412 F.3d 731
United States Court of Appeals,
Seventh Circuit.

Margaret L. HOSTY, Jeni S. Porche, and Steven P. Barba, Plaintiffs–Appellees,
v.
Patricia CARTER, Defendant–Appellant,
and
Governors State University, et al., Defendants.

No. 01–4155.
|
Argued Jan. 7, 2003.
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Decided April 10, 2003.
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Reargued En Banc Jan. 8, 2004.
|
Decided June 20, 2005.

Synopsis
Background: Students who worked for state university's newspaper sued university officers and dean for prior restraint violations of First Amendment, equitable relief, and punitive damages relating to publication of school newspaper. The United States District Court for the Northern District of Illinois, Suzanne B. Conlon, J, 2001 WL 1465621, denied dean's motion for summary judgment, and dean filed interlocutory appeal. The Court of Appeals, 325 F.3d 945, affirmed, and dean filed petition for rehearing en banc.

Holdings: The Court of Appeals, Easterbrook, Circuit Judge, granted petition and held that:

Hazelwood's framework for free speech analysis applied to subsidized student newspapers at colleges [redacted]

Reversed.

[redacted]

Opinion

EASTERBROOK, Circuit Judge.

Controversy began to swirl when Jeni Porche became editor in chief of the *Innovator*, the student newspaper at Governors State University. None of the articles concerned the apostrophe missing from the University's name. Instead the students tackled meatier fare, such as its decision not to renew the teaching contract of Geoffrey de Laforcade, the paper's faculty adviser.

I

After articles bearing Margaret Hosty's by-line attacked the integrity of Roger K. ***733** Oden, Dean of the College of Arts and Sciences, the University's administration began to take intense interest in the paper. (Here, and in Part II of this opinion as well, we relate matters in the light most favorable to the plaintiffs.) Both Oden and Stuart Fagan (the University's President) issued statements accusing the *Innovator* of irresponsible and defamatory journalism. When the *Innovator* declined to accept the administration's view of its duties—in particular, the paper refused to retract factual statements that the administration deemed false, or even to print the administration's responses—Patricia Carter, Dean of Student Affairs and Services, called the *Innovator's* printer and told it not to print any issues that she had not reviewed and approved in advance. The printer was not willing to take the risk that it would not be paid (the paper

relies on student activity funds), and the editorial staff was unwilling to submit to prior review. Publication ceased in November 2000. The paper has since resumed publication under new management; Porche, Hosty, and Steven Barba, another of the paper's reporters, have continued the debate in court, suing the University, all of its trustees, most of its administrators, and several of its staff members for damages under 42 U.S.C. § 1983.

Defendants moved for summary judgment, and the district court granted the motion with respect to all except Dean Carter. 2001 WL 1465621, 2001 U.S. Dist. LEXIS 18873 (N.D.Ill. Nov. 13, 2001); see also 174 F.Supp.2d 782 (N.D.Ill.2001). Some defendants prevailed because, in the district judge's view, they had not done anything wrong (or, indeed, anything at all, and § 1983 does not create vicarious liability); others received qualified immunity. As for Carter, however, the judge thought that the evidence could support a conclusion that threatening to withdraw the *Innovator's* financial support violated the first amendment to the Constitution (applied to the University, as a unit of state government in Illinois, through the fourteenth). Although *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), holds that faculty may supervise and determine the content of a student newspaper, the district court thought that decision limited to papers published by high school students as part of course work and inapplicable to student newspapers edited by college students as extracurricular activities—and the judge added that these distinctions are so clearly established that no reasonable person in Carter's position could have thought herself entitled to pull the plug on the *Innovator*. Carter took an interlocutory appeal to pursue her claim of qualified immunity. See *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). A panel of this court affirmed, 325 F.3d 945 (2003), and we granted Carter's petition for rehearing en banc.

When entertaining an interlocutory appeal by a public official who seeks the shelter of qualified immunity, the threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). See also, e.g., *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 598, 160 L.Ed.2d 583 (2004); *Newsome v. McCabe*, 319 F.3d 301, 303–04 (7th Cir.2003). Only if the answer is affirmative does the court inquire whether the official enjoys qualified immunity. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. We address the issues in the order *Saucier* specifies: the existence of a ***734** constitutional claim in Part II and immunity in Part III.

II

A

Hazelwood provides our starting point. A high school's principal blocked the student newspaper (which was financed by public funds as part of a journalism class) from publishing articles that the principal thought inappropriate for some of the school's younger students and a potential invasion of others' privacy. When evaluating the students' argument that the principal had violated their right to freedom of speech, the Court first asked whether the paper was a public forum. 484 U.S. at 267–70, 108 S.Ct. 562. After giving a negative answer based on the school's established policy of supervising the writing and reviewing the content of each issue, the Court observed that the school's subvention of the paper's costs distinguished the situation from one in which students were speaking independently, as in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). When a school regulates speech for which it also pays, the Court held, the appropriate question is whether the "actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273, 108 S.Ct. 562. "Legitimate" concerns, the Court stated, include setting "high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and [the school] may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." *Id.* at 271–72, 108 S.Ct. 562. Shortly after this passage the Court dropped a footnote: "A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. We need not now decide whether the same

degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 273–74 n. 7, 108 S.Ct. 562 (citations omitted).

Picking up on this footnote, plaintiffs argue, and the district court held, that *Hazelwood* is inapplicable to university newspapers and that post-secondary educators therefore cannot ever insist that student newspapers be submitted for review and approval. Yet this footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference. Whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age. Only when courts need assess the reasonableness of the asserted pedagogical justification in nonpublic-forum situations does age come into play, and in a way suggested by the passage we have quoted from *Hazelwood's* text. To the extent that the justification for editorial control depends on the audience's maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.) To the extent that ***735** the justification depends on other matters—not only the desire to ensure "high standards for the student speech that is disseminated under [the school's] auspices" (the Court particularly mentioned "speech that is ... ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences", 484 U.S. at 271, 108 S.Ct. 562) but also the goal of dissociating the school from "any position other than neutrality on matters of political controversy", *id.* at 272, 108 S.Ct. 562—there is no sharp difference between high school and college papers.

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B

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C

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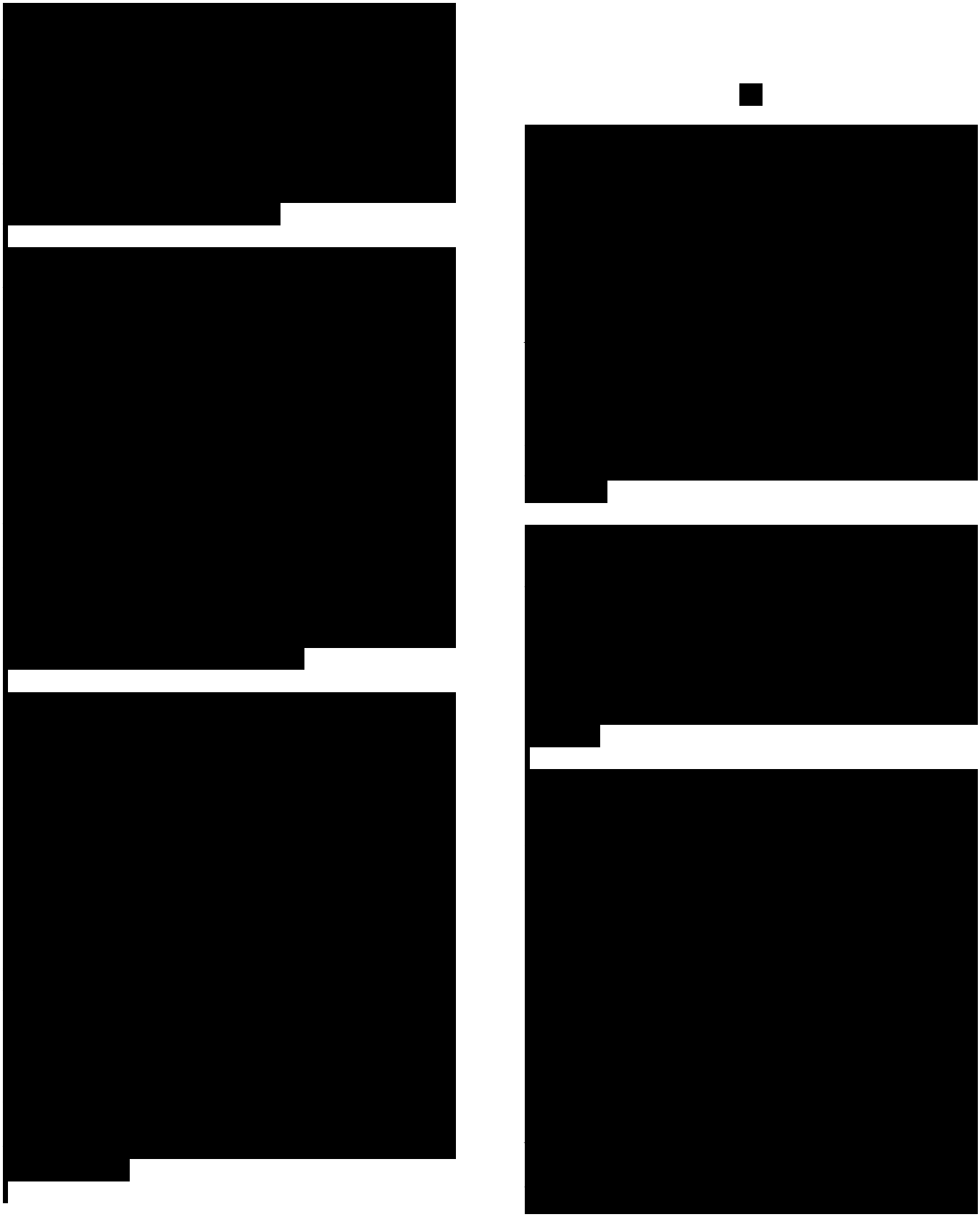

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REVERSED.

Footnotes

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1 According to the U.S. Census Bureau, only about one percent of those enrolled in American colleges and universities in 2002 were under the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey (CPS) Rep., Table A–6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002."

2 Other decisions of the Court outside the free speech arena likewise emphasize that greater restrictions are permitted on the rights of juveniles because they are less mature. For example, in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the Court noted that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592, 112 S.Ct. 2649.

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