

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**

**REPLY BRIEF OF PETITIONERS
MARGARET L. HOSTY, JENI S. PORCHE,
AND STEVEN P. BARBA**

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REPLY BRIEF OF PETITIONERS

1. The Brief in Opposition (“Opposition” or “Opp.”) mischaracterizes the record below in several significant respects. First, the record does not support Respondent’s contention that, as Dean of Student Affairs and Services at Governors State University, she in fact possessed apparent authority to insist on prior review of the student-operated *Innovator* newspaper as a prerequisite to its continued publication. *See* Opp. at 6. Rather, as the University’s president testified, “in no sense” did any faculty member or administrator “have a right to approve” the newspaper’s content prior to publication. Dep. of S. Fagan, Aug. 9, 2001, at 58:11-14. *See also* Defendants’ Statement of Uncontested Facts, District Court Docket No. 36, ¶ 38 (conceding that University’s written policy specified “that the staff [of the student media] will determine content and format of their respective publications without censorship or advance approval”) (alteration in original). Second, there is no support in the record for Respondent’s suggestion that the *Innovator* may have been published as part of the educational curriculum because academic credit theoretically “*could* be requested as compensation for working on the paper.” Opp. at 1 (emphasis added). In fact, it is undisputed that Petitioners neither expected nor received any such credit and, in all respects, student participation on the *Innovator*’s staff was a voluntary, extracurricular activity unconnected to any particular course of study or classroom activity.¹ Third, the

¹ *See* Dep. of M. Hosty, Aug. 2, 2001, at 14:1-13. Such non-grade credit divorced from classroom instruction cannot reasonably be compared to the supervised production of a newspaper within the confines of an academic course of study in any event. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1988) (student newspaper part of

record does not support Respondent's assertion that she was justified in insisting on prior review of the newspaper's content because its full name – "*Innovator, The Newspaper of Governors State University*" – made "eminently reasonable an inference of" University affiliation. Opp. at 17 n.3. It is, however, undisputed that, at all relevant times, the newspaper's masthead explicitly declared that it "is edited and published by the students" and that the "views expressed in" it "may not reflect the views . . . of Governors State University, and should not be regarded as such." Dep. of J. Porche, Aug. 2, 2001, Exh. 3, at 3.²

curriculum where produced in journalism class "taught by a faculty member during regular class hours[.]" where "[s]tudents received grades and academic credit for their performance in the course" and where teacher "was the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content.") (citation omitted); *id.* at 271 (School-sponsored speech comprises "expressive 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.*") (emphasis added). The newspaper at issue in this case, in contrast, was not produced in connection with any course of instruction supervised by a member of the faculty and exhibited none of the other indicia of a curricular activity – *i.e.*, a designated course number, course description, schedule or registration code, much less a curriculum, syllabus, assignments, grading system, or testing method. In this context, Respondent's suggestion that the *Innovator's* editors received a stipend paid from student activity fees is of no legal relevance. *See* Opp. at 1. This Court has expressly held that a university that voluntarily creates a system for funding student expression via a student activity fee "may not silence the expression of selected viewpoints" with which it disagrees. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

² Respondent's reference to the investigation undertaken by the Illinois College Press Association ("ICPA") is particularly inapposite, *see* Opp. at 2 n.1, since the ICPA expressly determined that *she* had "acted inappropriately, and probably illegally, with blatant disregard for

2. More significantly, Respondent's efforts to recast the record evidence cannot be reconciled with the obligation of the federal courts, on *her* motion for summary judgment, to review that evidence "in the light most favorable to the party opposing" such a motion, *i.e.*, Petitioners. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982). *See also, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 216 (2001) ("[I]f [a qualified immunity claim] turns on which of two conflicting stories best captures what happened . . . , [this Court's precedents] will not permit summary judgment in favor of the defendant official. And that is as it should be.") (Ginsburg, J., concurring). In this case, "view[ing] all facts and draw[ing] all reasonable inferences in favor of" Petitioners, *Brosseau v. Haugen*, 125 S. Ct. 596, 597 n.2 (2004), the record on which summary judgment was entered establishes that Respondent imposed a viewpoint-based system of prior restraint on a student newspaper operated separate and apart from the University's curriculum by adult students and that she did so in direct response to the newspaper's criticism of her official conduct.³

students' First Amendment rights" when she instructed "the paper's out-of-town printer . . . not to print any more issues of the Innovator unless she or another administrator had reviewed and approved the content." Dep. of S. Fagan, Aug. 9, 2001, Exh. 6.

³ Indeed, that record conclusively establishes both that the University had previously and unambiguously ceded unfettered editorial control of the newspaper to its student editors, *see, e.g.*, Defendants' Statement of Uncontested Facts, District Court Docket No. 36, ¶ 38; Dep. of M. Hosty, Aug. 2, 2001, at 151:17-22 (by policy and practice, *Innovator* was "totally student-run"), and that Respondent deviated from that in direct response to published criticism of her official conduct and that of the University, *see* Dep. of J. Porche, Aug. 2, 2001, Exh. 3 (October 31, 2000 issue containing, *inter alia*, two lengthy articles, four letters to the editor, and three columns harshly critical of the University administration, including one column devoted to Respondent's performance, as well as a notice that future issues would contain similar criticism). Not

3. On this record, Respondent's primary submission – *i.e.*, although questions concerning if and how this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), applies in the college setting may be "interesting" and "important," Opp. at 13, this Court should nevertheless deny the Petition because she is entitled to qualified immunity in any event – must be rejected. Petitioners have sued Dean Carter because the conduct in which *she* engaged plainly violated "clearly established" constitutional law. Her argument to the contrary is premised on *her* contention that such misconduct may be excused because "the law governing the applicability of *Hazelwood* to Dean Carter's calls to *Innovator*'s publisher was not 'clearly established' in 2000." Opp. at 10. The issue before this Court, therefore, is precisely whether that contention – that *Hazelwood* rendered it reasonable for a public university administrator to believe that she could impose a system of viewpoint-based censorship on a student newspaper published as an extracurricular activity – can be squared with this Court's precedents construing the First Amendment's application to adult students enrolled in public universities.

surprisingly, therefore, Respondent concedes that, immediately following the publication of these articles, she "called the [newspaper's] printer and instructed him not to print any more issues of [the] *Innovator* without first calling her so that she or someone from the administration could read and approve it." Opp. at 2. This concession belies Respondent's inaccurate assertion that Petitioner Porche cited another University entity, the Student Communications Media Board (SCMB), as the "chief deterrent" to future publication of the *Innovator*. *Id.* at 3 (citation omitted). In fact, Petitioner Porche testified that it was Respondent's demand for prior approval that prevented the newspaper's subsequent publication. *E.g.*, Dep. of J. Porche, Aug. 2, 2001, at 33:1-4 ("Q: Why were you not able to publish ... the papers? A: Because [Dean Carter] called our printer and said not to publish it."). *See also id.* at 60:20-23 ("Q: The SCMB doesn't prevent you from putting the paper together? A: No. . . .").

4. Respondent is, therefore, incorrect when she asserts that Petitioners have asked this Court to “issue [an] advisory opinion[] or to review dicta,” or are merely seeking “advice about the Seventh Circuit’s observations concerning if and how *Hazelwood* might apply to a non-public forum.” Opp. at 8. Respondent affirmatively invoked *Hazelwood* in the lower courts as *the* reason why she is entitled to qualified immunity. Respondent contends in this Court that *Hazelwood* casts doubt on the ongoing validity of “petitioners’ pre-*Hazelwood* authorities.” Opp. at 4. And Respondent defends the Seventh Circuit’s holding that, even in the context of adjudicating *her* motion for summary judgment, “the implementation of *Hazelwood*” has caused such “legal and factual uncertainties” to “dog the litigation,” that she is entitled to immunity. App. 14a; *see also* Opp. at 7. In short, Petitioners seek review of the Seventh Circuit’s *ratio decidendi* – *i.e.*, its holding that *Hazelwood* has created sufficient uncertainty in the law that, on the record presented on Respondent’s motion for summary judgment, it was objectively reasonable for her to believe that she could censor further criticism of her official conduct by adult students writing in a student newspaper published as an extracurricular activity. *See* App. 7a, 14a-15a.

5. In addition, there is nothing in footnote 7 of this Court’s decision in *Hazelwood* that could have, as Respondent asserts, rendered such a belief reasonable. *See* Opp. at 10. Indeed, she expressly concedes that the only question this Court “reserved” in that footnote was whether “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.*” *Id.* at i (emphasis added). That question has no bearing on the conduct at issue here – namely, the imposition by a public official of a viewpoint-based system of prior restraint on an

extracurricular student newspaper in retaliation for the newspaper's criticism of her and her colleagues.⁴

6. Respondent further contends that the Petition is “internally, and fatally, inconsistent,” Opp. at 8, because it emphasizes that there is presently confusion in the lower courts concerning if and how *Hazelwood* applies to colleges and universities. Opp. at 10. To be sure, there is considerable confusion in the lower courts about *Hazelwood*'s reach and that uncertainty has been materially exacerbated by the Seventh Circuit's decision in this case. Nevertheless, Respondent was not granted immunity because she restricted the content of a newspaper produced in the context of a journalism class (*Hazelwood*), a student thesis produced as a prerequisite to earning a master's degree (*Brown v. Li*, 308 F.3d 939 (9th Cir 2002)), the curricular speech of a student in the classroom (*Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004)), or the speech of a college professor during class instruction (*Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991)). Nor did she receive immunity because – to invoke the example offered by the Seventh Circuit majority – she undertook to control the content of a college alumni

⁴ This Court has held, both before and after *Hazelwood*, that such conduct violates the First Amendment, see *Rosenberger*, 515 U.S. at 835 (“[h]aving offered to [facilitate the expression] of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that ... First Amendment protections should apply with less force on college campuses than in the community at large.”), including specifically in the context of an adult student's contributions to a college newspaper, see *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973) (“the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech”).

magazine bearing the school's imprimatur. App. 8a-9a.⁵ The fact that the lower courts are badly divided with respect to the deference owed by the judiciary to educators in such circumstances does not diminish the clarity with which the precedents of this Court and the courts of appeals have heretofore condemned the conduct at issue here. *See* App. 12a (citing *Saucier*, 533 U.S. at 202) (qualified immunity inquiry "must be undertaken in light of the specific context of the case"). Nor does it diminish the need for this Court's guidance now that the Seventh Circuit has added to that confusion by holding that a university administrator could reasonably conclude that she was entitled to *Hazelwood* deference when she set out to censor criticism of her official conduct contained in "an independent publication organized

⁵ It bears emphasis that, despite the confusion in the lower courts regarding the appropriate reach of *Hazelwood* in other such post-secondary school contexts, the Seventh Circuit's decision stands alone in concluding that *Hazelwood* dictates the appropriate standard for examining the constitutionality of restrictions on the extracurricular collegiate press. Indeed, Respondent expressly conceded as much during oral argument before the *en banc* court of appeals. *See* <http://www.ca7.uscourts.gov>. In this regard, Respondent's reliance on the panel majority's decision in *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd*, 236 F.3d 342 (6th Cir. 2001) (*en banc*), is misplaced. First, that decision had already been vacated by the Sixth Circuit prior to the Respondent's conduct at issue in this case and was shortly thereafter reversed as plainly "erroneous" in an opinion joined by all but one of that court's 13 judges. *Kincaid v. Gibson*, 236 F.3d 342, 352-53 (6th Cir. 2001). Second, that case did not involve a student-operated newspaper and the Sixth Circuit therefore took great pains to emphasize that its application of forum analysis to the yearbook in question "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, an issue the *en banc* court recognized was governed by an imposing body of precedent holding that such conduct violates the First Amendment, *see id.* (citing *inter alia*, *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973)).

and published by students on their own time,” not as “part of an academic program, but rather [as] an extracurricular activity.” App. 24a (Evans, J., dissenting).

7. On this record, moreover, Respondent’s newly framed contention – that she is entitled to qualified immunity because a reasonable college administrator could have concluded that the *Innovator* was a non-public forum, *see* Opp. at 16, 22-23 – cannot be credited. Simply put, there is no legitimate basis for the assertion that a college newspaper published outside the educational curriculum as an independent student activity is anything other than a public forum. Respondent conceded as much below, *see* App. 24a, a concession made necessary both by the record evidence and by this Court’s decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 835 (1995). In that case, as Respondent correctly notes, the Court explained that, when the government “subsidize[s] transmittal of a message it favors,” the First Amendment permits it to “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.’” Opp. at 18 (quoting *Rosenberger*, 515 U.S. at 833-34). *Rosenberger* does not, however, “support[] the Seventh Circuit’s views on government-subsidized speech,” Opp. at 18, where, as in this case, the speech at issue is plainly critical of the government itself and the speakers do not purport to do so in the name of that government. *See Rosenberger*, 515 U.S. at 835 (“[h]aving offered to [facilitate the expression] of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints”).

8. For that very reason, this case presents an ideal vehicle for the Court to address the First Amendment rights of the student press in the college and university setting. It

not only arises in the context of “criticism of official conduct,” speech that goes to the “central meaning of the First Amendment,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964), it involves “the most serious and the least tolerable infringement of First Amendment rights,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976), the imposition of a viewpoint-based system of prior restraint on a newspaper as a direct result of such criticism. The Seventh Circuit’s holding that Respondent is nevertheless entitled to immunity because her conduct did not violate any “clearly established” rights affords this Court a unique opportunity to counsel both the administrators of public institutions of higher education and the lower courts concerning the First Amendment freedoms afforded the adult students who attend them.

9. Such guidance is especially warranted because the Seventh Circuit’s decision has already placed those freedoms in substantial jeopardy. This is not, as Respondent claims, “speculation” that is “premature at best.” Opp. at 15. To cite just one example, within ten days of its issuance, the Presidents of all of the schools in the California State University System were advised by their General Counsel that the Seventh Circuit’s decision “appears to signal that [public college and university] campuses may have more latitude than previously believed to censor the content of subsidized student newspapers.”⁶ Petitioners respectfully submit that, especially under these circumstances, this Court should grant their Petition for a Writ of Certiorari.

⁶ Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), available at <http://www.splc.org/csu/memo.pdf>.

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