NO. 19-2157

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HANNAH ROBERTSON, Individually and on Behalf of her Minor Child, R.R.S.,

Plaintiffs – Appellants,

v.

ANDERSON MILL ELEMENTARY SCHOOL; SPARTANBURG COUNTY SCHOOL DISTRICT #6; ELIZABETH FOSTER, Individually and in her Official Capacity as Principal,

Defendants – Appellees,

BRIEF OF DEFENDANTS-APPELLEES

HALLIGAN MAHONEY WILLIAMS
SMITH FAWLEY & REAGLE, P.A.

Jasmine Rogers Drain, Fed. I.D. No. 10169
jdrain@hmwlegal.com

Thomas K. Barlow, Fed. I.D. No. 7483
tbarlow@hmwlegal.com

1301 Gervais Street, Suite 1400
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Defendants - Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, Defendant-Appellee Spartanburg County School District #6 makes the following disclosure statement:

1. Is party or amicus a publicly-held corporation or other publicly held entity? No.

2. Does party/amicus have any parent corporations? No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly-held corporation or other publicly-held entity? No.

4. Is there any other publicly-held corporation or other publicly-held entity that has a direct financial interest in the outcome of the litigation? No.

5. Is party a trade association? No.

6. Does this case arise out of a bankruptcy proceeding? No.

s/ Thomas K. Barlow

Attorney for Defendants – Appellees

January 28, 2020

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I. STATEMENT OF ISSUES ON APPEAL

A. Did the District Court properly hold that Defendant-Appellee Foster was entitled to qualified immunity on Plaintiffs-Appellants' 42 U.S.C. § 1983 claim on the grounds that Plaintiffs-Appellants could not state a First Amendment claim as a matter of law?

B. Did the District Court properly hold that Defendant-Appellee Foster was entitled to qualified immunity on Plaintiffs-Appellants' 42 U.S.C. § 1983 claim on the alternative ground that the law was not clearly settled even if Plaintiffs-Appellants could state a claim for violation of the First Amendment?

C. Did the District Court properly dismiss Plaintiffs-Appellants' 42 U.S.C. § 1983 claims against Defendant-Appellee Spartanburg County School District 6 *sua sponte* on the grounds that its ruling on claims against Foster was equally applicable to claims against Spartanburg 6?

II. STATEMENT OF THE CASE

During the 2019-2020 school year, R.R.S., the daughter of Hannah Robertson,[1] was ten years old and in the fourth grade at Anderson Mill Elementary School in Spartanburg County School District 6 ("Spartanburg 6"). (J.A. 16.) Several weeks prior to the filing of the complaint, R.R.S.'s teacher gave her class

an assignment to write a short essay on any topic addressed "to society." (*Id.*) Copies of the essays of all the students were to be compiled and sent home with the students. (J.A. 17.) Because R.R.S.'s maternal grandfather is a homosexual, "R.R.S. decided that she wanted her paper to help society learn to treat members of the LGBTQ community equally." (J.A. 16.) About a week prior to the filing of this lawsuit, and after two written drafts, R.R.S. submitted the following essay, quoted verbatim:

> To society,
>
> I don't know if you know this but peoples view on Tran's genders is an issue. People think that men should not drees like a women, and saying mean things. They think that they are choosing the wrong thing in life. In the world people can choose who they want to be not being told that THEIR diction is wrong. I hope people understand that people can hurt themselves from others hurting their feelings. People need to think before they speak because one word can hurt someone's feelings. We need to fix this because this is getting out of hand!

(J.A. 16-17)

After Elizabeth Foster, the school principal, reviewed all of the students' essays, she directed R.R.S.'s teacher to tell R.R.S. that the school would not include her essay because it was not on an appropriate topic for fourth graders.

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[1] Plaintiffs-Appellants R.R.S. and Hannah Robertson are collectively referred to as "the Robertsons."

(J.A. 17.) R.R.S. revised the essay, and she thereafter submitted the following essay about bullying, quoted verbatim:

> To society,
>
> I don't know if you know this but peoples view on bullying is an issue. People think that saying mean things is ok and saying mean things. They think that they are choosing the wrong thing in life. In the world people can choose who they want to be not being told that THEIR diction is wrong. I hope people understand that people can hurt themselves from others hurting their feelings. People need to think before they speak because one word can hurt someone's feelings. We need to fix this because this is getting out of hand!

(J.A. 17-18). In the Amended Complaint, the Robertsons allege that:

> [t]hrough a series of increasingly abusive, harassing, emotionally distressful and/or clearly unwarranted communications with Plaintiff Hannah Robertson, [Foster] religiously defended her decision by consistently raising her voice and making loud statements, including but not limited to the following: that the original paper would "make other parents upset," "would create a undesirable situation at the school," was "not acceptable" and that it was "not age-appropriate to discuss transgenders, lesbians and drag queens outside of the home." [Foster] further proclaimed that "due to the type of school this is, the people that work here and the students and families of the students that go here, the topic would be disagreeable."

(J.A. 18). After the Robertsons protested, in a letter dated March 15, 2019, Foster indicated that both of R.R.S.'s papers would be included in the compilation.

(J.A. 19.) Ultimately, Foster made arrangements for both essays written by R.R.S.

to be published. (J.A. 103-104.) However "R.R.S.'s essays were removed at the request of Plaintiff[s]." (*Id.*)

III. SUMMARY OF THE ARGUMENTS

The District Court properly held that Defendant-Appellee Foster was entitled to qualified immunity as a matter of law because her alleged control of R.R.S. classroom essay, which bore the imprimatur of the school, was supported by legitimate pedagogical concerns, consistent with *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). *Hazelwood* does not require viewpoint neutrality, and even if it did, Foster's legitimate, pedagogical rationale for restricting R.R.S.'s speech was viewpoint neutral. In the alternative, the District Court properly held that Foster was entitled to qualified immunity because the law regarding permissible restrictions on student speech in classroom assignments is not clearly settled in this Circuit. Finally, because Plaintiffs-Appellants' claims against Foster failed as a matter of law and because they did not allege facts to support a claim under *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978), the District Court properly dismissed claims against Foster's employer, Defendant-Appellee Spartanburg County School District 6.

IV. ARGUMENTS

A. The District Court Properly Held That Foster Was Entitled To Qualified Immunity.

Government officials are entitled to qualified immunity when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity defense must be resolved "at the earliest possible stage of litigation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). Qualified immunity protects government officials from civil liability and suit for "conduct [that] does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. It protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity protects government officials from "bad guesses in gray areas" and ensures that they are liable only "for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

In addressing qualified immunity, the Supreme Court has formulated a two-prong test. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). First, the court must determine "whether the plaintiff has alleged the deprivation of an actual constitutional right at all." *Id.* (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)). Assuming the claim satisfies the first prong, the court then must consider

"whether that right was clearly established at the time." *Id.* With respect to the second step, "[t]he relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was lawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). A district court has discretion to decide which step of the two-prong test to analyze first. *Pearson*, 555 U.S. at 242. The answers to both prongs must be in the affirmative for a plaintiff to defeat a motion to dismiss or for summary judgment based on qualified immunity grounds. *See Batten v. Gomez*, 324 F.3d 288, 293-94 (4th Cir. 2003).

1. The District Court Properly Held that the Robertsons Did not State a First Amendment Claim

Although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 506 (1969), "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal citations and quotation marks omitted).

Historically, student speech has fallen into three main categories. First, in *Tinker*, the Supreme Court declared that a school district may regulate a student's

free speech rights in two circumstances: (1) if the speech would "impinge upon the rights of other students;" or (2) if the speech would result in "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 509, 514. Second, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Supreme Court held that schools may prohibit student speech that is vulgar, lewd, obscene, and plainly offensive. Finally, the last category, which is applicable to the allegations raised in the instant case, involves school-sponsored speech and is controlled by the standard in *Hazelwood*, 484 U.S. at 266.[2]

Based on the *Hazelwood* standard, public schools may exercise control over the style and content of student speech in school-sponsored expressive activities that bears the imprimatur of the school so long as their actions are reasonably related to "legitimate pedagogical concerns." *Id*. at 271-274. In *Hazelwood*, the Supreme Court upheld a school district's decision to remove articles regarding the impact of divorce on students and student pregnancy from the school newspaper. *Id*. at 262-264, 275-276. Beyond the school newspaper context, the *Hazelwood* Court recognized that a school's authority to control student speech extends to other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. *Id*. at 271. In fact, courts have reasoned that "if a school newspaper . . . can be considered school-

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[2] The Robertsons concede that *Hazelwood* controls the analysis. (Appellants'

sponsored speech, then surely student speech that takes place inside the classroom, as part of a class assignment, can also be considered-school sponsored speech." *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004); *see also Settle v. Dickson Sch. Bd.,* 53 F.3d 152, 155 (6th Cir. 1995), (explaining that "[w]here learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum.") *Hazelwood* thus clearly applies to the classroom assignment in which essays of R.R.S. and other students were to be drafted and published.

a. The District Court Properly Held that School Control of Student Speech Permitted by *Hazelwood* Does not Require Viewpoint Neutrality

Neither the Supreme Court nor the Fourth Circuit has decided whether *Hazelwood* permits schools to restrict student speech based on its viewpoint, and other circuits are split. The Second, Ninth, and Eleventh Circuits have held that viewpoint neutrality is required under *Hazelwood*. *See Peck ex rel. Peck* v. *Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 632-33 & n.9 (2d Cir. 2005); *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989). However, the First and Tenth Circuits have held that viewpoint neutrality is not required under *Hazelwood*. *See Fleming v. Jefferson Cty. Sch. Dist.*, 298 F.3d 918, 926-28 (10th Cir. 2002); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993). The *Hazelwood* Court did not

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Brief, p. 8.)

specifically mention viewpoint neutrality. However, the Supreme Court suggested that viewpoint neutrality is not required, noting that "[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy." *Hazelwood*, 484 U.S. at 272 (internal citation and quotation marks omitted). Moreover, as the Tenth Circuit has reasoned, *Hazelwood*'s "specific reasons supporting greater control over school-sponsored speech, such as determining the appropriateness of the message, the sensitivity of the issue, and with which messages a school chooses to associate itself will often turn on viewpoint-based judgments." *Fleming*, 298 F.3d at 928.

The District Court's interpretation of *Hazelwood* in the context of this case also properly takes into account the age of R.R.S. and her classmates. *See Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538-39 (7th Cir. 1996) (finding that "[i]t is unlikely that Tinker and its progeny apply to public elementary (or preschool) students."); *see also Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 673 (7th Cir. 2008) (relying on *Muller*, 98 F.3d at 1538-39, for the proposition that when a school regulates the speech of children that are "very young . . . the school has a pretty free hand."). Furthermore, "a school must

be able to take into account the emotional maturity of the intended audience…." *Hazelwood*, 484 U.S. at 272. "The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression." *Morgan v. Swanson*, 659 F.3d 359, 378 (5th Cir. 2011) (citing *Muller*, 98 F.3d at 1538). "The number of everyday decisions that must be made with respect to the boundaries of acceptable behavior of third graders is so great that courts cannot second guess elementary school officials on every minor dispute involving third graders' expression." *Walker-Serrano v. Leonard*, 325 F.3d 412, 419 (3d Cir. 2003).

R.R.S.'s essay, as part of a compilation of student essays written as part of a class assignment and published in a class book, clearly bore the imprimatur of the school. Under *Hazelwood*, Foster, as the school principal, had clear authority to condition publication of the essays to topics appropriate for the consumption of fourth graders.[3] This easily satisfies *Hazelwood*'s "legitimate pedagogical concerns" standard.

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[3] Foster ultimately extended the invitation to "publish" both of R.R.S.'s essays after the Robertsons and counsel complained, essentially offering the relief they initially sought in the Complaint. (J.A. 103-104.)

b. The District Court Properly Found That, in the Alternative, Foster's Rationale for Restricting R.R.S.'s Speech was Viewpoint Neutral

Even if *Hazelwood* required viewpoint neutrality in the elementary school context, the District Court properly concluded that the Robertsons' allegations, even if true, would not show that Foster was motivated by a disagreement with the view R.R.S. expressed in the essay. The Robertsons contend that Foster's statements about why she decided not to publish R.R.S.'s first essay, her tone of delivery, and the "implied bigotry" underlying these statements amount to content and viewpoint-based restrictions. (J.A. 57.) However, the alleged comments attributed to Foster, which are disputed, do not express Foster's views on the actual message of R.R.S's essay or reflect that Foster disagreed with R.R.S.'s position regarding equal treatment of members of the LGBTQ community. The alleged comments are attributed to how other members of the school community and parents might react to the content or the topic. Nothing alleged in the amended complaint would lead a reasonable person to believe the alleged comments and actions taken by Defendant Foster were not related to pedagogical concerns, but rather, were spurred by R.R.S.'s viewpoint on the topic. Moreover, the amended complaint makes continual references to the "topic" of LGBTQ issues, rather than Foster's viewpoint on the issue, as the crux of the case. (J.A. 17-18.) For those

reasons, the Robertsons could not state a First Amendment claim even if *Hazelwood* prohibited viewpoint discrimination.

As recognized by the District Court, "Although schoolteachers provide more than academic knowledge to their students, it is not a court's obligation to determine which messages of social or moral values are appropriate in a classroom. Instead, it is the school board, whose responsibility includes the well-being of the students, that must make such determinations." *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007). "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood*, 484 U.S. at 273. Accordingly, Foster's legitimate pedagogical prerogative trumps any First Amendment rights R.R.S. may have had in choosing her initial essay topic.

2. The District Court Properly Found, in the Alternative, that Even if the Robertsons Could Maintain a First Amendment Claim, Foster was Entitled to Qualified Immunity on the Ground that the Law was not Clearly Settled

This Circuit has "long held it is case law from this Circuit and the Supreme Court that provide notice of whether a right is clearly established." *Hill v. Crum*, 727 F.3d 312, 322 (4th Cir. 2012). "[I]f there are no cases of controlling authority in the jurisdiction in question, and if other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be clearly established

for qualified immunity purposes." *Rogers v. Pendleton*, 249 F.3d 279, 287-88 (4th Cir. 2001) (citing *Wilson*, 526 U.S. at 618); *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 469 (4th Cir. 2013); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

At a minimum, the outcome of the application of *Hazelwood* to the case at bar is an entirely unsettled issue, even assuming *arguendo* that *Hazelwood* requires viewpoint discrimination *and* that the facts alleged would constitute viewpoint discrimination. No elementary school principal in Foster's position should have to defend a 42 U.S.C. § 1983 claim in this factual context. Thus, the District Court properly held that "[t]his case appears to be exactly the type of case for which the qualified immunity defense was intended," even if the Robertsons could state a First Amendment claim. (J.A. 119.)

B. The District Court Properly Dismissed Federal Claims Against Spartanburg 6.

In their brief, the Robertsons incorrectly argue that Rule 41 provides the only basis upon which a district court can dismiss claims. (Appellants' Brief, pp. 5-6.) However, it is settled law that a district court can dismiss claims *sua sponte* under Rule 12(b)(6) when it is patently obvious that a plaintiff cannot prevail on the claim. *See* § 1357 Motions to Dismiss—Practice Under Rule 12(b)(6), 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.); *Jensen v. Conrad*, 570 F.

Supp. 91, 99-100 (D.S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

Because the District Court correctly held that the Robertsons could not state a claim against Foster as a matter of law because no constitutional violation occurred, no basis exists to hold her employer, Spartanburg 6, liable for Foster's alleged actions, regardless of whether the Robertsons had alleged or could allege a *Monell v. Dep't of Social Servs.,* 436 U.S. 658 (1978), claim. Further, the District Court correctly determined that the Robertsons did not properly plead any custom or policy that would be required to sustain a *Monell* claim against Spartanburg 6. (J.A. 119-120.) Nor can the Robertsons credibly claim unfairness or surprise from the Court's ruling, as they had the full opportunity to brief the underlying constitutional issue. *See Glotfelty v. Karas*, 512 Fed. App'x. 409, 412 (5th Cir. 2013) (affirming *sua sponte* dismissal of claims against non-moving defendants when rationale of order on motion of moving defendants disposed of all claims); *Vives v. Fajardo*, 472 F.3d 19, 22 (1st Cir. 2007) (*sua sponte* summary judgment ruling upheld because plaintiff could not show prejudice from applying ruling to claims not part of defendant's motion); *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 384-85 (7th Cir. 2008) ("if a district court grants one defendant's motion for summary judgment, it may *sua sponte* enter summary judgment in favor of non-moving defendants if granting the motion

would bar the claim against those non-moving defendants."); *Clinton Cmt'y. Hosp. Corp. v. S. Maryland Med. Ctr.*, 374 F. Supp. 450, 454 (D. Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir. 1975) (holding that judicial economy warranted consideration of claims against non-moving parties on motion to dismiss where common legal issues foreclosed all claims).

In this case, the Robertsons had a full opportunity to contest the legal issues applicable to claims against all defendants and it would serve no judicially economical purpose to remand the case for the same patently obvious outcome.

V. CONCLUSION

For the foregoing reasons, the District Court's rulings dismissing federal claims against all defendants should be upheld.

January 28, 2020

HALLIGAN MAHONEY WILLIAMS
SMITH FAWLEY & REAGLE, P.A.

s/ Thomas K. Barlow
Jasmine Rogers Drain, Fed. I.D. No. 10169
jdrain@hmwlegal.com

Thomas K. Barlow, Fed. I.D. No. 7483
tbarlow@hmwlegal.com

1301 Gervais Street, Suite 1400
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Defendants – Appellees

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,335 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 14.0.7153.5000 in 14-point font size in Times New Roman.

January 28, 2020

HALLIGAN MAHONEY WILLIAMS
SMITH FAWLEY & REAGLE, P.A.

s/ Thomas K. Barlow
Jasmine Rogers Drain, Fed. I.D. No. 10169
jdrain@hmwlegal.com

Thomas K. Barlow, Fed. I.D. No. 7483
tbarlow@hmwlegal.com

1301 Gervais Street, Suite 1400
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Defendants – Appellees

CERTIFICATE OF SERVICE

I certify that on January 28, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF System.

HALLIGAN MAHONEY WILLIAMS
SMITH FAWLEY & REAGLE, P.A.

s/ Thomas K. Barlow
Thomas K. Barlow, Fed. I.D. No. 7483
tbarlow@hmwlegal.com
1301 Gervais Street, Suite 1400
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Defendants – Appellees