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JURISDICTIONAL STATEMENT

Plaintiffs filed a complaint pursuant to 42 U.S.C. § 1983, alleging that Defendants had violated their First and Fourteenth Amendment rights and seeking declaratory, injunctive, and monetary relief. Doc. 1. Because of the Eleventh Amendment, the district court lacked jurisdiction over all claims against Defendants Governors State University and its Board of Trustees, and over the monetary claims against the individual defendants in their official capacities. Gossmeier v. McDonald, 128 F.3d 481, 487 (7th Cir. 1997). The court had jurisdiction only over Plaintiffs' compensatory damages claims against the individual Defendants who were served and only in their individual capacities under 28 U.S.C. §§ 1331, 1343, 2202.

On April 30, 2001, an order was entered dismissing with prejudice all of Plaintiffs' claims against Defendants Governors State University and the Board of Trustees, and Plaintiffs' claims for monetary relief against the individual Defendants in their official capacities, for lack of jurisdiction under the Eleventh Amendment. Doc. 15 at 3-4. On November 16, 2001, pursuant to Fed. R. Civ. P. 4(m), an order was entered dismissing Defendants Ferguson and Hill because they had not been served. Doc. 57. In that same order, the court also granted summary judgment in favor of all the other individual Defendants except Patricia Carter, finding that she was not entitled to qualified immunity. Id. Defendant Carter filed a notice of appeal from that order on December 3, 2001. Doc. 58. This Court has jurisdiction over Defendant Carter's appeal pursuant to 28 U.S.C. § 1291 under the collateral order doctrine. Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817 (1985).

ISSUES PRESENTED

1. Whether Plaintiffs failed to provide sufficient evidence from which a reasonable jury could find that Dean Carter violated their First Amendment rights by requesting that the University's student newspaper be reviewed and approved prior to printing.

2. Whether Plaintiffs failed to demonstrate that Dean Carter was not entitled to qualified immunity for requesting that the University's student newspaper be reviewed and approved prior to printing.

STATEMENT OF THE CASE

Plaintiffs Margaret Hosty and Jeni Porche were editors and writers, and Steven Baron was a writer, for Defendant Governors State University's student newspaper, the Innovator. They filed a complaint alleging among other things that Defendant Patricia Carter, the University Dean responsible for student activities such as the Innovator, had violated their First Amendment rights by requesting that the paper be submitted for review and approval prior to printing. They sought declaratory and injunctive relief as well as compensatory and punitive damages. All claims against Defendants Governors State University and the Board of Trustees were dismissed with prejudice on Eleventh Amendment grounds, as were Plaintiffs' claims for monetary relief against the individual Defendants in their official capacities. Defendants Ferguson and Hill, who had not been served, were dismissed as parties. The court also granted summary judgment in favor of all the other individual Defendants except Patricia Carter, finding that there was a question of fact as to whether her conduct had violated Plaintiffs' clearly established First Amendment rights. Dean Carter filed an interlocutory appeal from that order.

STATEMENT OF FACTS

Background¹

Plaintiffs Margaret Hosty and Jeni Porche are students at Defendant Governors State University (the University); Plaintiff Steven Baron is a University alumnus. Docs. 36, 43 at ¶¶ 1-3. Ms. Porche and Ms. Hosty were appointed the Editor-in-Chief and Managing Editor, respectively, of the University's student newspaper, the Innovator, from May 2000 until the end of the Spring 2001 trimester (April 30, 2001). Docs. 36, 43 at ¶¶ 17-19. In the Fall 2000 trimester, Mr. Baron was a staff reporter. Docs. 36, 43 at ¶ 20. The Student Communications and Media Board (SCMB) publishes the Innovator and approves its budget and expenditures. Docs. 36, 43 at ¶¶ 35, 36. The SCMB has seven members, of which four are students, two are faculty members, and one is from the support staff. Docs. 36, 43 at ¶ 37.

The Innovator has a faculty advisor, whose role is to counsel and advise students on journalistic issues, including libel, and who normally signed off on the paper before it went to the printer. Docs. 36, 43 at ¶¶ 45-46. Although Geoffrey de Laforcade was not on the University faculty after August 2000, he remained the paper's advisor until his contract expired in December 2000. Docs. 36, 43 at ¶ 44; Doc. 44 at Carter dep. at 20. Plaintiffs did not like his successor, who was appointed by Dean Carter and approved by the SCMB. Doc. 44 at Hosty dep. at 150, 152-53. Decisions as to subject matter and content of the paper were made by the editorial board, not the advisor. Doc. 44 at Hosty dep at 24-25. The University's written media policy states that the student staff determines the content and format of each publication without

¹ On summary judgment, the court must take as true the nonmovants' evidence and draw all reasonable and justifiable inferences in their favor. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). Consequently, the Statement of Facts resolves all disputed questions of fact in Plaintiffs' favor.

ensorship or advance approval. Docs. 36, 43 at ¶ 38; Doc. 44 at Bell dep. at ex. 1 (policy). The paper was supposed to be printed twice a month, but no Plaintiff remembers that this occurred while they were students at the University. Docs. 36, 43 at ¶ 21.

Defendants are or were employees or students (or both) at the University. Defendant Stuart Fagan, the University President since April 1, 2000, delegated student media issues to Defendant Paul Keys, the University Provost and Vice-President since October 23, 2000,² who reports to him. Docs. 36, 43 at ¶¶ 7, 8. Provost Keys, in turn, delegated these issues to Defendant Patricia Carter, the Dean of Student Affairs and Services. Docs. 36, 43 at ¶ 6, Doc. 43 at ¶ 7. Dean Carter is responsible for the Division of Student Life, which is responsible for student organizations including the SCMB. Docs. 36, 43 at ¶¶ 42, 43. Donald Bell, the Program Director in the Student Life Division of Student Affairs and Services, was administrative liaison to the SCMB before mid-July 2000 and after mid-November 2000. Docs. 36, 43 at ¶ 4. Tommy Dascenzo, his predecessor, retired on April 1, 2001. Docs. 36, 43 at ¶ 5. In 1999, he had recommended that Dr. Laforcade be appointed the paper's advisor, and Dean Carter had approved the appointment. Doc. 44 at Carter dep. at 21. Defendant Debra Conway is a secretary in the Student Life Division. Docs. 36, 43 at ¶ 10. Defendant Paul Schwellenbach is the University's Mailing Service Supervisor. Docs. 36, 43 at ¶ 16. Other Defendants are members of the SCMB: Frances Bradley, the Coordinator of the Academic Computer Services Lab; Peter Gunther, a faculty member; and Judy Young, a student and employee. Docs. 36, 43 at ¶¶ 12, 13, 15. Ed Kammer, a student, is the SCMB chair. Docs. 36, 43 at 14.

Plaintiffs' Tenure at the Innovator

² Defendant Jane Wells was the Interim Provost and Vice President of Academic Affairs between August 1999 and October 22, 2000; Defendant Peggy Woodard is the Interim Associate Provost. Docs. 36, 43 at ¶¶ 9, 11.

Plaintiffs Hosty and Porche published their first issue of the Innovator on July 10, 2000 and their fourth issue on October 31, 2000. Docs. 36, 43 at ¶ 27; see Doc. 44 at Fagan dep. at ex. 3 (the paper). Shortly thereafter, based on letters to Dean Carter from Defendants Bell, Conway, and Ceska, charges were filed against Plaintiff Hosty for violating the student code of conduct on October 25, 2000 by entering the Student Life office and removing files without authorization and for refusing to be interviewed about the incident by the University police. Doc. 44 at Carter dep. at 37-41 & Ex. 1. After a hearing, Ms. Hosty was disciplined, and the discipline was upheld on appeal. Id. at 41-46.

On or around October 31, 2000, Dean Carter called Charles Richards, the president and owner of Regional Publishing, which had the contract to print the Innovator. Docs. 36, 43 at ¶¶ 21, 41; Doc. 43 at Richards Affidavit and attached exhibits. Dean Carter had not read the current issue, and she did not know if the paper had an advisor at that time, so her intention was to ascertain that the paper was being reviewed by a staff person for compliance with the University's standards for grammar, punctuation, and composition as well as with journalistic standards. Doc. 44 at Carter dep. at 9, 4-5. Dean Carter told Richards that under her authority, she was ordering him not to print any more issues of the paper without first calling her so that she or someone else from the administration could come to the plant, read the paper, and approve it for printing. Doc. 43 at Richards aff. When Richards expressed concerns about violating the First Amendment, she "made it very clear that that was not [her] intention" but she wanted to make certain that the paper would be reviewed prior to printing. Doc. 44 at Carter dep. at 6. Dean Carter told him he had to follow her instructions and reminded him that the University paid his company. Doc. 43 at Richards aff. When she instructed him to call her when the next issue arrived at the plant, he replied that he could not promise to do so. Doc. 43 at Richards aff.

Richards later learned that the October 31, 2000 issue had already been printed and delivered. Doc. 44 at Richards aff.

Dean Carter raised her concern about the lack of an advisor with Mr. Dascenzo, who told her one had been appointed. Doc. 44 at Carter dep. at 16-17. She did not discuss these concerns with Plaintiffs Hosty or Porche. Id. at 18.

Sometime later, Dean Carter called Richards again with the same request. Doc. 42 at Richards aff. She asked him to call her when the paper arrived so that the University would know that it had been reviewed by an advisor before being printed. Doc. 44 at Carter dep. at 10-11. She did not have any concerns about the material in the October 31 issue, but having recently learned that Dr. de Laforcade was four hours away at another school, she was concerned that the students might submit the paper to the printer without having the advisor review it beforehand. Id. at 10, 14-15. She discussed those concerns with Plaintiffs Hosty and Porche, who objected to a faculty member reviewing the paper without their advisor's approval. Id. at 18-19.

Plaintiff Hosty spoke on the telephone with Richards, who told her he “quote, did not want to be in a hissing contest between the paper and the administration because [it was] a business and not a charity [and] the university administration released the funds” Doc. 44 at Hosty dep. at 21, 42. In November 2000, Richards recorded his summary of his phone calls with Dean Carter and sent a copy to her. Doc. 43 at Richards Aff. at ex. 2. The letter does not state that he would not print the paper, and he never indicated to her that the University had cancelled the printing contract. Id.; Doc. 44 at Hosty dep. at 33-34. Richards received no communication thereafter from any student or administrator at the University. Doc. 43 at Richards aff.

Dr. Fagan asked Dr. Keys to investigate Dean Carter's phone calls to the printer. Docs.

36, 43 at ¶ 53. Dr. Keys then spoke to Dean Carter, who reported that she had told the printer that an advisor needed to review the paper. Doc. 44 at Keys dep. at 9. He then reported back to Dr. Fagan that Dean Carter had called the printer to have the advisor look over the paper to avoid grammatical errors and to make suggestions but not to censor it. Docs. 36, 43 at ¶ 54. Dr. Keys later saw Richards's letter, which he felt was inaccurate. Doc. 44 at Keys dep. at 15.-17. Subsequently, Dr. Fagan issued a memo to the University community, stating his concerns about articles that had appeared in the October 31 issue. Doc. 44 at Fagan dep. at ex. 2. In mid-November, Plaintiff Porche responded in an open letter to the University community. Doc. 43 at ex. B.

Ms. Porche decided not to submit any issue of the paper to the printer after the October 31, 2000 issue. Doc. 44 at Porche dep at 36. In her view, the "chief deterrent" to publication was the SCMB, the paper's publisher. Id. at 60. Plaintiffs "didn't see much point in submitting a paper [and] doing all the work" because they thought the printer would not publish it until the issue was resolved by the paper and the administration. Doc. 44 at Hosty dep. at 57, 36-38, 48; see also Doc. 44 at Porche dep. at 33. Plaintiff Hosty also saw no point in putting out a paper between December 17, 2000 and the beginning of the next trimester, given that no one would be on campus to read it. Docs. 36, 43 at ¶ 34. Plaintiffs Hosty and Porche continued to receive a stipend for being editors even though no other issues were published. Docs. 36, 43 at ¶ 33.

Plaintiffs Hosty and Porche continued to work on the paper, conferring with their advisor, editing and proofreading articles, and doing other tasks. Docs. 36, 43 at ¶¶ 28-29; Doc. 44 at Hosty dep. at 47-51. The writers of the articles were Kelly Bober and Plaintiffs Hosty and Porche. Doc. 44 at Porche dep. at 45-46. No Defendant was known to have seen any of these articles, though the advisor did. Docs. 36, 43 at ¶ 31; Doc. 44 at Porche dep. at 38, 180. No

Defendant told Plaintiffs that they could not publish an article on a particular subject. Doc. 44 at Porche dep. at 180-81.

Meanwhile, in December 2000, Plaintiffs Porche and Hosty sent a grievance to Defendant Woodard, charging that Dean Carter and certain other Defendants had prevented the paper from being able to function. Doc. 43 at Ex. A (grievance). The Illinois College Press Association also was asked to investigate Plaintiffs' claim, and it concluded that the administrators had acted "inappropriately, and probably illegally." Doc. 43 at Ex. C. The Association also determined, however, that it could not support Plaintiffs Hosty and Porche's serving as student senators while also reporting on the senate, their writing investigative stories about an administrator who was their teacher, the blurring between news and commentary, and Dr. de Laforcade's writing both a letter to the editor and a book review for the October 31, 2000 issue. Id. In March 2001, the SCMB implemented a conflict of interest policy prohibiting students from serving simultaneously as editors and student senators, which was amended to be applied prospectively only. Docs. 36, 43 at ¶¶ 99-100.

The Complaint

In January 2001, Plaintiffs Hosty and Porche filed a complaint in the district court alleging that Defendants Governors State University, its Board of Trustees, Bell, Dascenzo, and Carter, among others, violated their rights to freedom of speech and the press. Doc. 1. They sought declaratory and injunctive relief, compensatory damages, and punitive damages of \$1,000,000.00. Id. Shortly thereafter, they filed an amended complaint, adding Defendants Fagan, Keys, Wells, and Conway. Doc. 2. Sometime later, the court granted them leave to file a

first amended complaint. Doc. 5. Among others,³ Plaintiffs added Defendants Woodard, Bradley, Young, and Gunther. Doc. 6. They also added Baron as a plaintiff. Id.

Defendants moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on various grounds. Doc. 12. The court dismissed all claims against the University and the Board, and the damages claims against the individual defendants in their official capacities, on Eleventh Amendment grounds (Doc. 15). Plaintiffs moved to reconsider the dismissal of the University and the Board (Doc. 17), but the court denied the motion ((Doc. 22).

Of the remaining Defendants, those who had been served filed answers to the first amended complaint, some of them denying the allegations of unconstitutional conduct and raising the affirmative defenses of qualified immunity and lack of standing. Docs. 16, 28, 53 (Kammer).

Plaintiffs moved to file a second amended complaint to add as Defendants other members of the SCMB and to add state law claims. Doc. 23. The motion was denied for failure to submit a proposed pleading. Doc. 24. Plaintiffs again moved to amend the complaint, attaching a proposed pleading that added two more defendants, as well as added state law claims against various Defendants. Doc. 29. Defendants objected to the amendment as untimely (Doc. 26), and the motion was denied (Doc. 21).

Defendants' Summary Judgment Motion

Defendants Bell, Dascenzo, Carter, Fagan, Keys, Conway, Woodard, Bradley, Gunther,

³ Defendants Dorothy Ferguson, and Claude Hill IV, members of the SCMB were named in the First Amended Complaint but never served. Doc. 16 at n.1, Doc. 28 at n. 1.

Young, and Schwellenbach then moved for summary judgment on, among other things, qualified immunity grounds. Doc. 35. They also filed a Rule 56.1(a)(3) Statement of Uncontested Facts with supporting documents. Doc. 36. Defendant Kammer originally joined in the motion (Doc. 50), but then withdrew that pleading but later sought and was granted leave to join in Defendants' motion again (Docs. 54, 56).

Plaintiffs responded to Defendants' motion, attaching a Rule 56.1(b) statement and various exhibits, including Richards's affidavit and letter and the depositions of Dean Carter and Plaintiffs Hosty and Porche. Docs. 42, 43, 44. In her deposition, Plaintiff Hosty agreed that it was "common practice" for the faculty advisor to review the paper prior to printing to point out problems, to determine if additional fact-checking was required, and "to also attempt to make sure that the paper is as liable free as possible in order to protect the university, the newspaper itself, and each of the contributing writers." Doc. 44 at Hosty dep. at 23-24. She also admitted that she knew of no University interference with the content of the paper before October 31, and that "it would be impossible for [her] to know exactly what the University prohibited the paper from publishing "because then [she] would have to know what they knew, and [she] can't possibly know what they knew." Id. at 30, 26, 28, 124. She agreed her concern that a faculty advisor chosen by the University would tamper with evidence or otherwise affect a story being investigated was "absolutely" speculation. Id. at 154.

Defendants moved to strike Plaintiff's response as violating Local Rule 56.1(b), arguing that it was unresponsive, included unsupported or improperly supported statements, and stated new facts (Doc. 51), but the motion was denied. Defendants also replied. Doc. 46.

The court granted Defendants' summary judgment motion as to all Defendants other than Dean Carter. Doc. 57 (AT Appendix at A.1). It found that Plaintiffs had failed to allege

sufficient facts from which a jury could find that Defendants Keys or Fagan violated Plaintiffs' First Amendment rights because a supervisor cannot be held liable for neglecting to detect unconstitutional conduct and the evidence showed that those Defendants did nothing more than investigate Dean Carter's telephone calls. Id. at 8. The court found that Plaintiffs failed to present sufficient evidence that Defendants Wells or Woodard had participated in any alleged constitutional violation. Id. The court also found that Defendants Dascenzo, Bradley, Gunther, and Young were entitled to qualified immunity because Plaintiffs had failed to establish their First Amendment right to a particular type of computer or an investigation of break-ins to the Innovator's office. Id. at 9. The court next decided that Defendants Conway and Schwellenbach were entitled to qualified immunity because Plaintiffs failed to present evidence that their conduct was an attempt to frustrate their First Amendment rights. Id. at 9-10. Likewise, the court found that Defendant Bell was entitled to qualified immunity for cancelling SCMB meetings, replacing the computer containing confidential files, denying Plaintiffs access to computer software, and not investigating the break-ins because the evidence failed to show he either had done so to suppress their speech or had any duty to investigate. Id. at 10-11.

The court found, however, that Dean Carter was not constitutionally allowed to take adverse action against the paper based on poor grammar, spelling, or content. Id. at 12. It therefore found that a factual dispute existed as to whether Dean Carter's conduct violated Plaintiffs' clearly established First Amendment rights. Id. at 12-13.

Dean Carter appealed. Doc. 58. That appeal was docketed as No. 01-4155. On January 15, 2002, Plaintiffs filed a notice of appeal from the grant of summary judgment in favor of the other Defendants and other interlocutory rulings. Doc. 63. Docketed as No. 02-1137, that appeal was dismissed for lack of appellate jurisdiction.

SUMMARY OF ARGUMENT

This is a simple case of failure of proof: Plaintiffs failed to provide either enough evidence to justify a jury verdict on their First Amendment claim, or enough authority to justify a finding that it was “clearly established” that the First Amendment prohibited Dean Carter from requesting review and approval of the paper prior to printing. Thus, Dean Carter was entitled to summary judgment.

In 1988, the United States Supreme Court held that unless a school has demonstrated an intent to make its student newspaper a public or limited public forum, it may impose restrictions, even on content, so long as the restrictions are reasonably related to legitimate pedagogical concerns. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). Here, given the “common practice” of requiring the advisor to review and sign off on each issue prior to printing, the Innovator was a nonpublic forum, despite a written policy ostensibly granting students editorial control. Thus, Dean Carter’s request to review and approve the paper did not violate Plaintiffs’ First Amendment rights, especially in light of the dearth of any evidence that she intended to review for content rather than for spelling and punctuation. Even if the paper were a limited public forum, Plaintiffs failed to show that any proposed article was constitutionally protected or that Dean Carter’s request, rather than their own decisions, caused no paper to be printed after October 31, 2000.

Alternatively, all Plaintiffs’ authorities pre-date Hazelwood, rendering their current vitality suspect. As a result, Plaintiffs completely failed to show that Dean Carter’s request violated a clearly established First Amendment right of students.

ARGUMENT

I. Dean Carter Was Entitled to Qualified Immunity Because Plaintiffs Did Not Demonstrate It Was Clearly Established That Her Request to Review and Approve the Innovator Prior to Printing Violates the First Amendment.

The district court denied Dean Carter's summary judgment motion on the ground that Plaintiffs' evidence created a question of fact as to whether Dean Carter's request to review and approve the paper prior to printing violated Plaintiffs' clearly established First Amendment rights. Doc. 57 at 11-13. The district court was mistaken, however, both as to the quantum and nature of the evidence Plaintiffs submitted as well as to the weight of their authorities on the state of First Amendment jurisprudence in the context of post-secondary school newspapers.

A. The District Court's Decision Is Not Entitled to Deference Under the De Novo Standard of Review.

Review of the district court's grant of summary judgment is de novo. Bellaver v. Quanex Corp., 200 F.3d 485, 491 (7th Cir. 2000). Thus, this Court applies the same standard used by the district court. Under those criteria, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Because it is the jury's role to weigh the evidence, make credibility determinations, and draw legitimate inferences from the facts, the court must take as true the nonmovant's evidence and draw all reasonable and justifiable inferences in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment is "not . . . a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (internal quotation marks and citation omitted).

Because the primary purpose of summary judgment is to isolate and dispose of factually unsupported claims (id. at 323-24), a plaintiff may not rest on his pleadings. Instead, he must respond, with affidavits or other evidence, “set[ting] forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). As Plaintiff notes, a non-movant’s own affidavit and deposition testimony can serve as “affirmative evidence” for summary judgment purposes. AT Brf. at 14, 18. This is not so, however, if that evidence contains factually unsupported conclusory statements, which cannot create issues of fact. Mills v. First Fed. Sav. & Loan Ass’n, 83 F.3d 833, 843 (7th Cir. 1996). Moreover, affidavits must be made on personal knowledge and “shall set forth such facts as would be admissible in evidence.” Fed. R. Civ. P. 56(e).

Factual disputes are “material” only if they “might affect the outcome of the suit under the governing law.” Liberty Lobby, 477 U.S. at 248. Factual disputes are “genuine” only “if the evidence is such that a reasonable jury could return a verdict for the [nonmovant].” Id. Evidence is not sufficient in this regard if it is “merely colorable,” “not significantly probative,” or “a mere scintilla.” Id. at 249-50, 252. The evidence must be enough to create more than “some metaphysical doubt as to the material facts.” Johnson v. University of Wisconsin-Eau Claire, 70 F.3d 469, 477 (7th Cir. 1995) (internal quotation marks omitted). Thus, unless a non-movant-plaintiff makes a sufficient evidentiary showing, the defendant movant is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323.

B. No Reasonable Jury Could Conclude That Dean Carter’s Request to Review and Approve the Paper Prior to Printing Violated Their First Amendment Rights.

The district court found that the First Amendment prohibited Dean Carter from asking to review and approve the paper prior to printing for content, spelling, or punctuation, and, relying on cases at least nineteen years old, it also found that there was a genuine question of fact as to

whether her conduct violated Plaintiffs' clearly established First Amendment rights. Doc. 57 at 12. A careful reading of the record, however, demonstrates that Plaintiffs submitted no evidence whatsoever that the University intended to make the paper a public forum or that Dean Carter's calls were prompted by the Innovator's content. On this record and under the applicable legal analysis, no reasonable jury could conclude that Dean Carter's conduct violated Plaintiffs' First Amendment rights.

1. Public School Students' First Amendment Rights in a Student Newspaper Are Far More Limited Than Those of Adults in Public Fora.

The First Amendment bars the government from "abridging the freedom of speech, or of the press" U.S. Const. amend. I. It applies to the States through the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). It applies to post-secondary school students. Widmar v. Vincent, 454 U.S. 263, 268-69 (1981). Among the prohibited restrictions on speech are "prior restraints," that is, a public official's power to deny use of a forum in advance of the speech based on content. Hill v. Colorado, 530 U.S. 703, 734 n.42 (2000); see also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 554 (1975) (listing elements of prior restraint claim). To determine whether the government has violated the First Amendment, a court must first decide whether the speech is constitutionally protected, after which it ascertains the applicable standard and then determines whether the restriction meets that standard. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 797 (1985) (charitable solicitation of government employees).

The Supreme Court has noted that a forum may have a public, nonpublic, or limited public nature, and that nature determines the applicable standard. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (school mailboxes are nonpublic). If a

school is a nonpublic forum, the government may impose restrictions on sponsored speech so long as they are reasonably related to legitimate pedagogical concerns. Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988). If the school is a public forum, the government may enforce content-neutral time, place, and manner restrictions that are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication,” while content-based restrictions are enforceable when narrowly tailored to serve a compelling interest. Perry, 460 U.S. at 45-46. The public forum standard also applies to a limited public forum, that is, one that the government has intentionally designated for use by certain speakers or discussion of certain subjects and that it is free to close for non-content-based reasons. Cornelius, 473 U.S. at 802; Perry, 460 U.S. at 46.

At one time, the United States Supreme Court viewed students’ First Amendment rights somewhat broadly. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (striking down prohibition against wearing armbands in high school and junior high school). Approximately twenty years later, however, the Court narrowed its view, emphasizing that the “First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings.” Hazelwood, 484 U.S. at 266 (internal quotation marks omitted). With Hazelwood and Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), the Court “has cast some doubt on the extent to which students retain free speech rights in the school setting.” Baxter by Baxter v. Vigo County School Corp., 26 F.3d 728, 737 (7th Cir. 1994) (holding that an official was entitled to qualified immunity for barring a grammar school student from wearing an expressive T-shirt). Today, as this Court observed quite recently, “the First Amendment [is] sensibly interpreted to allow school authorities greater control over the free speech of students than the state is permitted to exercise over the free speech

of adults engaged in political expression in the normal venues.” Gernetzke v. Kenosha School Dist. No. 1, 274 F.3d 464, 467 (7th Cir. 2001) (citing Hazelwood), cert. denied, 2002 U.S. LEXIS 2849 (April 22, 2002); see also Muller by Muller v. Jefferson Lighthouse School, 98 F.3d 1530, 1542 (7th Cir. 1996) (noting that the government may suppress speech in public schools based on viewpoint in certain circumstances, and, in non-public forum, it may censor speech even for adults on the basis of content).

The analytical framework used in Hazelwood, which rejected a prior restraint challenge to a principal’s decision to delete articles from a high school newspaper because of their “inappropriate content,” is instructive. Citing Perry and Cornelius, the Court first determined whether the newspaper was a public forum by examining the school’s policy and practice with respect to it, its nature and its compatibility with expressive activity, and its context. 484 U.S. at 267-70. Given that the evidence failed to show a clear intent by the school to make the paper a public forum, the Court concluded, the paper was a nonpublic forum. Id. at 270. As a result, the Court held, the applicable standard was a lenient one: school officials could reasonably regulate the paper’s style and its content “so long as their actions are reasonably related to legitimate pedagogical concerns.” Id. at 273. As for the particular types of regulation allowed, the Court held that officials may refuse to disseminate school-sponsored speech if it is “ungrammatical, poorly written, inadequately researched, or biased or prejudiced” Id. at 271-72.

Distinguishing Tinker, the Court emphasized that school officials have the right to exercise reasonable control over student speech to make sure that, among other things, “the views of the individual speaker are not erroneously attributed to the school,” stressing the difference between requiring a school to promote speech (Hazelwood) and requiring it to tolerate speech (Tinker). Id. at 270-71. The Court defined sponsored speech very broadly to include all

activities that “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” Id. at 271.

Of particular significance here is that the Hazelwood Court did not state whether its analysis was inapplicable to post-secondary schools. On the contrary, it explicitly declined to decide whether the deference accorded to high school officials would also apply at the post-secondary level. Id. at 273 n.7. Quite recently, Justice Souter observed that the Court’s “cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools.” Bd. of Regents of Univ. of Wisc. v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) (indicating his view that college students and their schools’ relation to them are “different and at least arguably distinguishable” from their secondary school counterparts).

As shown below, Plaintiffs failed to provide sufficient evidence to create a question of fact as to the University’s intent to create a public forum, so Hazelwood’s more lenient standard for restrictions on speech applies here. Even if they had demonstrated that the Innovator is a public forum, they failed to provide evidence from which a reasonable jury could find that Dean Carter’s conduct violated that standard or caused them not to continue publishing the paper.

2. Plaintiffs Failed to Demonstrate that Dean Carter’s Request to Review and Approve the Paper Prior to Printing Was Unconstitutional Under the Circumstances.

Plaintiffs appear to believe that the First Amendment gives them an absolute right to print

the paper without any University review or approval. They are wrong. As explained above, the First Amendment generally prohibits the government from denying the use of a forum for communication before the speech is expressed. Hill v. Colorado, 530 U.S. 703, 734 n. 42 (2000). This right, however, is not absolute, and in Hazelwood, the Court held that a school may refuse to disseminate a school sponsored newspaper if it contains speech that is ungrammatical, poorly written, inadequately researched, or biased or prejudiced unless it has shown an intent to make the paper a public or limited public forum. 438 U.S. at 271. Plaintiffs failed to provide sufficient evidence to demonstrate that the First Amendment requires a different result here.

As noted above, the first step in First Amendment analysis is that the speech at issue be constitutionally protected. Cornelius, 473 U.S. at 797. Here, however, Plaintiffs failed to provide evidence from which a jury could conclude that the proposed articles were protected, for not a single one of those articles appears anywhere in the record. Consequently, Plaintiffs failed to provide enough evidence to cross the threshold for a First Amendment claim -- the existence of constitutionally protected speech. This omission was fatal. Unless a non-movant-plaintiff makes a sufficient evidentiary showing on each essential element of his case, the defendant-movant is entitled to judgment as a matter of law because “a complete failure of proof concerning an essential element of the [plaintiff’s] case necessarily renders all other facts immaterial”). Celotex, 477 U.S. at 323. For this reason alone, Dean Carter is entitled to summary judgment in her favor.

There are other reasons too. Plaintiffs’ next task was to demonstrate whether the Innovator was a public forum, which would require any restriction to meet a higher standard. As noted above, a student newspaper will be deemed a public forum only upon evidence of the school’s deliberate intent to make it one, in the form of affirmative steps to do so. Hazelwood,

484 U.S. at 267-69. The relevant evidence for this inquiry includes the school's policy and practice with respect to the paper, its nature and its compatibility with expressive activity, and its context. Id. at 267-70. Here, although the district court found significant that all editorial decisions were made by Plaintiffs (Doc. 57 at 12), a review of the evidence shows that Plaintiffs failed to demonstrate that the University intended to give the students free reign.

As a threshold matter, it is undisputed that the paper was disseminated by the University. Indeed, its caption reads, in large type: "Innovator[.] The Newspaper of Governors State University." Doc. 44 at Fagan dep. at ex. 3. Thus, as Hazelwood teaches, the University had a significant interest in ensuring that a writer's views would not be erroneously thought to bear the University's imprimatur. Id. at 270-71. Moreover, though the University's written media policy (Doc. 44 at Bell dep. at ex. 1) appears to give students editorial control, Plaintiffs conceded that the advisor reviewed and signed off on the paper before it was printed (Docs. 36, 43 at ¶¶ 45-46). Moreover, Ms. Hosty candidly admitted that it was the University's "common practice" that the advisor review the paper to point out problems, to determine if additional fact-checking was required, and to protect the University, the paper, and the writers from liability. Doc. 44 at Hosty dep. at 23-24. Furthermore, though the district court found significant that the paper was not part of a class (Doc. 57 at 12), Hazelwood teaches that the traditional classroom setting is not the sine qua non for a nonpublic forum, "so long as [an activity is] supervised by faculty members and the activity is designed to impart particular knowledge or skills to student participants and audiences." 484 U.S. at 271. Here, there is no question that the paper was supervised by a faculty advisor or that it was designed to impart journalism knowledge and skills to its staff. Moreover, a student could choose to earn a grade for working on the paper. Doc. 44 at Hosty dep. at 11-14.

Moreover, although the district court viewed Dean Carter's request as an effort to restrict the paper's content (Doc. 57 at 11-13), the evidence does not support that view. For example, it is undisputed that Dean Carter did not see any of the proposed articles (Docs. 36, 43 at ¶ 31), and Plaintiff Porche conceded that no Defendant ever told Plaintiffs that they could not publish an article on any particular subject (Doc. 44 at Porche dep. at 180-81). Furthermore, Ms. Hosty herself conceded that she did not know if any Defendant knew about the paper's investigations. Doc. 44 at Hosty dep. at 124, 26. Thus, there is simply no evidence to support the notion that Dean Carter's request to review and approve the paper was motivated by an intent to suppress any article based on content.

In sum, Plaintiffs did not even try to demonstrate that the speech they claim would be restricted by Dean Carter's request was even qualified for constitutional protection, an essential element of their First Amendment claim, so Dean Carter was entitled to judgment for that reason alone. Moreover, Plaintiffs failed to show that the University intended to create a public forum by limiting its oversight of the paper to just general, administrative matters and ceding all other authority to students absolutely. Because Plaintiffs failed to provide sufficient evidence to demonstrate that the paper is a public forum, they failed to show that their First Amendment rights are any greater than the limited rights accorded to the students in Hazelwood. They also failed to show that the First Amendment prohibits the University from regulating the paper in any reasonable manner based on legitimate pedagogical concerns, including grammar and spelling. They even failed to show that Dean Carter's request was content-based. Given this record, no jury could conclude that Dean Carter's request violated Plaintiffs' First Amendment rights.

3. Alternatively, Plaintiffs Failed to Provide Evidence That It Was Dean Carter's Request That Prevented Them From Having the Paper

Printed After October 31.

Even if the paper were a limited public forum, requiring application of a more exacting standard for restrictions on speech, Dean Carter was entitled to summary judgment because Plaintiffs presented no evidence that it was Dean Carter's calls that restricted Plaintiffs' speech in the first place. In fact, it was Plaintiffs themselves who restricted their speech.

As Plaintiff Porche candidly conceded, it was her decision not to send any issues to the publisher after the October 31, 2000 issue. Doc. 44 at Porche dep. at 36. She also named the SCMB, which approves the paper's expenditures (Docs. 36, 43 at ¶¶ 35, 36), as the "chief deterrent" against having done so. Doc. 44 at Porche dep. at 36, 60. For not printing an issue of the paper between December 17, 2000 and the beginning of the next trimester in particular, Plaintiff Hosty provided another reason: they did not have an issue ready for printing before that date, and no one would be around to read it after that date. Docs. 36, 43 at ¶ 34. Moreover, Plaintiff Hosty admitted that they "didn't see much point in . . . doing all the work" to ready another issue to be printed because the printer would not print anything until Plaintiffs resolved the matter with the University. Doc. 44 at Hosty dep. at 57, 36-38, 48; Porche dep. at 33. Though Plaintiffs themselves apparently could have resolved the matter by assuring Dean Carter that an advisor would continue to review and sign off on the paper prior to printing, as was the custom (Docs. 36, 43 at ¶¶ 45-46), there is no evidence that they did so. Moreover, they even opposed a new faculty advisor chosen by the University after Dr. de Laforcade's term ended, based only on what Plaintiff Hosty has admitted was an "absolutely" speculative concern that the advisor would interfere with their investigations. Doc. 44 at Hosty dep. at 154.

Given this record, Plaintiffs utterly failed to demonstrate that it was Dean Carter's conduct that caused them not to publish another issue of the paper. As a result, Dean Carter was

entitled to summary judgment on their First Amendment claim.

II. Alternatively, Plaintiffs Failed to Demonstrate That Dean Carter’s Calls Violated “Clearly Established” Law.

Even if Plaintiffs had provided sufficient evidence to support a verdict in their favor on their claim, Dean Carter nevertheless was entitled to summary judgment because they failed to meet their burden of demonstrating that every reasonable university administrator would have been compelled to conclude that requesting review and approval of a post-secondary student paper violated the First Amendment.

A. Qualified Immunity Shields Government Officials From Suit for Damages on a Claimed Constitutional Violation Unless the Law Was Clearly Established at the Time.

Under the doctrine of qualified immunity, even if government officials performing a discretionary function violate a federally protected right, those officials “generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Wilson v. Layne, 526 U.S. 603, 614 (1999) (internal citations and quotation marks omitted). Thus, an official who violates a plaintiff’s constitutional rights can be held personally liable for damages only if the right at issue was sufficiently clear in light of pre-existing law. Id. at 614-15. This determination turns on the “objective legal reasonableness of the action” given the contemporaneous legal rules. Id. at 614 (internal quotation marks omitted).

When a defendant raises the affirmative defense of qualified immunity, the plaintiff then bears the burden of demonstrating that the law was “clearly established” at the time in question. Chan v. Wodnicki, 123 F.3d 1005, 1008 (7th Cir. 1997). The best proof of this is a Supreme

Court or circuit precedent directly on point that pre-dates the defendant's conduct. Kernats v. O'Sullivan, 35 F.3d 1171, 1176-77 (7th Cir. 1994). Lacking such proof, a plaintiff may point to reasonably analogous cases that have both articulated the right at issue and applied it to similar facts. Chan, 123 F.3d at 1008. A district court decision cannot "clearly establish" a legal right, though it may provide evidence of the state of the law at that time. Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995).

Significantly, though the very action in question need not have been held unlawful, the right "must be defined at the appropriate level of specificity before a court can determine if it was clearly established." Wilson, 526 U.S. at 615. This is so because "preexisting law must dictate, that is, truly compel, the conclusion for every like-situated, reasonable government agent that what [he] is doing violates federal law in the circumstances." Khuans v. School Dist. 110, 123 F.3d 1010, 1019-20 (7th Cir. 1997) (emphasis in original) (internal quotation marks and citations omitted). Accordingly, under Wilson, when Defendants raised the defense of qualified immunity, it was not enough for Plaintiffs to point to authorities for the proposition that students have rights under the First Amendment. Instead, the appropriate question was whether in October 2000, the law truly compelled every reasonable university administrator to conclude that it would be unlawful to require review and approval of a newspaper prior to printing. The answer is no.

On this issue, Wilson is instructive. There, the Court held that police officers enjoyed qualified immunity (on a Fourth Amendment claim for bringing along members of the media into homes to record an arrest) because the plaintiffs had presented neither controlling authority in their jurisdiction nor a consensus of cases of persuasive authority such that no reasonable officer could have believed that his conduct was lawful. 526 U.S. at 615-17. The Court found it

significant that the officials had relied on an official policy that explicitly contemplated their conduct, though the Court cautioned that the policy alone would not make reasonable a belief that was contrary to a body of law. Id. at 617. Because the relevant law was “at best undeveloped,” however, the Court concluded that it was not unreasonable for the official to rely on the policy. Id. The Court then held that the officials could not have been expected to predict the future course of constitutional law, noting that “[i]f judges thus disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy.” Id. at 618. As Wilson teaches, Plaintiffs had the burden of demonstrating that pre-existing law, in the form of controlling authority (from the Supreme Court or in this circuit) or a consensus of persuasive authority, truly compelled the conclusion for every reasonable university administrator that the First Amendment prohibited review and approval of a student newspaper before it was printed. As shown below, it is the opposite conclusion that is compelled, particularly in light of the University’s “common practice” of requiring the advisor to review and sign off on the paper prior to printing. Thus, Plaintiffs failed to show that Dean Carter was not entitled to qualified immunity.

B. Plaintiffs Failed to Demonstrate That Every Reasonable University Administrator Would Be Compelled to Conclude that It Was Unlawful to Require Review and Approval of the Student Paper Before It Was Printed.

As demonstrated above, to avoid entry of summary judgment in favor of Dean Carter, Plaintiffs were obliged to establish that she was not entitled to qualified immunity. They failed to do so, but this is not surprising, for it is impossible to demonstrate that First Amendment jurisprudence is clearly established in the context of post-secondary school student publications even today.

Under the Supreme Court's forum analysis in Hazelwood, it is constitutionally permissible to require review and approval of a school sponsored, nonpublic forum for grammar, punctuation, fact-checking, and even for content, so long as the restriction is connected to a legitimate pedagogical interest, and the Court explicitly decided not to decide whether this same deference should be accorded to a post-secondary school paper. 484 U.S. 260, 273 n.7. As Justice Souter pointed out in Southworth, the Court has not issued a single decision addressing this question. 529 U.S. at 238 n.4. Furthermore, Plaintiffs have pointed to neither a single post-Hazelwood decision from this Court nor to any consensus in other federal courts on this issue.

Perhaps the most obvious evidence that the state of the law in this area is "at best undeveloped" can be found in the Sixth Circuit's decisions in Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999), rev'd, 236 F.3d 342 (6th Cir. 2001) (en banc). In Kincaid, a university official confiscated the school yearbook based on objections to its color, its theme, its quality, and its contents. 236 F.3d at 345. The original Sixth Circuit panel applied the Hazelwood forum analysis and concluded that the University did not intend the yearbook to be a public forum, noting that the evidence of a contrary intent was "equivocal at best." 191 F.3d at 726-28. The court then held that the university could reasonably regulate the yearbook's content, so

confiscating it for the reasons asserted was constitutional in light of the yearbook's failure to accomplish its intended purpose. 191 F.3d at 728-29. After rehearing en banc, however, the court reversed. 236 F.3d 342. It held that the evidence showed that the university did intend the yearbook to be a limited public forum, and that even applying the more lenient standard for a nonpublic forum, the confiscation was unconstitutional because it appeared to be viewpoint-based. 236 F.3d at 347-56. This decision was not unanimous: the author of the original decision dissented (id. at 359 (Norris, J., dissenting)), and another judge dissented in part (id. at 358 (Boggs, J., concurring in part and dissenting in part)).

Plainly, even federal reviewing court judges do not agree about the nature of university publications and the constitutionally acceptable restrictions that can be placed on them. The Kincaid court even explicitly declined to state whether it would apply the same analytical framework in this context. 236 F.3d at 348 n.6 (stating that its ruling “has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper” and questioning whether forum analysis applies in that context). Under these circumstances, Dean Carter is entitled to qualified immunity because it would be unjust to subject her to money damages for picking the losing side of the controversy. Wilson, 526 U.S. at 618.

C. Plaintiffs' Authorities Are Unpersuasive.

The five district and appellate court cases on which Plaintiffs and the district court relied for the notion that Dean Carter was not entitled to qualified immunity do not demonstrate that the law is “clearly established” in relation to the circumstances at issue here. Perhaps these cases' greatest defect is that all of them pre-date Hazelwood. Their continued vitality is questionable since the Hazelwood Court deliberately limited students' First Amendment rights in sponsored

speech after Tinker.

The cases are also distinguishable. For example, in Fujishima v. Bd. of Educ., 460 F.2d 1355 (7th Cir. 1972), the speech at issue was not school-sponsored, whereas the restriction here is on a University-sponsored publication. Because the Hazelwood Court stressed the distinction between promoting and merely tolerating speech, Fujishima's applicability here is doubtful at best. In Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975), the Fifth Circuit held that a university administrator did not have the right to dismiss students from their editorial positions for bad grammar, spelling and language because those reasons were not "special circumstances," the standard that allows restrictions only if the speech could lead to "significant disruption on the university campus or within the education processes." A similar standard was used by the district court in Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970), and by the Fourth Circuit in Joyner v. Whiting, 477 F.2d 456, 461(4th Cir. 1973). Plaintiffs failed to demonstrate, however, that this standard applies after Hazelwood even in school fora that are intended to be public. As for Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983), it was a case of mixed motive, and unlike here, the evidence indicated that the motive for the restriction was content-based.

In sum, Plaintiffs are unable to show that the pre-existing law truly compels the conclusion that all reasonable university administrators in these circumstances would know that they could not require content-neutral review and approval of a university student newspaper. For this reason, Dean Carter is entitled to qualified immunity.

CONCLUSION

For the reasons stated above, Defendant-Appellant Carter respectfully requests that this Court reverse the denial of her motion for summary judgment on qualified immunity grounds and enter judgment in her favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

The undersigned attorney hereby certifies that the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0, which indicates that the brief contains 8,777 words of text.

Mary E. Welsh

SHORT APPENDIX

1. Order and Memorandum Opinion (Doc. 57) A-1

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

The undersigned certifies that all of the material required by Circuit Rules 30(a) and 30(b) are contained in this Short Appendix.

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PROOF OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that two (2) copies of the foregoing Brief of Defendant-Appellee were served upon the below-named parties by depositing such copies in the United States mail at 100 West Randolph Street, Chicago, Illinois, in an envelope bearing sufficient postage on May 3, 2002 before 5:00 p.m.

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SUBSCRIBED and SWORN to before me
this 3rd day of May, 2002.

NOTARY PUBLIC