



April 11, 2014

**VIA U.S. MAIL & EMAIL**

Chancellor Jacqueline R. Johnson  
UMM Chancellor's Office  
Room 309 Behm  
University of Minnesota Morris  
600 East 4th Street  
Morris, Minnesota 56267

**Re: Theft and Defacement of *The Morris NorthStar* Newspapers**

Dear Chancellor Johnson:

We represent the *The Morris NorthStar*, an independent student publication and university recognized organization at University of Minnesota Morris (UMM). Last semester, an entire edition of *The NorthStar* was stolen from campus distribution bins after a UMM professor encouraged students to trash all copies of the edition because of the views it expressed. Public records we obtained from UMM indicate you are aware of what happened. In addition, this semester, nearly 100 copies of *The NorthStar* were defaced because the newspaper contained a story discussing pro-life viewpoints. While the professor and other UMM community members are entitled to express their personal opinions, they are not entitled to incite theft or deface property. We ask that you publicly condemn these instances of theft and destruction, investigate and prosecute them, and take steps to protect *The NorthStar* from such viewpoint-based censorship in the future.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of students to freely live out their faith and express their ideas. We are dedicated to ensuring that religious and conservative students may exercise their rights to speak, associate, and learn on an equal basis with other students.

**FACTUAL BACKGROUND**

The following is our understanding of the facts. *The NorthStar* is a university recognized student organization that publishes a monthly newspaper. The paper often uses satire to communicate its independent viewpoints.

On November 22, *The NorthStar* released an issue that contained satirical articles on affirmative action. The same day, Associate Professor Paul Z. Myers of UMM's biology program published a blog entry that encouraged people to steal and throw away *The NorthStar*'s November 22 issue. Professor Myers wrote:

We do have conservative students here — I expect that the majority are more conservative than I am — but they also trend towards being more the reasonable, rational, educate sort of conservative. Not the kind you'll see on Fox News, and most unfortunately, not the kind who are likely to get elected to the Republican party.

This is not a story about any of those students. This is about our wingnutty [sic] embarrassments. We do have a few of them.

The embarrassments have a weekly student paper of their own, *The North Star* . . . . *The North Star* is a disgrace — its one virtue is that it makes the *Register* look professional. We've tolerated the *North Star* despite its inanity because hey, at least it's sucking in money from external conservative organizations, and it does a fabulous job of demonstrating the ethical bankruptcy of movement conservatism. But now they've stepped way over the line. Their latest crusade is basically promoting racial hatred and discrimination, and I'm ashamed to see their drivel distributed on campus.

...

Having a group of young Republican assholes-in-training mocking our minority students is not a step forward.

...

**I would advocate the disposal of their flyers if the Ku Klux Klan started papering our campus, and likewise, the *North Star* has worn out its welcome and must go. Treat their scattered papers as hate-filled trash and dispose of it appropriately.**

Not that it will help much. I've been told by one of our students that they've made arrangements with our town newspaper, the *Sun Tribune*, to have their evil rag distributed with that paper every week. I guess I won't be reading that paper anymore, either, if they're endorsing this kind of racism. And I guess the community will now get

the idea that our university endorses racism, thanks to the racist idiots publishing the *North Star*.

This is currently our university's shame. The measure of our commitment to equality will be determined by how we deal with it.<sup>1</sup>

A day after Professor Myers's blog entry, approximately 350 copies of *The NorthStar*'s November 22 edition were stolen from campus distribution bins. There is little likelihood that people lawfully took one copy each of the paper because in the past it has taken several days for all copies of *The NorthStar* to be exhausted on campus. Each paper is marked "First Copy Free, All Subsequent \$5." The theft of these papers cost *The NorthStar* approximately \$1,750.

*The NorthStar* notified campus police who reviewed surveillance video near the distribution locations, but none of the cameras can see the distribution locations. The police took no further action at that time.

In January, *The NorthStar* published an issue that contained a pro-life article on the front cover with the headline "Gift of Life." Approximately, 100 copies of the newspaper were later found defaced. Someone used black pen to change "Gift of Life" into "Gift of Strife." *The NorthStar* contacted UMM police, and an investigation is ongoing. But the UMM administration has not publicly condemned these actions.

### LEGAL ANALYSIS

#### **I. THE FIRST AMENDMENT PROTECTS *THE NORTHSTAR*'S DESIRED EXPRESSION.**

*The NorthStar* wants to convey its political viewpoints on UMM's campus by publishing and distributing its monthly newspaper. "It is beyond dispute that the right to distribute newspapers is protected under the First Amendment."<sup>2</sup> The First Amendment also protects offensive speech, whether expressed through satire or another means.<sup>3</sup> These protections apply to student newspapers at public

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<sup>1</sup> PZ Myers, *Race-baiting is alive and well at UMM*, PHARYNGULA BLOG (Nov. 22, 2013), <http://freethoughtblogs.com/pharyngula/2013/11/22/race-baiting-is-alive-and-well-at-umm/> (on file with ADF) (emphasis added).

<sup>2</sup> *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1061 (9th Cir. 2012) (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988)).

<sup>3</sup> See *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (finding that speech which is offense to good taste, no matter how great, does not justify restriction); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) ("it is clear that the First Amendment prohibits the Regents from

universities.<sup>4</sup> Thus, *The NorthStar*'s desired speech is protected by the First Amendment, and documents we obtained from UMM indicate that you agree with this conclusion.

By contrast, speech that incites imminent lawless action and conduct that is downright unlawful is not protected under the First Amendment.<sup>5</sup> That means people may express freely their opinions about *The NorthStar*,<sup>6</sup> but they may not incite the UMM community to steal, throw away, or deface an entire edition of the paper.

## II. VIEWPOINT DISCRIMINATION AGAINST *THE NORTHSTAR*.

"[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."<sup>7</sup> Not only is the "college classroom with its surrounding environs . . . peculiarly the 'marketplace of ideas,'"<sup>8</sup> but the Supreme Court also "has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."<sup>9</sup> "A public university may not constitutionally take adverse action against a student newspaper . . . because it disapproves of the content of the paper."<sup>10</sup> Moreover, a public university may not engage in viewpoint discrimination against a student publication.<sup>11</sup>

Professor Myers's blog calling for the censorship of *The NorthStar* resembles viewpoint discrimination by a government official against a private speaker. In addition, if a UMM employee participated in the theft or defacement, then they too would be liable for viewpoint discrimination. In *Giebel v. Sylvester*, a speaker at a conference sponsored by Montana State University lawfully posted flyers about his talk on university bulletin boards. A Montana State University professor tore down

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taking adverse action against the *Daily* because the contents of the paper are occasionally blasphemous or vulgar.").

<sup>4</sup> See *Stanley*, 719 F.2d at 282 ("most courts have "recognized that student media outlets at public universities, and the student journalists who produce those outlets, are entitled to strong First Amendment protection."); *Husain v. Springer*, 494 F.3d 108, 121 (2nd Cir.2007); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir.1973).

<sup>5</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

<sup>6</sup> Professor Myers has a right to free speech on his blog, but like any individual, he does not have a right to incite lawless action.

<sup>7</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>8</sup> *Id.* at 188.

<sup>9</sup> *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

<sup>10</sup> *Stanley*, 719 F.2d at 282.

<sup>11</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

the flyers.<sup>12</sup> The U.S. Court of Appeals for the Ninth Circuit ruled that the professor's actions violated the speaker's First Amendment rights because they constituted forbidden viewpoint discrimination.<sup>13</sup> The court also stripped the professor of qualified immunity, meaning that he could be held liable for monetary damages incurred by the speaker.<sup>14</sup>

Similarly, in *Stanley v. Magrath*, the *Minnesota Daily*, a student newspaper at the University of Minnesota—Twin Cities, published a controversial issue that satirized religious, political, social, and ethnic groups.<sup>15</sup> The university's Board of Regents subsequently voted to change the newspaper's funding, which significantly reduced the *Daily's* budget. The U.S. Court of Appeals for the Eighth Circuit ruled that the Regents' decision to change the *Daily's* funding mechanism violated its First Amendment rights because the evidence showed the Regents were motivated by the content of speech expressed in the *Daily*—speech they called sacrilegious and vulgar.<sup>16</sup>

Similar to the suppression of speech in *Giebel* and *Stanley*, Professor Myers publicly denounced the viewpoints expressed by *The NorthStar* in its November 22 edition. If the evidence shows that any UMM official participated in the theft or defacement of *The NorthStar's* newspapers, aside from potential criminal liability, they will be liable civilly for money damages as a result of violating *The NorthStar's* First Amendment rights.

Further, regardless of Professor Myers's right to express his opinion about *The NorthStar*, he has chilled *The NorthStar's* speech by advocating that people steal the paper and throw it in the trash. When a government employee engages in acts that "would chill or silence a person of ordinary firmness from future First Amendment activities," he violates the First Amendment.<sup>17</sup> Any student organization that publishes materials for distribution on campus would be chilled by Professor Myers's incitement of theft. As you well know, student organizations do not have large sums of revenue and would not want to waste money knowing that a UMM employee was encouraging people to steal their publications. Furthermore, Professor Myers, instead of debating or debunking *The NorthStar's* views, chose to undermine the public trust in university faculty members and

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<sup>12</sup> 244 F.3d 1182, 1185 (9th Cir. 2001).

<sup>13</sup> *Id.* at 1188-89.

<sup>14</sup> *Id.* at 1190.

<sup>15</sup> 719 F.3d at 280.

<sup>16</sup> *Id.* at 284.

<sup>17</sup> *Garcia v. City of Trenton*, 348 F.3d 726, 728-29 (8th Cir. 2003); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

administrators. No doubt many students look to Professor Myers as a representative of UMM and of faculty who should protect the free exchange of ideas. Professor Myers has betrayed that public trust by his advocacy of censorship.

### **III. UMM May Have Violated *The NorthStar's* Fourth and Fourteenth Amendment Rights.**

The Fourth Amendment “generally provides a right not to have newspapers seized from newsracks without a warrant or probable cause.”<sup>18</sup> “A ‘seizure’ of property occurs when there is some meaningful interference with an individual's possessory interests in that property.”<sup>19</sup> If the evidence shows that any UMM official took part in the theft and destruction of *The NorthStar's* November 22 issue, they may be liable for violating the paper's Fourth Amendment rights.<sup>20</sup>

Similarly, the Fourteenth Amendment's Due Process Clause “generally requires that the government give notice before seizing property.”<sup>21</sup> In *OSU Student Alliance*, Oregon State University confiscated without notice the newsbins and newspapers of *The Liberty*, an independent student newspaper. The university dumped the newsbins and newspapers in a heap by a dumpster, which damaged the newsbins and ruined an entire edition of the paper. The U.S. Court of Appeals for the Ninth Circuit ruled that the students had a valid claim against the university for violating their right to due process of law because the university was unjustified in removing the newsbins and newspapers without notice. Similarly, if the evidence shows that any UMM official confiscated *The NorthStar's* November 22 issue without notice to *The NorthStar's* editors, then UMM may have violated the paper's right to due process of law.

### **CONCLUSION**

While Professor Myers and other UMM community members may express their opinions about *The NorthStar*, the First, Fourth, and Fourteenth Amendment do not protect government officials when they incite illegal activity, engage in viewpoint discrimination, confiscate property without notice, and seize *The NorthStar's* property.

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<sup>18</sup> *Coming Up, Inc. v. City & Cnty. of San Francisco*, 857 F. Supp. 711, 715 (N.D. Cal. 1994); see *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979) (finding there are “special constraints upon searches for and seizures of material arguably protected by the First Amendment.”).

<sup>19</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

<sup>20</sup> See *Coming Up*, 857 F. Supp. at 715 (finding police officers were not entitled to qualified immunity after they seized newspapers critical of the police chief).

<sup>21</sup> *OSU Student Alliance*, 699 F.3d at 1068.

The most troubling aspect of this situation is UMM's silence on these incidents and the message that sends to students. A public university is supposed to be a marketplace of ideas, where free thought and discourse flourish. By failing to take swift action to denounce the theft and defacing of a newspaper, UMM is teaching students that the appropriate response to ideas you disagree with is to censor or destroy those ideas. That recalls a sad and dangerous time in history when government leaders ordered the burning of dissenting literature.<sup>22</sup> Surely, we can agree that is not the message UMM wants its students to hear.

*The NorthStar* maintains a strong desire to share its political views on campus. We request that you notify us by **May 2, 2014** that UMM condemns Professor Myers's advocacy of theft, that UMM condemns the defacing of student publications, that UMM is pursuing an investigation to prosecute the theft and defacement, and identify the actions you are taking to protect *The NorthStar* from such viewpoint-based censorship in the future. If we do not hear from you at that time, we can only assume that UMM approves of the viewpoint discrimination, theft, and unlawful seizure of *The NorthStar* and that UMM does not intend to protect the marketplace of ideas.

Very truly yours,



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ALLIANCE DEFENDING FREEDOM

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<sup>22</sup> See the history of book burning in England recounted in *Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Mo.*, 367 U.S. 717, 724-25 (1961).