



March 4, 2020

President Breanna Harmon  
Student Government Association  
Virginia Commonwealth University  
901 Floyd Avenue  
Richmond, Virginia 23284

*Sent via U.S. Mail and Electronic Mail (sga@vcu.edu)*

Dear President Harmon:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

Founded in 1974, the Student Press Law Center (SPLC) is the nation's only legal assistance agency devoted exclusively to supporting, defending, and educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in covering important issues free from censorship. The SPLC is a nonpartisan, nonprofit organization.

FIRE and SPLC are concerned about the state of First Amendment rights, and specifically the freedom of the press, at Virginia Commonwealth University (VCU). Our concerns are occasioned by the recent actions by you and other members of the Student Government Association (SGA) to remove copies of *The Commonwealth Times*, VCU's student newspaper, from newsstands in an attempt to prevent the papers from reaching the hands of bona fide readers. These actions are forbidden by the Constitution. Accordingly, we call upon SGA as an entity, and you as its elected leader, to take remedial actions and publicly recommit to upholding freedom of expression at VCU.

**I. SGA Leaders Remove Newspapers Documenting SGA's Internal Rifts**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, SGA members who emptied *Commonwealth Times* newsstands

undermined the free press rights of VCU student journalists, and SGA must rectify those actions.

On February 26, *The Commonwealth Times* published a news story outlining allegations from within SGA that conflicts between SGA members have led to a “hostile” and “toxic” environment.<sup>1</sup> Specifically, SGA Vice President Alexia Guzman alleged that she faced a Title IX report aimed at “prov[ing] she was unfit to lead.”<sup>2</sup> SGA Chief of Staff Taylor Maloney alleged harassment by Senate Secretary Erica Ware.<sup>3</sup> Further, *The CT* story included a statement by SGA Senate Speaker Udhanth Mallasani that SGA procedures are inadequate to resolve issues such as those faced by Guzman and Maloney.<sup>4</sup>

The story appeared on the front page of *The CT*'s Wednesday print edition, which was distributed via newsstands on Wednesday afternoon.

Later that day, about 800 newspapers were missing, according to *Times* executive editor Georgia Geen. Witnesses, including *Times* news editor Hannah Eason, saw members of SGA removing newspapers from kiosks throughout campus.<sup>5</sup> One witness said she saw you and another SGA member empty a kiosk in the Commons.<sup>6</sup> Eason said she saw an SGA member removing copies from a newsstand in the Trani Life Sciences Building.<sup>7</sup> Other witnesses indicated they found stacks of newspapers in trash and recycling receptacles.<sup>8</sup> We are unaware of any rationale for removing and destroying the newspapers—other than preventing students, faculty, and other members of the community from reading the front-page story about SGA.

After these incidents, a group of SGA senators signed a statement condemning these actions,<sup>9</sup> making it clear that SGA stands divided regarding its relationship with the student press and the propriety of these censorial actions. This division has been made clearer by a call for your impeachment, publicly released on Instagram by SGA Senator Jed Baul.<sup>10</sup> However, regardless of whether unanimity exists within SGA regarding the removal stacks of newspapers from

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<sup>1</sup> Hannah Eason, *I felt like it was wasted: VCU SGA members asking for accountability from fellow leadership*, COMMONWEALTH TIMES, Feb. 26, 2020, <https://commonwealthtimes.org/2020/02/26/i-felt-like-it-was-wasted-vcu-sga-members-asking-for-accountability-from-fellow-leadership>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Hannah Eason, *Commons employees: SGA leaders cleared out copies of The CT following story on conflict within organization*, COMMONWEALTH TIMES, Feb. 26, 2020, <https://commonwealthtimes.org/2020/02/26/commons-employees-sga-leaders-cleared-out-copies-of-the-ct-following-story-on-conflict-within-organization>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Hannah Eason & Georgia Geen, *SGA senators call for impeachment of organization's president*, COMMONWEALTH TIMES (Feb. 27, 2020), <https://commonwealthtimes.org/2020/02/27/sga-senators-call-for-impeachment-of-organizations-president>.

<sup>10</sup> Jed Baul (@whatsupitsjed), INSTAGRAM (Feb. 26, 2020), <https://www.instagram.com/p/B9Dh9EKgzoU>.

kiosks, these actions are attributable to the organization by way of participation of its leadership—including yourself, the designated “figurehead” of the SGA.<sup>11</sup>

VCU administration has appropriately responded to these actions by reaffirming its support of *The CT* and by committing to address the situation through its student disciplinary process.<sup>12</sup>

## II. The First Amendment Limits Acts by SGA Officials

It has long been settled law that the First Amendment guarantee of freedom of speech is binding on public colleges like Virginia Commonwealth University. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”). Because they are an arm of VCU’s governance and exercise authority delegated to them by the university, SGA and its officials are state actors bound to uphold the law and principles of the First Amendment.

### A. *SGA is a state actor, performing traditional government functions in VCU’s stead.*

State actors are bound to comply with the First Amendment. State actors include private individuals who carry out functions on behalf of the state. *See, e.g., Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015).

SGA is overseen by VCU’s Division of Student Affairs, which employs three staff members to advise and assist SGA,<sup>13</sup> demonstrating that SGA acts on behalf of, and as an entity within, VCU—an arm of the state.

Making this relationship clearer is SGA’s “assum[ption of] a traditional public function” that is “significantly encouraged by the state,” namely the distribution of mandatory student activity fees that are collected by VCU from students.<sup>14</sup> *Jarvis*, 805 F.3d at 8 (internal

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<sup>11</sup> *See Executive Branch*, VIRGINIA COMMONWEALTH UNIVERSITY STUDENT GOVERNMENT ASSOCIATION, <https://sga.vcu.edu/executive> (referring to the SGA president and executive group as the “figurehead . . . of the entire SGA”) (last visited Feb. 28, 2020).

<sup>12</sup> VCU (@VCUdsa), TWITTER (Feb. 27, 2020), <https://twitter.com/VCUdsa/status/1233104238634340352>.

<sup>13</sup> *Meet Our Staff*, UNIVERSITY STUDENT COMMONS AND ACTIVITIES AT VCU, <https://usca.vcu.edu/student-governance/meet-our-staff> (last visited Feb. 28, 2020).

<sup>14</sup> *Tuition and Fees*, VIRGINIA COMMONWEALTH UNIVERSITY DIVISION OF STRATEGIC ENROLLMENT MANAGEMENT, <https://accounting.vcu.edu/tuition> (last visited Mar. 2, 2020).

quotation marks and citations omitted); *see also Koala v. Khosla*, 931 F.3d 887, 894, n. 1 (9th Cir. 2019); *Gay & Lesbian Students Ass’n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988).

Given SGA’s role in distribution of mandatory fees imposed by VCU, there can be no reasonable dispute that SGA has taken on a traditional public function, and that SGA is therefore intertwined with VCU. Indeed, the Supreme Court implicitly held that student governments are state actors in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), in which it assumed that the student government at issue acted as the state in its governance over fee distribution.

SGA is thus bound by the First Amendment to the same extent as VCU, especially in its dealings with student organizations—including student media through funding of printing costs—that it supports through distribution of mandatory student fees.<sup>15</sup>

### III. The Removal of *Times* Copies from Kiosks is Unconstitutional Content-Based Censorship

#### A. *The CT’s coverage of SGA is protected by the First Amendment, advancing the press’s central role as a watchdog over the actions of public officials.*

There can be no legitimate dispute that *The CT’s* reporting on allegations of hostility and conflict within SGA is expression protected by the First Amendment. The Supreme Court has recognized that the press is charged with “exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences[.]” *Estes v. Texas*, 381 U.S. 532, 539 (1965). The First Amendment’s guarantee of free expression “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also Stromberg v. California*, 283 U.S. 359, 369 (1931) (holding that it “is a fundamental principle of our constitutional system” that people be allowed unfettered discussion about government).

To fulfill this function, the press enjoys wide latitude to publish content that may appear critical, and indeed content that is *actually* critical of public officials. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“The First Amendment affords the broadest protection to such political expression”); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (holding that a heightened standard of culpability be applied to defamation cases involving public officials in order to protect the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

Courts do not waver in applying these standards in the context of the student press. Student journalists are a critical component in the expressive ecosphere comprising college campuses, and student journalists are increasingly called upon to serve their broader

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<sup>15</sup> *See Burrell v. Bd. of Trs. of the Univ. of Me. Sys.*, No. 99-107-P-C, 2000 U.S. Dist. LEXIS 2412 (D. Me. 2000) (assuming an action by a student senate to dismiss a student employee was a state action).

communities as local newspapers are shuttered by economic hardships.<sup>16</sup> Accordingly, courts routinely hold public universities, including student governments, accountable for violating the First Amendment rights of student journalists. *See Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (holding that college newspapers “cannot be suppressed because college officials dislike its editorial comment”); *See also Koala*, 931 F.3d at 998–99 (holding that the free press clause of the First Amendment is implicated by a student government revoking funding to student media after publication of disfavored speech); *Silkwood v. Kerr-McGee Corporation*, 563 F.2d 433, 435–37 (10th Cir. 1977) (student journalist, although “not a salaried reporter,” was entitled to reporter’s privilege when subpoenaed).

SGA members certainly fulfill a public function, as discussed above, acting as public officials. Therefore, content exposing allegations of conflicts within SGA, even when this content may be seen as critical of SGA or of particular SGA members, directly fulfills the central watchdog function that the press fulfills in the constellation of constitutional rights. *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (identifying the freedom of press as a “grave concern” because of the press’s role in informing the public, which “is the most potent of all restraints upon misgovernment”).

***B. Official removal of newspapers aimed at keeping bona fide readers from consuming specific content is prior restraint, the ‘most serious’ form of censorship.***

Official seizure of newspapers targeted at preventing dissemination of information to its intended audience is a type of prior restraint, “the most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). This is because, as the United States Court of Appeals for the Fourth Circuit observed, the First Amendment “protects *both* a speaker’s right to communicate information and ideas to a broad audience *and* the intended recipients’ right to receive information.” *Rossignol v. Voorhar*, 316 F.3d 516, 522 (4th Cir. 2003) (emphasis in original). The *Rossignol* court further reiterated this point: “Liberty of circulation is as important to freedom of the press ‘as liberty of publishing[.]’” *Id.* (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

Indeed, the Fourth Circuit clearly stated in *Rossignol* that the official seizure of newspapers “before [they] ever reach[] the eyes of readers . . . [meets] the classic definition of a prior restraint.” *Id.*<sup>17</sup> In other words, any time a public official takes actions designed to prevent content from reaching its reader, that public official has engaged in an unconstitutional prior restraint.

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<sup>16</sup> *See, e.g.*, Dan Levin, *When the Student Newspaper Is the Only Daily Paper in Town*, N.Y. TIMES, Oct. 19, 2019, <https://www.nytimes.com/2019/10/19/us/news-desert-ann-arbor-michigan.html>.

<sup>17</sup> It is notable that at issue in *Rossignol* was public officials *purchasing*, rather than *stealing*, a large quantity of newspapers. The Fourth Circuit nonetheless concluded that this action created a prior restraint in violation of the First Amendment. *Id.*

Finally, removing newspapers from stands because of disagreement with content is a violation of the basic principal “that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995). Here, it appears that SGA members removed the newspapers in an attempt to keep students and other readers from reading *The CT*’s coverage of internal rifts within SGA, a clear example of censorship based on content.

Thus, not only were the actions that you and other SGA members engaged in a violation of the First Amendment’s prohibition of content-based censorship, but also constituted one of the most egregious forms of First Amendment violation: prior restraint.

#### IV. Conclusion

In taking copies of *The Commonwealth Times* from newsstands in order to prevent students and others from reading coverage of conflict within SGA, you and other SGA members instituted a prior restraint in violation of *The CT*’s First Amendment rights.

It is incumbent upon SGA, as a state entity, to publicly condemn these actions and recommit to respecting the freedom of the student press at VCU. SGA must also take steps to remedy the injustice caused not only to *The Commonwealth Times*, but also to its readers.

We request receipt of a response to this letter no later than the close of business on March 11, 2020.

Sincerely,



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Cc:

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