

No. 05-377

In the Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA,
PETITIONERS,

v.

PATRICIA CARTER, RESPONDENT.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988), this Court declined to decide if post-secondary public school officials may reasonably regulate the content and style of school-sponsored speech for legitimate pedagogical purposes in a non-public forum. Petitioners, who were editors and a staff reporter of *Innovator*, *The Newspaper of Governors State University* (GSU), filed this suit against respondent Dean Patricia Carter (among others), alleging that she violated their First and Fourteenth Amendment rights by requiring pre-publication review of the paper. Sitting *en banc*, the Seventh Circuit agreed with petitioners that a reasonable jury could find that *Innovator* was not a non-public forum and thus was not subject to editorial control by GSU administrators. The court granted summary judgment for Dean Carter on qualified immunity grounds, however, holding that not all reasonable university officials in her shoes had to know that *Innovator* was not a non-public forum because “factual and legal uncertainties dog the litigation.”

The question presented is whether the Seventh Circuit erred in holding that Dean Carter was entitled to qualified immunity, given the “cloudy” facts in the record on summary judgment and petitioners’ concession that judges disagree even today about if and how *Hazelwood* applies to post-secondary schools.

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STATEMENT

A. From May 2000 through April 2001, petitioners Jeni Porche and Margaret Hosty were the Editor-in-Chief and Managing Editor, respectively, of *Innovator*, *The Newspaper of Governors State University* (GSU); petitioner Steven Barba was a staff reporter. Docs. 36, 43 at ¶¶ 17-20. Contrary to petitioners' repeated characterization of the paper as operating "outside of" or "separate and apart from" GSU's curriculum (*see, e.g.*, Pet. i, 20, 25 n.10, 26), class credit (or work-study status or a stipend) could be requested as compensation for working on the paper (Doc. 44 at Hosty dep. at 11-12). The parties agree that petitioners Porche and Hosty each received a \$4,500 stipend for the year. Docs. 36, 43 at ¶ 33; Doc. 44 at Hosty dep. at 14.

GSU's Student Communications and Media Board (the SCMB) published *Innovator*, which was funded by student activities fees. Pet. App. 11a. According to its charter, the SCMB was "responsible to the Director of Student Life," who in turn was a subordinate of respondent Patricia Carter, GSU's Dean of Student Affairs and Services. Pet. App. 11a-12a. GSU's media policy states that the student staff determines the content and format of each publication without censorship or advance approval. Pet. App. 11a.

Like other SCMB media, *Innovator* had a faculty advisor. Pet. App. 12a. The parties agree that the "normal procedure" was to have the faculty advisor sign off on the paper before it went to the printer. Docs. 36, 43 at ¶ 46. They also agree that after August 2000, *Innovator*'s advisor (Geoffrey de Laforcade) was no longer a GSU faculty member and instead was employed at a college in Carlinville, Illinois. Docs. 36, 43 at ¶ 44.

B. The October 31, 2000 issue of *Innovator* contained several articles by petitioner Hosty. Doc. 44 at Fagan dep. at exhibit. One criticized the coordinator of GSU's English department, another criticized GSU's Dean of the College of Arts and Sciences concerning the decision not to renew de Laforcade's employment contract, and a third reported on a GSU student senate meeting at which the senate president had criticized GSU President Stuart Fagan. *Id.* Another student wrote a column criticizing GSU's financial aid office (*id.*), which was under Dean Carter's aegis (Doc. 44 at Carter dep. at 25).

On or around October 31, 2000, Dean Carter called the printer and instructed him not to print any more issues of *Innovator* without first calling her so that she or someone from the administration could read and approve it. Pet. App. 2a. She called again later and made the same request. Doc. 44 at Richards affidavit.

On November 3, 2000, GSU President Fagan distributed to the GSU community a memorandum he wrote to petitioner Porche, criticizing the October 31, 2000 issue as "an angry barrage of unsubstantiated allegations that essentially – and unfairly – excoriated some members of the university faculty and administration (myself included)." Doc. 44 at Fagan dep. at exh. 2. On November 16, 2000, petitioner Porche responded in an open letter to the GSU community on *Innovator's* letterhead.¹ Doc. 43 at exh. B.

¹ When the Illinois College Press Association (ICPA) investigated Porche and Hosty's censorship claims, it concluded that they and de Laforcade had committed "several ethical lapses": (1) Porche and Hosty reported on the student senate even though they were senate members; (2) they printed de Laforcade's letter to the editor criticizing the administration

Petitioner Porche decided not to submit another issue of *Innovator* for publication; she felt that the “chief deterrent” to publishing subsequent issues was the SCMB, which controlled the paper’s funds. Doc. 44 at Porche dep. at 36, 60; *see also* Pet. App. 39a. She and petitioner Hosty continued to work on articles for the paper, and they continued to be paid their stipends. Docs. 36, 43 at ¶¶ 28-29, 33.

C. In January 2001, petitioners sued Dean Carter as well as GSU itself, GSU’s Board of Trustees, and several other GSU administrators, faculty members, and students, alleging violation of their First and Fourteenth Amendment rights. Pet. App. 35a. After dismissing GSU and its Board of Trustees on sovereign immunity grounds (Pet. App. 52a), the district court found that all remaining defendants except Dean Carter were entitled to summary judgment on the merits or on qualified immunity grounds (Pet. App. 34a-48a). Citing pre-*Hazelwood* cases holding that to require pre-publication review of a paper created and funded by a public university was unconstitutional, petitioners argued that Dean Carter’s calls to the printer violated clearly established First Amendment law. Pet. App. 46a-47a.

In a single paragraph, the district court found that Dean Carter was not entitled to qualified immunity. Pet. App. 47a. It disagreed with her argument that *Hazelwood* cast doubt on

about a faculty member’s employment situation; (3) they wrote stories about the English Department coordinator, who was also one of their teachers, which appeared to be a conflict of interest; and (4) the paper blurred the line between news and commentary, particularly in its coverage of the student senate. Doc. 43 at exh. C. ICPA also believed that GSU administrators, including Dean Carter, had acted inappropriately. *Id.*

petitioners' pre-*Hazelwood* authorities because (1) *Hazelwood* concerned a "supervised learning experience," whereas *Innovator* was an "autonomous student organization"; and (2) *Hazelwood* applied only to high schools, relying on *Hazelwood*'s footnote declining to decide the degree of deference to be accorded to school-sponsored speech in post-secondary schools. *Id.* (citing 484 U.S. at 273 n.7).

Dean Carter appealed this interlocutory order, and a three-judge panel of the Seventh Circuit affirmed (Pet. App. 25a-33a), but the full court vacated that opinion (Pet. App. 59a).

D. After rehearing *en banc*, the Seventh Circuit reversed on the second step of the qualified immunity analysis in *Saucier v. Katz*, 533 U.S. 194 (2001). Pet. App. 1a-15a. On the merits, the court agreed with petitioners that a reasonable jury could conclude that *Innovator* was not a non-public forum and thus was beyond the control of GSU administrators. Pet. App. 10a-12a. It held, however, that Dean Carter was entitled to summary judgment on qualified immunity grounds because "both legal and factual uncertainties dog the litigation." Pet. App. 10a-15a.

Before addressing the merits, the court briefly reviewed *Hazelwood*, which concerned a newspaper produced by a high school journalism class and financed with public funds. Pet. App. 4a. The court noted that the *Hazelwood* court began by first applying public forum analysis and determining that the paper was a non-public forum due to the school's policy and practice of supervising the writing and reviewing the content of each issue. *Id.* (citing 484 U.S. at 267-70). The court observed that *Hazelwood* distinguished the newspaper articles from the students' independent speech in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), on the ground that the school in *Hazelwood* subsidized the paper's costs. Pet. App. 4a. The court reasoned that under *Hazelwood*, school-funded

speech may be regulated when “reasonably related to legitimate pedagogical concerns,” which permits setting standards for speech disseminated under its auspices that are even higher than “real world” standards. Pet. App. 5a (citing 484 U.S. at 271-72). The court added that in a footnote, *Hazelwood* explicitly declined to decide if the “substantial deference” lower federal courts had accorded educators’ decisions about the content of school-sponsored expressive activities was appropriate at the post-secondary school level. Pet. App. 5a (citing 484 U.S. at 273-74 n.7).

Next, the Seventh Circuit rejected petitioners’ (and the district court’s) reading of the *Hazelwood* footnote to mean that high school newspapers are reviewable but college newspapers are not. Pet. App. 5a. It stressed that the footnote addressed only degrees of deference, adding that “[w]hether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers’ age.” Pet. App. 5a (emphasis in original). The court agreed with petitioners that age comes into play when courts assess the reasonableness of an asserted pedagogical justification in a non-public forum, *e.g.*, when the justification is audience maturity. Pet. App. 6a. By contrast, the court suggested, when the justification depended on a desire to ensure high standards (for, *e.g.*, grammar, style, research, or lack of bias) for speech disseminated in non-public forums and under the school’s auspices, there would be “no sharp difference between high school and college papers.” *Id.* Noting that even adult speech may be reasonably regulated in non-public forums when government-funded, while in designated public forums, viewpoint-based restrictions on private speech are forbidden even in elementary schools, the court concluded that “age does not control the public-forum question.” *Id.* at 6a-7a (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

The Seventh Circuit then rejected petitioners' (and the district court's) view that *Hazelwood* had deemed the paper there a non-public forum based solely on its curricular status. Pet. App. 8a-9a. As support, it offered examples of school-sponsored extracurricular speech in which "the right to control would be evident," *e.g.*, a student's article in the alumni magazine for which college credit or payment is given. Pet. App. 9a. The court reasoned that "being part of the curriculum may be a *sufficient* condition of a non-public forum, [but] it is not a *necessary* condition. Extracurricular activities may be outside any public forum . . . without also falling outside all university governance." *Id.* (emphases in original). The court reasoned that the public-forum analysis used in *Hazelwood* applies to all school-subsidized newspapers, later adding that *Hazelwood*'s framework "depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities." Pet. App. 7a, 13a.

Turning its attention to the merits of petitioners' claims, the Seventh Circuit first asked if *Innovator* was a non-public forum, for only then would it matter if Dean Carter's calls to the printer were justified by legitimate pedagogical concerns. Pet. App. 10a. The court then agreed with petitioners that a reasonable trier of fact could conclude from the record that *Innovator* was a designated public forum, which put the paper beyond the control of GSU administrators. *Id.* The court, however, "d[id] not think it possible on this record to determine what kind of forum the University established or [to] evaluate Dean Carter's justifications." *Id.* In particular, the court noted, the SCMB's rules were ambiguous, its charter provided that it was responsible to Director of Student Life, who appeared to be a subordinate of Dean Carter, and the parties disagreed about the identity of the advisor and the extent of his control. Pet. App. 11a-12a.

Addressing the second step in the qualified immunity analysis, the Seventh Circuit pointed out that the district court itself had reached the wrong conclusions about if and how *Hazelwood* applied to colleges generally and to extracurricular speech in particular. Pet. App. 13a. Even if the constitutional framework did differ for high school and colleges, the court held, “it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule.” *Id.* As support, the court cited (among other authorities) the *Hazelwood* footnote, noting that the First Circuit had misconstrued this footnote as a holding that the deference accorded to high school educators did not apply at the college level. *Id.* (citing *Student Gov’t Ass’n v. Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989)). Emphasizing that the Seventh Circuit itself had not spoken on the issue, the court described other circuits’ approach as “hard to classify” and added that “[m]any aspects of the law with respect to students’ speech . . . are difficult to understand and apply . . .” Pet. App. 13a-14a (citing *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (*en banc*), and *Brown v. Li*, 308 F.3d 939 (9th Cir. 2003)). Under these circumstances, the court held, Dean Carter was entitled to qualified immunity because “the implementation of *Hazelwood* means that both legal and factual uncertainties dog the litigation.” Pet. App. 14a. These uncertainties, the court reasoned, “make it inappropriate to say that any reasonable person in Dean Carter’s position in November 2000 had to know that the demand for review before the University would pay the *Innovator*’s printing bills violated the first amendment.” Pet. App. 14a-15a.

The three members of the original panel (joined by a fourth judge) dissented. Pet. App. 15a-24a. They quarreled with the majority’s view that *Hazelwood*’s deferential standard would apply to a non-public forum at the college level, on the ground that “[a]ge . . . has always defined legal rights” and the schools’ missions are different. Pet. App. 15a-21a. The dissent also

disagreed with the holding that Dean Carter was entitled to qualified immunity, on the ground that “*Hazelwood* did not change th[e] well-established rule” that “university administrators could not require prior review of student media or otherwise censor student newspapers.” Pet. App. 21a-22a.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court’s criteria for a grant of certiorari.

As a threshold matter, the petition is internally, and fatally, inconsistent. Even though petitioners insist (as they did in the courts below) that the law was “clearly established” (Pet. 20), they now contend that confusion abounds in the lower courts about if and how *Hazelwood* applies in post-secondary schools (Pet. 23-29). This latter argument necessarily means that petitioners cannot plausibly quarrel with the Seventh Circuit’s holding that Dean Carter was entitled to summary judgment on qualified immunity grounds under *Saucier*’s second prong.

Another reason to deny the petition is that this case presents a particularly poor vehicle for addressing if and how the *Hazelwood* standard applies in post-secondary schools. Here, the Seventh Circuit *agreed* with petitioners that a reasonable jury could conclude that *Innovator* was a designated public forum, so the court did not apply the *Hazelwood* standard to it. Under these circumstances, what petitioners seek is this Court’s advice about the Seventh Circuit’s observations concerning if and how *Hazelwood* might apply to a non-public forum, which the court expressed when addressing the first *Saucier* prong and which were technically dicta. Though these legal questions may be interesting ones in a proper case, this Court does not grant certiorari either to issue advisory opinions or to review dicta. Moreover, even if that question were resolved in petitioners’ favor, it would make no difference to the judgment here – they admit that judges disagree about the applicability of

Hazelwood to colleges.

Likewise, petitioners' (and their amici's) rank speculation that the Seventh Circuit's opinion will have dire consequences for free speech in post-secondary schools does not justify this Court's review. On the contrary, the Seventh Circuit *agreed* with petitioners' view that *Innovator* was not subject to control by GSU administrators because it was a designated public forum, and the court implied that its broad view would apply to other designated public forums, regardless of the speaker's age.

Petitioners are wrong to argue that the Seventh Circuit's use of forum analysis or its qualified immunity holding squarely conflicts with opinions by this Court and the circuit courts. No other court has held that forum analysis does not apply to post-secondary school speech. To the contrary, the Seventh Circuit's use of forum analysis here is completely consistent with its application by this Court and the circuit courts, regardless of the speaker's age or the extracurricular nature of the speech. Likewise, no opinion by this Court or a circuit court would necessarily lead that court to deny Dean Carter qualified immunity on the record here. Thus, no square conflict exists that warrants this Court's resolution.

For these reasons alone, certiorari should be denied. At bottom, however, petitioners (and their amici) seek this Court's review because they believe the Seventh Circuit wrongly held that Dean Carter was entitled to qualified immunity. As noted above, however, petitioners' admission that there is disagreement about if and how *Hazelwood* applies to post-secondary schools necessarily means that the Seventh Circuit got that dispositive and ultimate question right.

I. Given Petitioners' Concession That Judges Disagree Over If and How *Hazelwood* Applies to Colleges, They Necessarily Concede the Judgment Against Them Was Correct.

Petitioners admit, nay trumpet, the disagreement among federal judges about if and how *Hazelwood* applies to colleges. Pet. 23-29. They complain of “a host of conflicting analyses,” multiple dissenting opinions, and the need for two *en banc* opinions in cases concerning post-secondary school speech. Pet. 23. This argument, however, fatally undermines their contention that Dean Carter was not entitled to qualified immunity. *See, e.g.*, Pet. 20. Because they concede that the law is not “clearly established” today, they necessarily agree that the law was not clearly established in 2000. Thus, they perforce concede that the judgment against them was correct. Accordingly, this Court’s review is not warranted here. *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam*) (holding that “[t]his Court reviews judgments, not statements in opinions”) (internal quotation marks omitted).

That the law governing the applicability of *Hazelwood* to Dean Carter’s calls to *Innovator*’s publisher was not “clearly established” in 2000 cannot be gainsaid, as amply demonstrated by the disagreement among the twelve judges who have considered this case. In addition, the *Hazelwood* Court explicitly reserved the question of whether university officials are entitled to the same degree of deference accorded their high school counterparts when regulating a school-sponsored non-public forum. 484 U.S. at 273 n.7. As the Seventh Circuit observed, this Court does not reserve ruling on a question with a “clearly established” answer. Pet. App. 13a (citing *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999)). Similarly, if the applicability of *Hazelwood* here were “clearly established” when Dean Carter called the printer in October and November 2000, post-secondary school students and their relations to their

schools would have been more than “at least *arguably* distinguishable from their counterparts in college education” in May 2000. *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 238 n.4 (Souter, J., concurring) (emphasis added). Lastly, if the law were “clearly established” in 2000, petitioners could not argue that there is “confusion” and “uncertainty” about the law in the lower courts today. Pet. 23-29.

As an example of disagreement among judges about if and how *Hazelwood* applies to post-secondary schools, Petitioners (like the Seventh Circuit) point to *Kincaid*. Pet. 23-24. A careful reading of the Sixth Circuit’s panel and *en banc* decisions demonstrates that Dean Carter is entitled to qualified immunity, for both before and after her calls to the printer in 2000, those judges disagreed about whether the evidence showed that the yearbook there was a non-public forum and what standard was applicable when regulating it.

In *Kincaid*, a university official confiscated the yearbook based on objections to its color, theme, quality, and contents. 236 F.3d at 345. Prior to Dean Carter’s calls to the printer in 2000, the panel majority held that the yearbook was a non-public forum even though it was not a classroom product, which meant (under *Hazelwood*) that the university could reasonably regulate its contents. 191 F.3d at 726-29 & nn.2-3 (citing *Hazelwood*). One judge dissented from both the evidentiary ruling that the yearbook was a non-public forum and from the majority’s application of *Hazelwood*’s deferential standard to it, noting that no circuit court had yet decided the question the *Hazelwood* footnote had left unanswered. *Id.* at 730 & n.1 (Cole, J., concurring in part and dissenting in part). In 2001, *after* Dean Carter’s calls, the full court concluded that the yearbook was a limited public forum and that the confiscation failed both the strict scrutiny standard for content-based regulation and the reasonableness standard for time, place and manner restrictions. 236 F.3d at 347-56. Significantly, the

Kincaid court explicitly stated 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.” *Id.* at 348 n.6. Moreover, this opinion was not unanimous. Judge Boggs expressed his view that even in limited public forums, “some minimum standards of competence could be a reasonable ‘manner’ restriction.” *Id.* at 358 (Boggs, J., concurring in part and dissenting in part). Judge Norris, the author of the panel decision, continued to believe that the yearbook was a non-public forum, reiterating that in such forums, regulation “need not be the most reasonable or the only reasonable limitation.” *Id.* at 359 (Norris, J., dissenting) (internal quotation marks omitted).

As petitioners also note, two Ninth Circuit judges disagree about if and how the *Hazelwood* standard applies to curricular speech, in a decision that post-dates Dean Carter’s calls. Pet. 24-25 (citing *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002)). There, using three different rationales, two of which addressed *Hazelwood*, the court upheld the university’s right to disapprove the content of a student’s thesis. Judge Graber concluded that because the thesis was curricular speech, it was a non-public forum under *Hazelwood*, so educators could apply the deferential *Hazelwood* standard and disapprove it for failure to meet legitimate academic standards. *Id.* at 944-55. Judge Reinhardt, however, interpreted *Hazelwood* as holding that school-sponsorship, not curriculum status, was determinative on the public forum question, and he believed that which standard to apply to school-sponsored college speech was an open one. *Id.* at 956-67 (Reinhardt, J., concurring in part and dissenting in part). In his view, *Hazelwood*’s deferential standard was inapplicable to the thesis, and he suggested other possible standards, stressing that “different First Amendment standards [may be] applicable in different contexts to restrictions imposed at the university level depending on both the speaker and the nature of the particular forum” and the

importance of “distinguish[ing] student speech from university speech . . . and the speech of private individuals using the university’s facilities.” *Id.* at 960-64 (Reinhardt, J., concurring in part and dissenting in part). The third judge concluded that the speech was deceptive and thus not entitled to First Amendment protection. 308 F.3d at 955-56 (Ferguson, J., concurring in part).

Put simply, *Kincaid* and *Brown* (and the lower court’s rulings here) convincingly demonstrate that judges disagreed even after Dean Carter’s calls to the printer about if and how *Hazelwood* applies to post-secondary schools. In light of these disagreements, the *Hazelwood* Court’s reservation of the question, and the lack of a Seventh Circuit opinion on this point heretofore, Dean Carter is entitled to qualified immunity.

II. This Case Is a Poor Vehicle For Determining If and How *Hazelwood* Applies to Post-Secondary Schools.

However interesting and important may be the question of if and how *Hazelwood* applies to post-secondary schools, this case is not the right vehicle for resolving that question, on at least two grounds. One is that what petitioners want is this Court’s advice about the Seventh Circuit’s reasons for holding in their favor on the merits (*i.e.*, the first *Saucier* prong). Even if this Court were to “reverse” that reasoning, reversal would be without any effect on the court’s ultimate qualified immunity holding (*i.e.*, the second *Saucier* prong). The other reason this case is a poor vehicle for addressing *Hazelwood*’s applicability to non-public forums at colleges is that petitioners’ speculation about the dire consequences of the Seventh Circuit’s reasoning are premature at best. Nothing in the opinion indicates that courts will be more likely to hold that a college forum is non-public in nature (and thus subject to *Hazelwood*’s deferential standard) or that colleges will be more likely to impose more and greater restrictions on speech.

Here, when addressing the merits prong of Dean Carter’s qualified immunity defense, the Seventh Circuit *agreed* with petitioners that a reasonable jury could conclude that *Innovator* was a designated public forum and thus “beyond the control of the University’s administration.”² Pet. App. 10a. Not surprisingly, petitioners do not ask this Court to review that holding. They also do not seek this Court’s review of the Seventh Circuit’s *agreement* with their argument that if a school justifies editorial control in a non-public forum based on the audience’s maturity, age matters. Pet. App. 6a.

Instead, petitioners invite this Court to review just the Seventh Circuit’s reasons for agreeing with them on the merits and its dicta about *Hazelwood*’s applicability to other, non-public forums. In effect, petitioners want this Court to “reverse” the Seventh Circuit’s view that the *Hazelwood* standard of deference would have applied to *Innovator* if it had been a non-public forum. They also want this Court to “reverse” the court’s dicta that being part of the curriculum is

² To the extent that it implied that designated public forums cannot be regulated at all, the court misstated the law. Content-based regulation is permitted in a designated public forum to preserve the limited purposes of that forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). Moreover, even in public forums, content-based regulation is permitted when necessary if narrowly tailored to achieve a compelling government interest; in addition, certain time, place, and manner restrictions are permitted as well, so long as ample alternative channels of communication are left open. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). In a designated public forum, reasonable “manner” restrictions could include “minimum standards of competence.” *Kincaid*, 236 F.3d at 358 (Boggs, J., concurring in part and dissenting in part).

not a necessary condition for a non-public forum. This Court, however, does not sit to review such matters. *Bunting v. Mellen*, 514 U.S. 1019, ___, 124 S. Ct. 1750, 1754 (2004) (Scalia, J., dissenting from the denial of certiorari). Moreover, even if these matters were resolved in petitioners' favor, that ruling would make no difference to the judgment that Dean Carter was entitled to qualified immunity given that judges have continued to disagree about *Hazelwood's* applicability to colleges even after Dean Carter's calls to the printer in 2000. Thus, no matter how interesting the petition's legal questions may be, this case is not the right vehicle for resolving them. *Belda v. Marshall*, 416 F.3d 618, 620-21 (7th Cir. 2005) (federal courts do not issue advisory opinions, no matter how interesting the question).

The other ground petitioners (and their amici) raise for granting their petition is a parade of horrors, which is based on their speculation that the Seventh Circuit's dicta will have broad effects on other courts' rulings on expressive activity. Pet. 28-29. Not one of the rulings they cite, however, concerns a college newspaper. Instead, the opinions concern completely different types of restrictions (speech codes and speech zones) and completely different types of speech (extracurricular, obviously private speech). *Id.* Petitioners likewise speculate that the decision "will surely accelerate the promulgation of such regulations across the nation." Pet. 27-29 & nn.12-13. In fact, petitioners *won* on the merits, and that ruling on the merits has "clearly established" the law for certain designated public forums in the Seventh Circuit. Thus, the effect of the Seventh Circuit's opinion is more likely to be that college papers will be found *not* to be non-public forums and thus *not* subject to *Hazelwood's* deferential standard. Petitioners' rank speculation to the contrary is premature at best and illogical at worst. It is no reason for granting their petition.

III. The Seventh Circuit's Opinion Creates No Certworthy Conflict With Any Opinion by This Court or the Other Circuits.

Petitioners contend that the Seventh Circuit's analysis squarely conflicts with opinions from this Court and other circuit courts. Pet. 12-20. Not so. The Seventh Circuit's decision here is nothing more, and nothing less, than a straightforward application of forum analysis, and neither this Court nor any circuit court has directly rejected the use of forum analysis for college speech. Likewise, neither this Court nor any circuit has issued an opinion that would deny Dean Carter qualified immunity here. Indeed, there can be no such opinion – as petitioners themselves maintain, federal judges disagree about if and how *Hazelwood* applies to colleges.

A. The Seventh Circuit's Use of Forum Analysis Creates No Certworthy Conflict.

Under this Court's well-settled First Amendment jurisprudence, the first step when determining the degree of deference accorded to government restrictions on speech in any government-created forum is to determine the nature of that forum, even for adult speakers and audiences. *See, e.g., Perry*, 460 U.S. at 45-48 (applying forum analysis to intra-school mail system for adult staff); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1984) (same, to advertising on city-owned buses); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-06 (1985) (same, to charity drive aimed at federal employees); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-83 (1992) (same, to airport); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-82 (1998) (same, to debate on publicly-owned television station); *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205-07 & n.3 (2003) (same, to internet access in public libraries).

Significantly, this Court applied forum analysis even to extracurricular speech in post-secondary schools before and after *Hazelwood*. In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, this Court applied forum analysis to a university policy denying religious groups the use of school facilities generally available to registered student groups.³ Indeed, *Widmar* demonstrates that petitioners’ view of students’ First Amendment rights at colleges as completely unfettered is far too broad. There, this Court “recognized that such rights must be analyzed ‘in light of the *special characteristics of the school environment*.’” *Id.* at 267 n.5 (emphasis added) (quoting *Tinker*, 393 U.S. at 506). *Widmar* also negates petitioners’ assumption that a college paper is never a non-public forum, stressing that “a university differs in significant respects from public forums. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.” *Id.*; *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (holding that “[a]cademic freedom thrives . . . on autonomous decisionmaking by the academy itself” as well as the exchange of ideas) (emphasis added).

In fact, this Court applied forum analysis in one of petitioners’ primary authorities (*Rosenberger*, 515 U.S. 819) to a public university’s denial of an application for student activity

³ Of additional significance here is that the *Widmar* court “doubt[ed] students could draw any reasonable inference of University support from the mere fact of a campus meeting place” in light of the more than one hundred recognized student groups at the university. *Id.* at 274 n.14. By contrast, the full title of the paper here (*Innovator, The Newspaper of Governors State University*) makes eminently reasonable an inference of GSU support.

funds for a Christian student group's newspaper, based solely on paper's Christian viewpoint. Petitioners' contention that the Seventh Circuit's decision conflicts with *Rosenberger* (Pet. 13-14) is right, but for the wrong reason. As explained above, the Seventh Circuit's view that designated public forums are outside a college's control conflicts with *Rosenberger*. 515 U.S. at 829-30 (holding that content regulation may be permissible in limited public forum to preserve purposes of that forum). However, and more significant for present purposes, *Rosenberger* supports the Seventh Circuit's views on government-subsidized speech. *Id.* at 833-34 (stressing that when the government "subsidize[s] transmittal of a message it favors," it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee" because "when the State is the speaker, it may make content-based choices") (emphasis added). The same is true of *Southworth*. 529 U.S. at 228-35 (observing that university could impose mandatory activity fee program for funding extracurricular student speech, which it disclaimed, but if *extracurricular* speech were financed by tuition dollars and university were responsible for its content, "the case might be evaluated on the premise that the government itself is the speaker," because when a university speaks through its agents or employees, "the analysis likely would be altogether different") (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983)).

Like the *Widmar* and *Rosenberger* courts, circuit courts have applied forum analysis to post-secondary schools, to both curricular and extracurricular speech and to both faculty and student speech. *See, e.g., Kincaid*, 236 F.3d at 356 (holding that the district court had "simply misapplie[d] well-established public forum law"); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549 (11th Cir. 1997) (analyzing challenge to university's system of funding for student groups by concluding that funding system was limited public forum, so content could

be regulated to preserve fund's limited purposes (citing *Rosenberger*)); *Bishop v. Aronov*, 926 F.2d 1066, 1071-74 (11th Cir. 1991) (rejecting professor's challenge to restrictions on his assertions of religious beliefs and holding that "insofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284-89 (10th Cir. 2004) (concluding that classroom was non-public forum, so officials could regulate student's classroom speech "in any reasonable manner," citing *Hazelwood*, and holding that speech was "school-sponsored" because the "imprimatur concept covers speech that is so closely connected to the school that it appears the school is sponsoring the speech" and "[t]he 'pedagogical' concept merely means that the activity is 'related to learning'").

As these cases amply demonstrate, the Seventh Circuit's application of forum analysis to *Innovator* is fully consistent with opinions by this Court and other circuits.

B. The Seventh Circuit's Holding That Dean Carter Was Entitled to Qualified Immunity Creates No Certworthy Conflict.

As indicated in Part II above, petitioners do not contend that the Seventh Circuit's *agreement* with their view that *Innovator* was a designated public forum (and thus was not subject to GSU's regulation) creates a conflict for this Court's review. Likewise, as explained in Part I above, the disagreement among federal judges about *Hazelwood*'s applicability to post-secondary schools – which Part III of the petition concedes – necessarily means that the Seventh Circuit's holding that Dean Carter is entitled to qualified immunity can create no square conflict for this Court's review.

Petitioners nevertheless insist that the law was "consistently

clear” prior to *Hazelwood*, relying on pre-*Hazelwood* lower court cases, including district court cases. Pet. 20-22. Because *Hazelwood* explicitly reserved the question of how much deference should be accorded to college officials regulating non-public forums, the question plainly had no “clearly established” answer. Pet. App. 13a (citing *Wilson*, 526 U.S. at 614-18). Furthermore, logic dictates that a case decided before *Hazelwood* reserved this question simply cannot create any conflict about if and how the *Hazelwood* applies. As for petitioners’ per-*Hazelwood* district court authorities, district court decisions cannot “clearly establish” the law (*Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995)), so any conflict with a district court ruling is surely no reason for granting this petition.

Tellingly, petitioners point to no post-*Hazelwood* opinion by this Court or any circuit court that would necessarily require a finding that Dean Carter is not entitled to qualified immunity. As the Seventh Circuit explained, the First Circuit was mistaken when it relied solely on the *Hazelwood* footnote for its holding that this Court “holds” *Hazelwood*’s approach is inapplicable to non-public forums in post-secondary schools. Pet. App. 13a (citing *Student Gov’t Ass’n*, 868 F.2d at 480 n.6). *Kincaid* creates no square conflict – the Sixth Circuit explicitly stated that its *en banc* ruling about the yearbook “ha[d] no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper.” 236 F.3d at 348 n.6. As for *Brown* (308 F.3d 939), the three different rationales employed there (to curricular speech) cannot be construed as creating any conflict with the Seventh Circuit’s holdings here.

In sum, petitioners failed to demonstrate that the Seventh Circuit’s qualified immunity ruling conflicts with any opinion by this Court or any other circuit court.

C. The Seventh Circuit's Opinion Creates No Certworthy Conflict With *Healy* and Its Progeny.

Petitioners insist that the Seventh Circuit's opinion conflicts with *Healy v. James*, 408 U.S. 169 (1972), "and its progeny." Pet. 12-20. Other than cases petitioners string-cite concerning the age and maturity of college students or broad First Amendment principles, however, they identify just two cases as *Healy*'s "progeny": *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973), and *Rosenberger. Id.* As explained above, the only conflict with *Rosenberger* is the Seventh Circuit's implication that designated public forums cannot be regulated at all. Likewise, the Seventh Circuit's ruling creates no conflict with *Healy* or *Papish*, both of which pre-date the forum analysis cases cited above as well as *Hazelwood*.

In *Healy*, this Court held only that a state-supported college could not deny a student group (the Students for a Democratic Society) the opportunity to place meeting announcements in the college paper and the use of campus bulletin boards and facilities merely because the college president disagreed with the groups' philosophy and had an unsubstantiated fear of disruption. *Id.* at 187-90. Though petitioners tout *Healy*'s broad general propositions about First Amendment rights (Pet. 12), *Healy* also stressed that "where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" 408 U.S. at 180 (quoting *Tinker*, 393 U.S. at 507). Certainly, *Healy* does not conflict with the Seventh Circuit's holding that a reasonable jury could conclude that *Innovator* was a designated public forum. It also does not conflict with the court's ultimate holding that Dean Carter was entitled to qualified immunity due to disagreement about *Hazelwood*'s applicability to colleges and the "cloudy" record

in this case.

Papish too creates no conflict with the Seventh Circuit's holdings on either the merits or qualified immunity. There, a graduate student was expelled for distributing an off-campus "underground" newspaper, which state university officials previously had allowed to be sold on campus, because it deemed "indecent" the content of a particular issue (a political cartoon of policemen raping the Statue of Liberty and an article containing foul language). 410 U.S. at 670 (distinguishing content-based regulation from reasonable time, place, and manner restrictions on speech and its dissemination). As this Court explained in *Hazelwood*, an off-campus newspaper is merely allowed by a school, and thus is readily distinguishable from a newspaper that is school-sponsored. 484 U.S. at 271 n.3.

Lastly, citing *Healy*, *Papish*, and *Rosenberger*, petitioners posit three arguments for why Dean Carter is not entitled to qualified immunity. Even if Part III of the petition had not argued that confusion exists about the law governing college speech, which mean that this holding was correct, not one of these arguments requires much attention.

The first is petitioners' view that the *Hazelwood* standard must apply only to high schools because this Court has drawn distinction between colleges and high schools in those three cases. Pet. 15-17. As noted above, however, the *Hazelwood* court's explicit reservation of whether the deferential *Hazelwood* standard applies to colleges' non-public forums negates this argument. Next, petitioners argue that under *Healy*, *Papish*, and *Rosenberger*, extracurricular activities are not non-public forums, so all reasonable university officials in Dean Carter's position had to know that *Innovator* was not a non-public forum due to the paper's "undisputed status as a student activity operated apart from the education curriculum and the undisputed record in this case." Pet. 17-19 & n.7. As

the Seventh Circuit's examples demonstrated, however, an extracurricular activity may be a non-public forum. Pet. App. 8a-9a. More important is that, as noted above, *Innovator's* extracurricular status is *not* "undisputed" – according to petitioner Hosty herself, those who worked on the paper could seek class credit. Doc. 44 at Hosty dep. at 11-14. In their third argument, petitioners summarily assert that because the Seventh Circuit agreed that a reasonable jury could find *Innovator* was a designated public forum, "there is simply no principled basis" for finding that the law was not "clearly established." Pet. 20. As explained above, however, and as petitioners conceded in Part III of the petition, judges continue to disagree about the law even today, thereby demonstrating that Dean Carter was entitled to qualified immunity under the second prong of *Saucier. Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject [defendants] to money damages for picking the losing side of the controversy.").

In sum, there is no conflict with any ruling by this Court or any circuit that requires this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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