criticize Reed's focus on investigative journalism, saying it was the Board's job to control the "tone" of the publication and that the newspaper was portraying the University in a negative light, specifically mentioning the inquiry into the Starbucks contract, according to Malaske. (Compl. ¶ 44; Reed Decl. ¶ 22, Ex. A-6.)

Faced with unfavorable national publicity, NMU waived the fee and produced approximately 1,200 pages of emails responsive to the FOIA. (Compl. ¶¶ 46-48; Reed Decl. ¶¶ 24-25.) Several dozen pages were redacted in part and an unidentified number were withheld from production entirely. (Compl. ¶ 48; Reed Decl. ¶ 25.) The bulk of the produced records were innocuous emails between *The North Wind* staff and advisor and the administration, which the newspaper already had, while most of the emails between administrators (in which the journalists had the greatest interest) were blacked out, at least partially. In a letter accompanying the documents, the University claimed that some of the records within the scope of Finkbeiner's request were exempt from FOIA disclosure. (Compl. ¶ 48; Reed Decl. ¶ 25.)

Finkbeiner appealed the decision to withhold and redact records to Erickson, but he denied the appeal. (Compl. ¶¶ 49-50; Reed Decl. ¶ 26.)

The hostility from Neiheisel and the Board became so great that Finkbeiner secured pro-bono legal assistance from the attorney for the Michigan Press Association, Robin Luce-Hermann. (Compl. ¶ 51; Reed Decl. ¶ 27, Ex. A-7.) Luce-Hermann wrote to Erickson on Feb. 11, 2015, asking him to take immediate steps to remedy what the letter identified as “a pattern of antagonism toward the newspaper, its staff and faculty advisor connected with *The North Wind*’s pursuit of news stories about the University’s contracting practices.” (Compl. ¶ 51; Reed Decl. ¶ 27, Ex. A-7.) The letter described a series of adverse actions taken against Reed and the newspaper staff, including the threats conveyed by Cantrill. (Compl. ¶ 52; Reed Decl. ¶ 27, Ex. A-7.) The letter described how the University went back on its agreement to provide Reed with four credit-hours of paid “release time” for time spent advising *The North Wind*. (Compl. ¶ 52; Reed Decl. ¶ 27, Ex. A-7.) In the letter, Luce-Hermann cautioned Erickson that the Bylaws were improper to the extent that they purported to give the Board control over the “tone” of the newspaper. (Compl. ¶ 54; Reed Decl. ¶ 28, Ex. A-7.)

The letter requested that Erickson take curative measures including directing that the University respond completely to Finkbeiner’s FOIA request, revising the newspaper’s Bylaws to make clear that the Board has no control over the “tone” of the publication or which documents the staff requests through FOIA, and restoring the compensated release time that Reed was promised. (Compl. ¶ 56; Reed Decl. ¶ 28, Ex. A-7.) Erickson wrote back declining to provide any of the requested relief, and not acknowledging that any mistreatment of *The North Wind* or its staff had occurred; the letter was hostile in tone and its focus was attacking the accuracy of the newspaper. (Compl. ¶ 52; Reed Decl. ¶ 29.)

The University's campaign of attacks on *The North Wind*, described in more detail in the Complaint and Declarations, culminated in a vote by the five Defendants at the Board's April 3, 2015 meeting to remove Reed as advisor and to deny Williams the position of Editor-in-Chief for the upcoming school year although he was the only applicant and is plainly qualified for the position as the paper's second-ranked editor. (Compl. ¶¶ 65-68; Reed Decl. ¶ 39-41.) Both decisions were made in a closed-door meeting from which editors and staff members of *The North Wind* were excluded. (Compl. ¶ 70; Reed Decl. ¶ 38.) During that closed meeting, several of the Defendants overtly linked the decisions about Reed's and Williams' positions to the viewpoints expressed in the publication, which were termed overly negative and critical about the University. (Compl. ¶¶ 66, 74; Reed Decl. ¶¶ 39, 45.) Reed's removal occurred even though, less than one month earlier, she received a performance evaluation from the Board, with no mention or even hint of her possible removal. (Compl. ¶¶ 61-62; Reed Decl. ¶¶ 33-34.) Reed's reviews from the Board were admittedly mixed, but her reviews from the newsroom were positive and she received an exemplary evaluation from the English Department, including for her work with *The North Wind*. (Compl. ¶¶ 62-63; Reed Decl. ¶¶ 34-35.) Reed's removal materially deviated from the procedure set forth for hiring the Journalistic Advisor in the Bylaws, which require that the decision be made in consultation with the newspaper's editorial staff. (Compl. ¶ 70; Reed Decl. ¶ 40, Ex. A-13.) The vote to remove Reed served no purpose other than to convey a message of intimidation and retaliation from the Board to the newspaper's staff. (Compl. ¶ 71; Reed Decl. ¶ 42.) As a result of Reed's removal, Williams and others working on *The North Wind*, as well as Reed herself, will be less likely to exercise their First Amendment right to comment critically on policies of the University. (Compl. ¶¶ 77, 83; Reed Decl. ¶ 48; Williams Decl. ¶ 8.)

The week after the Board's vote, Finkbeiner and other staff members from *The North Wind* met with Erickson to ask whether Erickson would intercede and overrule the Board's actions, but Erickson told the students that he regarded the vote of the Board to be final and that he would not overturn it, thus placing the imprint of his office on a retaliatory decision with the intent and effect of chilling constitutionally protected speech. (Compl. ¶ 76.)

ARGUMENT

A court should grant a preliminary injunction if, after considering four factors, it determines that the balance of equities favors injunctive relief. *See Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858-59 (6th Cir. 1992). The four essential factors are (1) that the Plaintiffs can demonstrate a likelihood of success on the merits; (2) that the Plaintiffs will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that issuing the injunction is in the public interest. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001); *Int'l Res., Inc. v. N.Y. Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991). These factors are not "prerequisites [to be] satisfied" and merely "guide the discretion of the court." *Eagle-Picher*, 963 F.2d at 859. *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) ("the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met."). In other words, "they are not meant to be rigid and unbending requirements," because "[a] fixed legal standard is not the essence of equity jurisprudence." *Id.* (quotation and citation omitted). A party is not required to actually prove his case at the preliminary injunction stage, since the purpose of a preliminary injunction is merely to maintain the relative positions of the parties until a trial can be had. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Here, a preliminary injunction is warranted because Plaintiffs meet all four factors for such interim relief and the balance of harms clearly weighs in their favor.

I. Plaintiffs Are Likely to Succeed on the Merits

Defendants have punished Plaintiffs and *The North Wind* staff, more generally, for the newspaper's investigative reporting that was critical of the University. Defendants have acted under color of state law despite four of them being private individuals. The Board, upon which Defendants serve and are a quorum, is clothed with governmental authority by virtue of its oversight of NMU's student newspaper, a creation of the University that is funded by advertising and student activity fees and which has been designated as a public forum by the University, as well as by its supervisory authority over the job of the Journalistic Advisor, a state employee. (Compl. ¶¶ 13-14, 18; Reed Decl. Ex. A-13.) Moreover, the four private Defendants were influenced in their decision making process by NMU's administration, including Defendant Neiheisel. (Compl. ¶ 44; Reed Decl. ¶ 22, Ex. A-6.) Defendants have crossed the line of the permissible role of an oversight body by using their state-delegated authority to punish student speakers for viewpoints and content reflecting unfavorably on the University.

A. Defendants Have Acted Under Color of State Law.

“The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988), citation omitted). The Sixth Circuit has utilized three tests to decide whether a private party facing Section 1983 claims is acting under color of state law: “(1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test.”

Wilcher v. City of Akron, 498 F.3d 516, 519 (6th Cir. 2007) (citing *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000)). Defendants qualify as acting under color of state law under all of these tests, although only one is required for Section 1983 claims to reach a private party defendant. *Id.*

The public function test requires private party defendants to “exercise powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain.” *Id.* (quoting *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1991)). The assignment or removal of tasks from a public employees duties is a quintessential power reserved exclusively to the state. The Defendants², as a quorum of the Board, voted to remove Reed, an employee of Northern Michigan University from her post as Journalistic Advisor, which puts the Defendants in the position of overruling an indisputably governmental decision made by the English department. (Compl. ¶ 67; Reed Decl. ¶ 41.) But-for the delegation of authority to the Board, administrators of the University would have to make this decision. This action alone meets the requirements of the public function test.

The state compulsion test is also satisfied in this case. This test “requires that the state ‘exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state.’” *Id.* (quoting *Wolotsky*, 960 F.2d at 1335. Here, Defendant Neiheisel, a state employee and high ranking member of the NMU administration, met with all of the student members of the Board one-on-one. (Compl. ¶ 44; Reed Decl. ¶ 22, Ex. A-6.) The lone student not to vote with Defendant Neiheisel to remove Reed from the Journalistic Advisor position has publicly stated that in her meeting with Neiheisel, he criticized *The North Wind’s* FOIA requests as unnecessary and

² Defendant Neiheisel as an employee of NMU, who sits on the Board as a result of that employment, is a state actor.

wasteful, and criticized Reed directly for promoting investigative journalism, specifically mentioning the inquiry into the Starbucks contract. (Compl. ¶ 44; Reed Decl. ¶ 22, Ex. A-6.) It is reasonable to believe he held similar conversations with the other Defendants during their one-on-one meetings and possibly other meetings or conversations. Given the independent statements of the lone student dissenter, Defendant Neiheisel likely significantly encourage his co-Defendants in dismissing Reed in retaliation for The North Wind's critical coverage of the University.

Finally, Defendants also are subject to Section 1983's requirements as acting under color of state law pursuant to the symbiotic relationship test. The symbiotic relationship test subjects private parties to Section 1983 "where 'there is a sufficiently close nexus between the state and the challenged action of the [defendant] so that the action of the latter may be fairly treated as that of the state itself.'" *Wilcher*, 498 F.3d at 520 (quoting *Wolotsky*, 960 F.2d at 1335)). The nexus here is self-evident. Among the many indicia are the facts that Defendants all have their positions on the Board as a result of their affiliation with the University, they are delegated the discretion to determine the use of student activity fee monies collected under state authority, they exercise supervision over programs and functions that (but-for the mechanism of the Board) would otherwise be under the supervision of a University administrator, and they are able to overrule the assignment decision made by the English department, which results in a change in the teaching assignments made by the department as a routine governmental function of a university.

Because Defendants have acted under color of state law under not just one, but all three of this Circuit's tests for determining when private parties are subject to Section 1983, suit can

be brought against Defendants under Section 1983. Plaintiffs are likely to succeed on the merits of this issue.

B. Defendants Have Unconstitutionally Infringed Upon Plaintiffs' Free Speech Rights.

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). College students have First Amendment rights enforceable against state institutions comparable to those of adults in the off-campus world; indeed, the U.S. Supreme Court has emphasized that a college campus is “peculiarly the marketplace of ideas,” making it doubly essential for the law to provide robust protection for the exchange of even unpopular views. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); see also *Papish v. Bd. of Curators, Univ. of Missouri*, 410 U.S. 667, 671 (1973) (“the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech”).

The North Wind operates as a designated public forum, as set forth in the newspaper’s Bylaws. (Compl. ¶ 18; Reed Decl. Ex. A-13.) The Sixth Circuit recognizes that college student publications are forums for student expression. See *Kincaid v. Gibson*, 236 F.3d 342, 349 (6th Cir. 2001) (*en banc*) (holding that student-produced college yearbook at a state university was entitled to the rigorous protection afforded to speech in a designated public forum). When government evidences a purpose to set aside property, including a student newspaper, for expressive purposes, then a designated public forum arises. In a designated public forum, as in a traditional public forum, content-based restrictions on speech are presumed to be unconstitutional and bear a heavy burden of justification. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (explaining that in either a traditional or

designated public forum, regulations on the content of speech are “subject to the highest scrutiny” and will be constitutional “only if they are narrowly drawn to achieve a compelling state interest”).

The facts establish that Reed was removed from her position as advisor to punish her and her students, including Williams, for the content of *The North Wind* and to deter Williams and his editorial staff from engaging in investigative journalism unflattering to the University in the future. Defendants were not subtle about their purpose and intent; they were explicit about it, stating during the closed-door executive session of the Board on April 3 that they wanted Reed replaced and wanted to find an editor-in-chief unconnected with the newspaper so as to change the “tone” of the newspaper’s coverage, which they found overly negative toward the University. (Compl. ¶¶ 66, 74; Reed Decl. ¶¶ 39, 45.) Removal of a college newspaper’s advisor for unflattering coverage of the institution of higher learning has been held to be a violation of the newspapers’ staff and the advisor’s free speech rights. *Moore v. Watson*, 838 F. Supp. 2d 735, 759 (N.D. Ill. 2012); *Coppola v. Larson*, No. 06-2138(SRC), 2006 U.S. Dist. LEXIS 51205, at *29-32 (D.N.J. July 26, 2006). The same is true here.

Viewpoint discrimination by a private parties clothed with state authority or governmental bodies is virtually never permissible, and most certainly not within a designated public forum. As the Supreme Court said in *Rosenberger*, in which the Court found that a state university could not base its decision to grant or withhold funds to a student newsmagazine based on the editors’ viewpoint: “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” 515 U.S. at 829.

Just as Plaintiffs are likely to succeed on their Freedom of Speech/Freedom of Press claim, Plaintiffs are likely to succeed on their First Amendment retaliation claim. “The essence of [a First Amendment retaliation] claim is that the plaintiff engaged in conduct protected by the Constitution or by statute, the defendant took an adverse action against the plaintiff, and this adverse action was taken (at least in part) because of the protected conduct. *Thaddeus-X v Blatter*, 175 F3d 378, 386-87 (6th Cir. 1999). In advising *The North Wind*, Reed was unquestionably engaging in conduct protected by the First and Fourteenth Amendments and it is equally beyond question that Defendant took an adverse action against her. Similarly, in his role as an editor of the North Wind, Williams also engaged in conduct protected by the First and Fourteenth Amendment and had adverse action taken against him, in both the removal of Reed as Journalistic Advisor and the Board’s decision not to hire him, the only candidate at the time, for the Editor-in-Chief position. The facts in this case further show that this adverse action was taken, at least in part, because of the negative coverage NMU received during Reed’s advising tenure. As such, Plaintiffs have established a likelihood of success on the merits of their First Amendment retaliation claim.

Where First Amendment rights are compromised, irreparable harm is presumed. *See Elrod v. Burns*, 427 U.S 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). Even beyond the dignitary injury to their right of free expression, Plaintiffs have been damaged concretely by Defendants’ unlawful acts. Reed will lose compensated “release time” and will be forced to teach more hours of classes if she wants to receive the same pay, and will lose the career opportunity of being a newspaper advisor for which she bargained and which induced her to accept the job with NMU in the first place. (Compl. ¶ 78; Reed Decl. ¶¶ 4, 46.) Having been

removed from the advisor position will damage Reed's ability to compete for tenure consideration if she elects to stay with the University. If she does not, having a "firing" on her record will damage Reed's ability to compete for advising positions at other institutions. Williams will be denied the benefits of being editor-in-chief of *The North Wind*, a position for which he is the most qualified candidate and which he would have received but-for Defendants' unlawful motive to force *The North Wind* to alter its critical viewpoint toward the University. These benefits are both tangible (the editor-in-chief position pays up to \$200 per week, depending on hours worked) and intangible (being editor-in-chief is an irreplaceable career credential that would qualify Williams to compete for more prestigious job opportunities upon graduation and to attend skill-building workshops that are reserved only for the editors of college newspapers).

Defendants can be expected to attempt to justify their actions by arguing that *The North Wind's* coverage of the university was unfair or inaccurate. But in a First Amendment analysis, none of that matters. As the Supreme Court has reminded us over and over, speech does not lose its protection merely because it comes from an ideological perspective, *see Rosenberger*, 515 U.S. at 835, or even because it is factually erroneous (indeed, even if it is *knowingly* factually false), *see United States v. Alvarez*, 132 S. Ct. 2537, 2844-45 (2012). It would be extraordinarily dangerous to let government officials sit in judgment of which journalism is "good enough" or "fair enough" to warrant protection against punishment, since such a principle would invite the exact pattern of illicit retaliation that took place in this case: Punishing journalism about issues of public concern that the government finds unflattering. Fortunately, this is not the law.

Accordingly, Plaintiffs have established a substantial likelihood of succeeding on the merits of their First and Fourteenth Amendment claims.

C. Defendants Will Suffer no Harm from an Injunction.

Defendants will not be harmed in the slightest by an order freezing the status quo until the rights of the Plaintiffs can be adjudicated fully at trial. As members of the Board of *The North Wind*, Defendants have no cognizable interest in which member of the NMU faculty holds the title of Journalistic Advisor. Merely having the effects of the Board's vote temporarily frozen cannot be a sufficient "injury" to justify denial of a preliminary injunction, because *all* preliminary injunctions by their very nature involve delaying the implementation of a decision.

D. The Balance of Hardships Tips Conclusively in Favor of Injunctive Relief.

Because Defendants will suffer no cognizable injury at all from an order forestalling Reed's removal as advisor, and Reed and Williams will suffer irreparable harm if Defendants' course of retaliatory conduct is not enjoined, the balance of harms leans decisively in favor of Plaintiffs' petition. Certainly, it cannot be argued that the harm to the members of the Board from negating the effects of a retaliatory vote is *greater* than the harm that the victims of their retaliation are suffering. *The North Wind* has operated successfully with Reed as Journalistic Advisor and will continue doing so with her holding over in the position pending resolution of the underlying claims; indeed, there is no allegation that Reed is unqualified for or incapable of doing the job, only that the Board disagrees with the "tone" of the newspaper under her guidance. That the newspaper may continue having a "tone" that the Defendants consider disagreeable during the pendency of this action is hardly an "injury" entitled to weight in a constitutional analysis – especially since Defendants, as state actors, do not have any legitimate say in determining the "tone" of a newspaper in the first place. In any event, such a negligible

injury cannot come close to counterweighing the injury resulting from the deprivation of Plaintiffs' fundamental constitutional rights.

As explained *supra*, Plaintiffs will suffer irreparable harm, both to their intangible free-speech rights and tangibly to their career interests, if Defendants' unlawful course of conduct is not immediately enjoined. These injuries are not susceptible of meaningful redress if Defendants' unlawful course of conduct is not enjoined. Losing the ability to speak freely about matters of public concern, even for a short time, is an irreparable injury.

Williams is a rising college senior with only one opportunity to work on his student newspaper. (Williams Decl. ¶ 2.) If the newspaper is restrained from pursuing requests for public records and from publishing stories reflecting unfavorably on the University's reputation, Williams' ability to develop professionally as a journalist and to prepare himself for successful employment as a journalist will be compromised. If Williams receives a substandard journalism education and graduates with second-rate journalistic work samples that "cheerlead" for the University (as the Defendants would prefer), that deprivation cannot be redressed by an award of money damages. A court cannot place Williams in a more prestigious journalism job in the private sector. As a college senior and with the fall 2015 academic term just a few months away, Williams does not have any realistic option to leave NMU and continuing his education elsewhere to obtain a high-quality journalism experience – nor should he be forced to take such extraordinary measures.

Similarly, once Reed is displaced from the job as Journalistic Advisor, as a practical matter it is doubtful she will ever recover it. The job is one-of-a-kind at Northern Michigan, and once it is filled with another candidate, a court will be highly unlikely to order Defendants to fire that incumbent and reinstate Reed. Reed came to NMU and made plans to remain at

NMU specifically because of the attraction of this position, and she cannot be “made whole” by an award of money damages or by appointment to a “just-as-good” position, because none exists.

Given the irreparable harm that will result if Reed is removed from her position and if Defendants’ campaign of content and viewpoint-based retaliation against *The North Wind* continues, the balance of harms conclusively favors entry of a preliminary injunction.

E. The Public Interest Is Served by Enjoining Defendants’ Unlawful Acts from Taking Effect.

A student newspaper on a college campus provides an irreplaceable public service that is not fulfilled by any other news medium. It serves as the “newspaper of record” for the campus community – in the case of Northern Michigan University, a community made up of 9,000 students and some 450 faculty members – and as the conduit by which students make their opinions heard on matters of public policy affecting their education. College student newspapers are being asked more than ever to serve as the primary information source not just for students but for all community members, because of the downsizing of professional news staffs nationwide.³ Because of the vital role that student media play in the “information ecosystem” of the community, the public has an investment in keeping *The North Wind* as an independent journalistic voice free from content and viewpoint-motivated interference by the Board and NMU’s administration, the very people that the newspaper is responsible for keeping watch over.

³ “Campus-based publications, and student collaborations with professional news outlets, are filling in gaps created by the traditional media's decline.” Jonathan Peters & Frank LoMonte, “College Journalists Need Free Speech More Than Ever,” *The Atlantic*, March 1, 2013, available at <http://www.theatlantic.com/national/archive/2013/03/college-journalists-need-free-speech-more-than-ever/273634/>.

The public has a particular investment in the type of watchdog journalism in which Williams and the staff at *The North Wind* have engaged during the current school term – the journalism that Defendants punished through their unlawful actions and seek to deter in the future. Defendant Neiheisel, whose influence permeates the Board and who used his authority to enlist the other Defendants in eradicating investigative reporting at *The North Wind*, began pressuring and retaliating against Plaintiffs after publication of two articles addressing topics of paramount public concern, sexual assault on campus and the integrity of government contracting practices. The public’s interest in journalistically independent coverage of these essential issues is self-evident. Thus, the public interest manifestly will be advanced by an injunction that spares Plaintiffs from the impact of Defendants’ retaliatory actions at least until this matter can be adjudicated fully on the merits.

CONCLUSION

For the aforesaid reasons, Plaintiffs ask the Court to enter a preliminary injunction directing Defendants to:

(1) Retain Reed in the position of Journalistic Advisor to *The North Wind* for the duration of this action, and

(2) Refrain from making content- and viewpoint-motivated decisions affecting the rights of the Plaintiffs, including but not limited to the decision to select an Editor-in-Chief for the 2015-16 school term.

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Respectfully submitted,

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