

852 F.3d 973  
United States Court of Appeals,  
Tenth Circuit.

Monica POMPEO, Plaintiff–Appellant,  
v.  
BOARD OF REGENTS OF THE UNIVERSITY OF  
NEW MEXICO; Caroline Hinkley; Susan Dever, in  
their individual capacities, Defendants–Appellees.

No. 15-2179  
|  
March 28, 2017

### Synopsis

**Background:** Student brought state action against public university professor, department chair, and university board of regents, asserting § 1983 claim for violation of First Amendment, and seeking declaratory judgment and damages. Following removal, the United States District Court for the District of New Mexico, No. 1:13-CV-00833-MCA-CG, M. Christina Armijo, Chief Judge, 58 F.Supp.3d 1187, denied defendants’ motion to dismiss, and subsequently, granted defendants’ motion for summary judgment. Student appealed.

**Holdings:** The Court of Appeals, Lucero, Circuit Judge, held that:

professor was entitled to qualified immunity, and

department chair was entitled to qualified immunity.

Affirmed.

[REDACTED]

[REDACTED]

### Opinion

LUCERO, Circuit Judge.

This appeal requires us to enter the intersection of deference to educators in the academic setting and the exercise of freedom of speech under the First Amendment. Because educators should strive to establish relationships of mutual trust and respect with their students, encouraging them to “remain free to inquire, to study and to evaluate, to gain new maturity and understanding,” Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (plurality opinion), we abhor actions that “cast a pall of orthodoxy over the classroom,” Keyishian v. Bd. of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Nevertheless, our jurisprudence has long recognized that the “freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). Federal courts “do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.” Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

Monica Pompeo, a student in a graduate-level course at the University of New Mexico (“UNM”), asks us to intercede in precisely such a dispute. She claims that UNM officials retaliated against her in violation of her free speech rights because they disagreed with viewpoints she expressed in an assigned class paper. We held in Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004), that courts may not override an educator’s decision in the school-sponsored speech context “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment” and instead used “the proffered goal or methodology [as] a sham pretext for an impermissible ulterior motive.” Id. at 1293 (quotation omitted). In that case, we held that a compelled speech requirement may have been imposed as “a pretext for religious discrimination.” Id. We are asked by Pompeo

to draw an analogy between the religious discrimination at issue in Axson-Flynn and the viewpoint discrimination she brings to us. Yet our court has specifically held that precedent “allows educators to make viewpoint-based decisions about school-sponsored speech” and may restrict speech they believe contains “inflammatory and divisive statements.” Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 926, 934 (10th Cir. 2002). Exercising jurisdiction under 28 U.S.C. § 1291, for the reasons we elaborate herein, we affirm.

### \*978 I

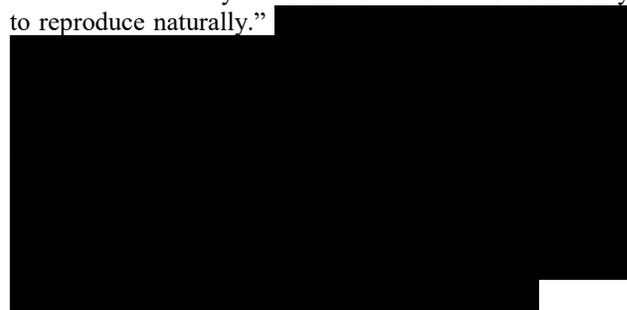
In the Spring 2012 term, Pompeo enrolled in an upper-division course at UNM taught by Professor Caroline Hinkley titled “Images of (Wo)men: From Icons to Iconoclasts.” The course syllabus states that the class would cover a wide range of themes and that, because students will view sexually explicit material, the course is restricted. Students are advised that there is “controversy built right into the syllabus” and they should expect “perhaps even incendiary class discussions.” However, the syllabus further states that students will be expected to act “with respect and care for everybody’s marvelously complex subjectivities,” and that students who remain in the course agree “to participate with such respect.”

As part of the course, students were required to complete response papers discussing the assigned material. The syllabus explains that “[w]ell-developed responses usually 1) refer to the reading, point to several passages, identify a page number; 2) offer a context or summary of what the author is saying; and then 3) pose a question.” Hinkley’s pedagogical goals for the course were to teach students how “to write a critical and analytic paper,” “think critically,” and “discern a critical argument from opinions and polemics.” Hinkley emphasized to her students that she would “ask them to re-write their papers if they did not satisfy the requirements.”

During her enrollment in the course, Pompeo submitted four response papers. She received an A- on her first paper and an A for her second and fourth papers. None of these papers included citations from the required readings. Hinkley stated that she was “very lenient on many of the requirements” in grading papers early in the semester in an effort to encourage students, but would “become more emphatic about citations and [ ] critical authority” as the term progressed.

Pompeo’s third response paper, submitted on February 21, 2012, discussed the 1985 film Desert Hearts, which

depicts a lesbian romance. In the paper, Pompeo states: “For those uninterested in lesbian romance, the film is likely intolerable to watch in its entirety because there is virtually no other theme in the film; providing no reason for anyone other than lesbians who are unable to discern bad film from good film to endure Desert Hearts.” In response to an assigned article describing the women in the film as “gorgeous,” Pompeo writes that “their general appearance conjures the cliché, ‘you can put lipstick on a pig, but it’s still a pig.’ ” She describes one of the characters as “still sexually vibrant, in spite of her perverse attraction to the same sex” and states that “lesbianism is a very death-like state as far as its inability to reproduce naturally.”



On March 6, 2012, Hinkley asked Pompeo to meet with her to discuss the paper. Prior to their meeting, Hinkley returned the paper to Pompeo without a grade, but with several handwritten comments. For example, Hinkley wrote: “Oops, Monica—I can assure you that lesbians can discern a good film from a bad one just as any informed straight viewer,” and “Why is attraction to the same sex perverse? This \*979 is a strong statement that needs critical backup. Otherwise it’s just inflammatory.” With respect to Pompeo’s discussion of two female characters’ “fatal attraction to one another,” Hinkley explained that one of the characters was straight. Hinkley also corrected several minor grammatical errors.

Pompeo met with Hinkley on March 20, 2012. Hinkley scheduled the meeting to discuss the ways in which she believed portions of the paper fell short of the standards applicable to critical analysis, specifically, Pompeo’s “unsupported generalizations about lesbians.” She explained that “inflammatory” or “polemical” statements in particular must be “backed up with critical, authoritative citations and sources.” Hinkley felt that the paper merely stated opinions rather than critically stating and developing an argument, and that Pompeo was “critiquing lesbians,” not the film. Rather than grade the paper poorly, Hinkley gave Pompeo an opportunity to rewrite it. After Pompeo stated that Desert Hearts was unendurable, Hinkley responded that the class would view other similar films that Pompeo would likely find unendurable as well. Toward the end of their meeting, Hinkley became “alarmed” when Pompeo veered away

from the subject at hand and shared details of her personal sexual history and preferences. She described the meeting as ending in a standstill. Hinkley was not sure whether Pompeo wanted to rewrite the paper.

Pompeo states that Hinkley was emotional during the meeting, accused Pompeo of using “hate speech,” and said “that it was in [Pompeo’s] best interest not to return to her class.” However, Pompeo also avers that Hinkley suggested she write a paper on another film and indicated that she would probably receive a good grade. Pompeo characterized her “status” in the class following the meeting as “unresolved.”

It is undisputed that Pompeo attended the next class, which occurred just after the meeting. Hinkley states that Pompeo was particularly disruptive in that class but had been disruptive throughout the semester. She states that Pompeo was generally domineering during classroom discussions, spoke out of turn, and interrupted other students. In the class after their meeting, Pompeo strayed from the course materials, engaging in a lengthy rant about Elizabeth Edwards and discussing Tony Curtis’ sexuality. Concerned with the “disruptive situation,” Hinkley asked Cinematic Arts Department Chair Susan Dever to visit the class, which she did. Pompeo asserts that she was made uncomfortable by Dever’s presence and felt like she was being monitored because of the statements made in her paper.

The day after the March 20 meeting, Pompeo tried unsuccessfully to meet with Hinkley again. On March 22, Pompeo met with UNM Provost Jane Slaughter. The same day, Associate Dean Holly Barnet-Sanchez directed Pompeo to address her concerns to Dever. Pompeo met with Dever and Assistant Professor James Stone on March 23. At that meeting, Dever and Stone told Pompeo that her use of the words “barren” and “cock” were not appropriate. Dever also conveyed to Pompeo that she had offended Hinkley. According to Dever, during this meeting Pompeo decided to complete the course as an independent study with Dever and was enthusiastic about her decision. But Pompeo states that through this series of meetings “it was clear that I was banned from the Images class because of the perceived views and the language used in my paper.” According to Pompeo, she wished to remain in the class, but “understood that [she] would ... not be allowed back in the \*980 Images classroom” and had no choice but to complete the independent study.

In an email from Dever to Pompeo dated March 26, Dever wrote that she looked forward to completing an independent study program with Pompeo in lieu of the Images class. She stated: “As we agreed, given our thorough review of the ungraded paper, we’ll chalk that

up to a learning experience that will not feature in your final portfolio.” Dever offered several pieces of writing advice, including that “[p]ositing a thesis, rather than stating an opinion” would strengthen Pompeo’s work. She also thanked Pompeo for her “willingness to enter into these and other conversations with great openness on Friday.” Finally, Dever stated in closing that Pompeo had the right to speak with Barnet-Sanchez if she wished to do so.

On March 29, Pompeo responded by email that she would like to meet again and may want to speak with Barnet-Sanchez. She wrote that she felt like she had “done something wrong” and had “been quietly removed from the classroom.” Dever responded that she would be happy to talk and that Pompeo could visit with Barnet-Sanchez if she preferred. Pompeo wrote back indicating that she would like to talk with Dever by phone and had decided what she wanted to do. Apparently after a phone conversation, Pompeo wrote to Dever, “You’re too good at what you do. Thank you some more!” The two scheduled another independent study meeting for April 5.

On April 6, Dever wrote to Pompeo to recap their meeting. As reflected in the email, Dever agreed during the meeting that Pompeo would revise and resubmit her Desert Hearts paper, rather than write on another topic. Dever believed that, in doing so, Pompeo had “chosen the hardest road,” but stated she would support Pompeo either way. She asked Pompeo to submit a new draft by April 10 and advised her to keep in mind that she was writing for an academic audience. She suggested that Pompeo reconsider some word choices, including “perverse,” which “is opinion and just muddies another point the essay seems to be making,” and “barren,” which “has been used historically to punish and degrade women.”

Pompeo responded that she would “probably use the word ‘BARREN’ ” and does not “like to be told what words [she] may and may not use, ever.” Dever replied that Pompeo could use whatever words she chose, “but after so much conversation about the word [barren], we know that ... choices have consequences.” As to Pompeo’s statement that she did not like being told what words to use, Dever explained that she was “in the business of trying to help students learn to write unassailable essays ... that speak to a general, academic audience with respect.”

Pompeo met with Barnet-Sanchez on April 9. Barnet-Sanchez told Pompeo that Hinkley and Dever thought she had been disruptive and disrespectful in class. Pompeo denied that was true. She states that was the first time she was made aware of such a problem.

Barnet-Sanchez proposed mediation, but that apparently did not occur.

Despite receiving several extensions, Pompeo never submitted a revised draft of her paper. Dever states that Pompeo eventually abandoned the independent study by failing to submit any essays or otherwise participate. Pompeo avers that she did not abandon the independent study. However, she also states that she “felt like [she] had no choice but to abandon the paper” after meeting with Dever on March 23. Pompeo further indicates that she was unwilling to omit specific words from her paper, and that she understood the “consequences” Dever threatened to be a poor grade or \*981 other academic or non-academic penalties. Pompeo admits that she ultimately withdrew from the course in part because she was unwilling to revise her paper. She also identifies the lack of a grade for her paper and dishonesty from Hinkley and Dever as reasons for her decision to withdraw.

Pompeo later filed a grievance with UNM. The school agreed to refund her tuition for the course. Pompeo then filed suit in state court against Hinkley, Dever, and the UNM Board of Regents.

## II

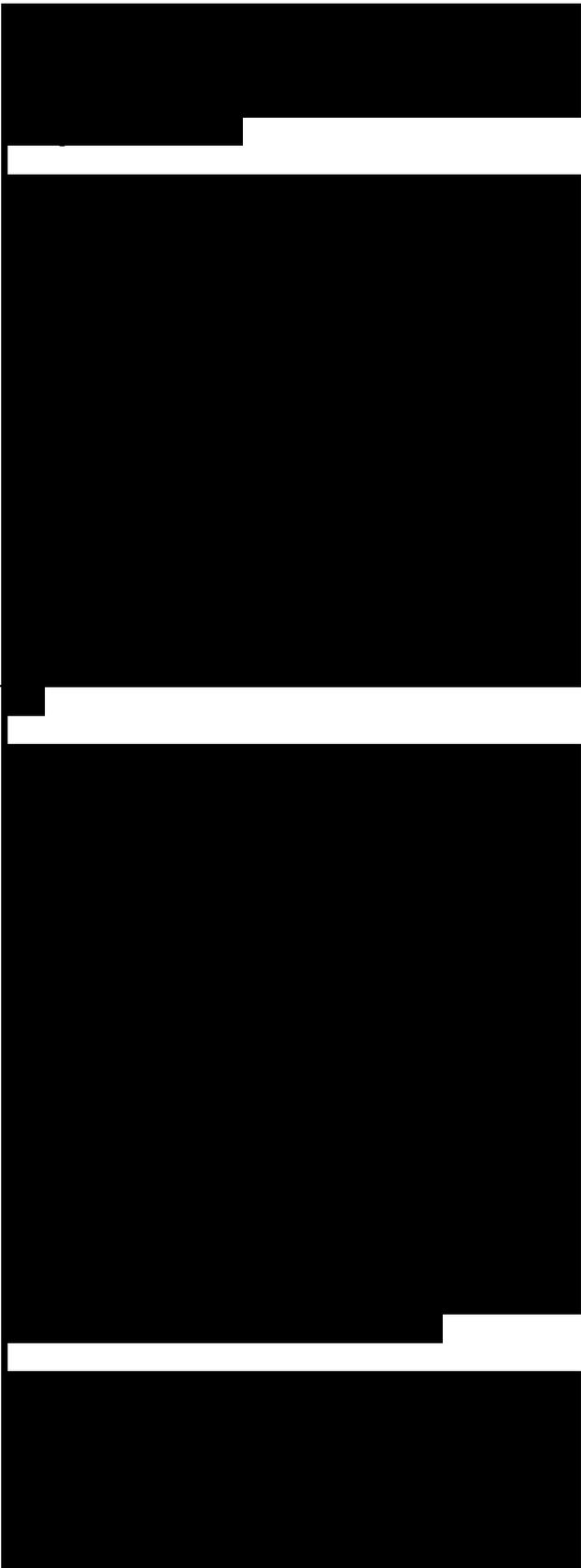
We review the grant of summary judgment de novo. Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1179 (10th Cir. 2009). A party is entitled to summary judgment only if, viewing the evidence in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law. Id.

## A

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**B**

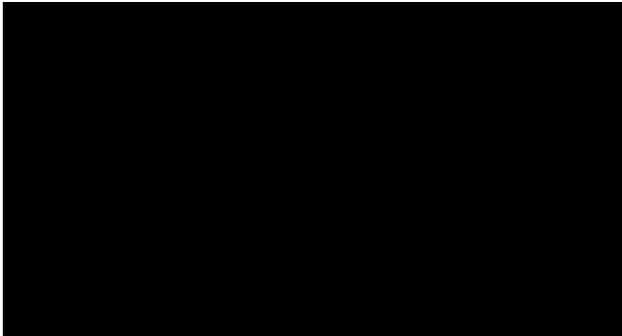
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**C**

Pompeo also contends that defendants’ actions were not reasonably related to legitimate pedagogical concerns. Her argument appears to be that because there is evidence that Hinkley and Dever were personally offended by Pompeo’s position, the court necessarily cannot conclude that any proffered pedagogical motive for their actions is legitimate. This position requires us to consider whether the pedagogical concern inquiry is objective or subjective. As we explain, *infra*, our case law is unclear as to the correct approach. However, we need not decide the issue because Hinkley and Dever are entitled to qualified immunity under either standard.

**I**



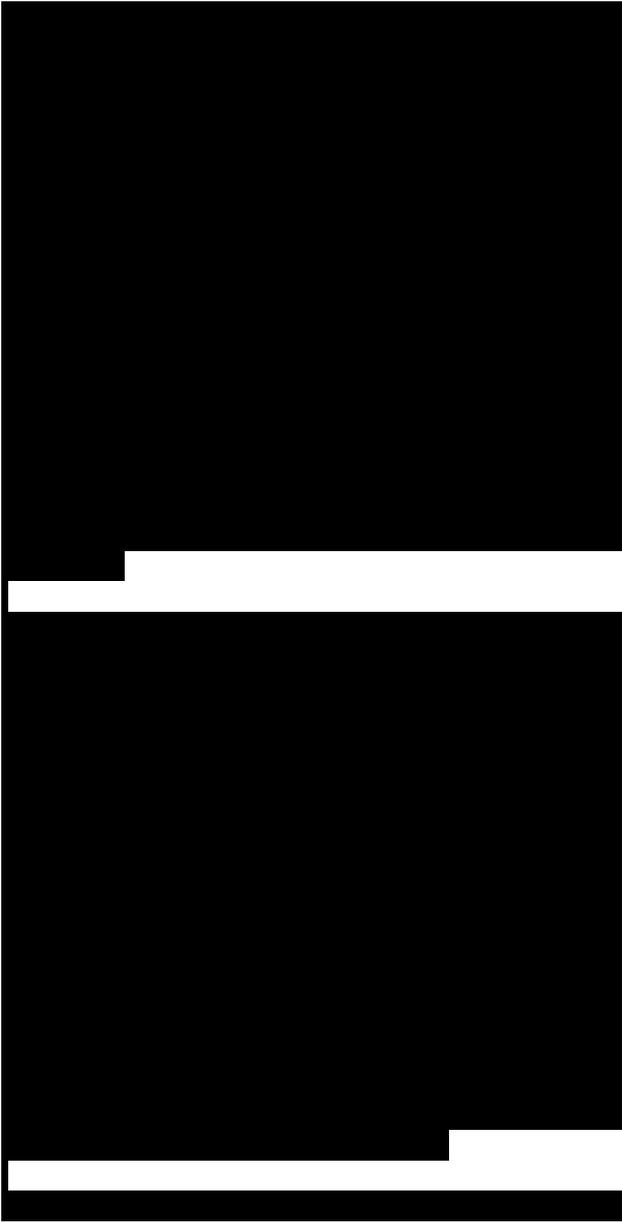
“is by no means confined to the academic for it includes discipline, courtesy, and respect for authority.” Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219, 1228 (10th Cir. 2009) (quotations omitted). Several courts “have established that the pedagogical test may be satisfied simply by the school district’s desire to avoid controversy within a school environment.” Id. at 1228-29 (quotation omitted); see also id. at 1232 (quoting \*988 out-of-circuit authority for the proposition that “[i]t is well within the parameters of school officials’ authority ... to teach civility and sensitivity in the expression of opinions” (alterations in original)). And in Fleming, we held that a school may restrict school-sponsored speech “with inflammatory and divisive statements.” 298 F.3d at 934. Similarly, the Supreme Court has held that “schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.” Fraser, 478 U.S. at 683, 106 S.Ct. 3159.

In considering defendants’ entitlement to qualified immunity, we must look to their individual actions. See Pahls, 718 F.3d at 1233. Pompeo’s complaints about Hinkley focus on their March 20, 2012, meeting. During that meeting, Hinkley chastised Pompeo for using inflammatory language, suggesting it could be considered hate speech, and asked Pompeo to rewrite her paper. Hinkley stated that it was in Pompeo’s best interest not to return to class. But Pompeo does not claim to have been expelled from the class by Hinkley. Instead, she describes her status in the class as “unresolved.” It is undisputed that Pompeo attended class after the meeting and that Hinkley lacked the power to expel a student from class.<sup>5</sup> After the meeting, Hinkley asked her superior, Dever, to attend class because she was concerned about Pompeo being disruptive and was unclear about how Pompeo wished to proceed with her Desert Hearts paper. Although Pompeo repeatedly refers to Hinkley’s “refusal” to grade the paper, Pompeo does not claim that she actually requested a grade from Hinkley following their March 20 meeting. Hinkley states that she would have graded the paper if Pompeo requested.

From an objective standpoint, Hinkley’s actions are related to legitimate pedagogical goals. Criticizing a student’s paper, even in harsh terms, and asking her to rewrite it relate to the pedagogical goals of encouraging critical analysis, avoiding unsupported generalizations, and maintaining focus on assigned material rather than a student’s general opinions. And requesting a superior attend class to assist with a potentially disruptive student cannot be deemed unreasonable.<sup>6</sup> See \*989 Axson-Flynn, 356 F.3d at 1290 (holding that teachers may restrict speech to “penalize a student for disruptive classroom

“[T]he ‘pedagogical’ concept set forth in Hazelwood merely means that the activity is related to learning” and

behavior”).



Dever’s challenged actions are reasonably related to the legitimate pedagogical goal of deterring students from using words in a class assignment that the teacher subjectively finds inappropriate. See Axson-Flynn, 356 F.3d at 1292 (“The school’s methodology may not be necessary to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be ‘reasonably related’ to pedagogical concerns.” (emphasis omitted)). Our case law does not suggest that federal courts are in the business of determining whether a term is actually inappropriate for an academic audience, to the extent appropriateness can be objectively defined. Short of turning every classroom into a courtroom, we must “entrust[ ] to \*990 educators these decisions that require judgments based on viewpoint.” See Fleming, 298 F.3d at 928.

### III

In assessing defendants’ claims of qualified immunity, we are mindful of the Supreme Court’s admonition to “define the clearly established right at issue on the basis of the specific context of the case.” Tolan, 134 S.Ct. at 1866 (quotations omitted). Pompeo claims a right to use language in a course assignment that her professors found to be inflammatory without being criticized or pressured to make revisions. Because we conclude that such a right is not clearly established, the district court’s grant of summary judgment in favor of defendants is **AFFIRMED**.

#### All Citations

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