20-925

No.

In the Supreme Court of the United States

JEREMY COLLINS, PETITIONER

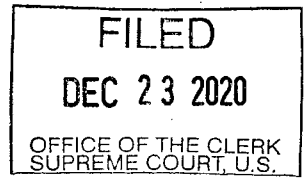
v.

REBECCA PUTT, in her individual and official capacity, ED KLONOSKI, in his official capacity as President of Charter Oak State College and CHARTER OAK STATE COLLEGE

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI



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QUESTIONS PRESENTED

1. Whether or not viewpoint discrimination in a college classroom is permissible under the Supreme Court's ruling in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260.

2. Whether or not a college student's classroom speech is protected by the First Amendment and the Supreme Court's ruling in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Collins v. Putt, No. 3:17-cv-01621, U. S. District Court for Connecticut.

Judgment entered March 28, 2019.

Collins v. Putt, No. 19-1169, Court of Appeals for the Second Circuit.

Judgement entered October 29, 2020.

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The opinions of the court of appeals are found at App., *infra,* 2a-46a. The opinion of the district court is found at App., *infra,* 47a-58a. Neither case is published.

JURISDICTION

The district court granted a 12(b)6 motion to dismiss for failure to state a claim on March 28, 2019. The judgement of the court of appeals was was entered on October 29, 2020. A petition for rehearing was denied on November 25, 2020 (App., *infra,* 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I.

STATEMENT AND BACKGROUND

The bare facts of this case and the evidence presented by the petitioner (App., *infra*, 59a-61a) are undisputed by the parties: The petitioner Jeremy Collins (Collins) was enrolled at Charter Oak State College, a public "online-only" college, for the Fall 2017 term. Collins was enrolled in a course, Communications 101, which was taught by the respondent Rebecca Putt (Putt).

At the time of the events which gave rise to this suit all classes were conducted by Charter Oak State College "online", i.e. hosted on an internet website, via commercially licensed software known as Blackboard LMS. The Blackboard Learning Management System is one of the two leading software programs used to teach courses online and is utilized by many colleges and universities in the United States from Charter Oak State College to Princeton University.[1]

1.) https://blackboard.princeton.edu/

On or about the first week of September 2017 Collins posted to the Blackboard website as directed by Putt in response to a classroom discussion assignment. Collins posted his answer to the assignment, then posted a reply to another student who responded to his post, and so on. On or about September 6, 2017 Putt censored (deleted) his entire discussion, including the posts of another student who had responded to him, and sent him an email explaining why she had censored him (App., *infra*,. 59-61a).

All parties agree that Collins was not accused of any disciplinary or academic misconduct, and all agree that he received full credit for the discussion towards his final grade. The parties have not argued that his speech might be considered vulgar or offensive in a way that would implicate the school speech restrictions found in *Bethel School District Number 403 v. Fraser* 478 U.S. 675, nor have they argued that his speech might have been considered disruptive under the rule of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503.

Both courts have ruled that because Putt's actions fell within the well nigh unlimited reach of "legitimate pedagogical concerns" her actions to censor Collins were lawful under the rule of *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260. However, in a far more scrupulous concurrence (App., *infra*, 21a-46a), Judge Menashi joined the opinion of the majority only because he believed that Putt was entitled to qualified immunity, and expatiated at length on the significant shortcomings of the majority opinion. Unfortunately, no court has yet applied this Court's precedent: A "reasonable person" must conceivably believe that Collins's comments could bear the school's "imprimatur" in order for *Hazelwood* to govern this matter. Neither the district court nor the appeals courts has performed this rudimentary analysis before reaching their respective conclusions.

In this case, the locus of the events which led to this suit is the virtual Blackboard classroom, which is a password-protected website that no "reasonable person" could access unless they were either a student or a college administrator. Of those two types of "reasonable person", student or teacher, both know that students' posts are not endorsed by the school, and that Collins's posts, which were in some sense critical of the materials used to teach the course, were obviously not the views of the school. A reasonable person, student or teacher, would probably assume that if the school didn't like their own materials, they could do something about it, and wouldn't need to comment on them in a classroom assignment.

Members of the public are not permitted to access the Blackboard course website and Collins has not even been able to obtain posts made by his classmates, or their names, as Charter Oak State College contends they are protected by student privacy laws. Ergo, there can be no question as to whether the public has access to view and possibly mistake Collins's views as those of Charter Oak State College. Even in case of a lawsuit, the door to the Blackboard classroom is firmly shut.

Putt's censorship was arguably reactionary and entirely subjective. According to Putt's own email Collins was censored because he had been critical of the classroom materials when writing his answer, and because he had offended her personally and might offend others. The boundaries of her displeasure were not otherwise articulated and it would be impossible, simply as a practical matter, for Collins to limn the horizon of what might offend her, or the hypothetical others, and thereby avoid more censorship in future. Like the greengrocer[2] descibed by Vaclav Haval in his famous essay Collins was expected to unthinkingly post slogans, not because he believes them, but because he doesn't, or is indifferent, to signify his complicity with the regime.

2.) Havel, Vaclav. "'The Power of the Powerless' - Vaclav Havel." *Bard HAC*, hac.bard.edu/amor-mundi/the-power-of-the-powerless-vaclav-havel-2011-12-23.

This case is itself evidence that hostility to free speech on college campuses[3] and the corresponding epidemic of student self-censorship across the United States[4] is, at least partially, based on actual instances of intimidation and coercion on campus. The fact that many students are undertaking lifelong debt payments in order to fund their indoctrination should move this Court, at the very least, to clarify what students can rightfully expect to be subjected to before they sign on the dotted line.

Collins has brought this case, which is unique in its simplicity and limited scope, merely to clarify the rights of students to express their own viewpoint in a college classroom without fear of censorship or punishment. The evidence necessary to show this case has merit is already before this Court in the form of Collins's work and Putt's emailed confession wherein she admits to her actions to censor Collins and her motives for doing so.

The particular value in this case is not only the aforementioned merit but also the venue. Online classrooms provide a perfect environment for classroom censorship to flourish because they often do not set an appointed time and place to meet like a brick and mortar classroom, but rather a website that is accessed over a period of days, weeks or months. In the future disfavored speech could "dissapear" instantly, flagged by key word or phrase, never to be seen or heard by anyone but merely scanned and binned by an AI censor in a fraction of a second. It is therefore the important role of this Court to ensure that "*In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.*" *Tinker* at 511.

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3 Jones, Jeffrey M. "More U.S. College Students Say Campus Climate Deters Speech." *Gallup.com*, Gallup, 23 Nov. 2020, news.gallup.com/poll/229085/college-students-say-campus-climate-deters-speech.aspx?utm_source=alert.

4 Friedersdorf, Conor. "Evidence That Conservative Students Really Do Self-Censor." *The Atlantic*, Atlantic Media Company, 17 Feb. 2020, www.theatlantic.com/ideas/archive/2020/02/evidence-conservative-students-really-do-self-censor/606559/.

REASONS FOR GRANTING THE PETITION

The primary issue in this case is free speech. But whether or not this Court believes that this case ought to be governed by the rule of *Hazelwood*, as the lower courts have held, or the rule of *Tinker,* as Collins contends, this case is still worthy of review by this Court.

AS TO QUESTION 1

A fair reading of Collins's current operative complaint has forced at least one appeals court judge to conclude that he has plausibly alleged viewpoint based discrimination: "*We must construe Collins's complaint liberally and afford him the benefit of factual inferences. Applying that standard, I would conclude that Collins plausibly alleges that Putt treated his post differently from other students' posts because she thought Collins's post was offensive and expressed a view with which she disagreed.*" (App., *infra*, 42a) The Second Circuit has has held that that sort of viewpoint discrimination is unconstitutional but not all circuits agree. Compare *Peck v. Baldwinsville Cent. School Dist.*, 426 F. 3d 617 (Second Circuit) and *Axson–Flynn v. Johnson*, 356 F.3d 1277 (Tenth Circuit).

There is a split between the sister circuits as to whether or not viewpoint-based discrimination is permitted in the college classroom under the *Hazelwood* rule. The Second, Sixth, Ninth, and Eleventh Circuits have held that regulation of student speech must be viewpoint-neutral while the First, Third and Tenth Circuits have held differently, allowing for viewpoint-based discrimination. Despite this Court's ruling in *Healy v. James*, 408 U.S. 169 at 180 "*...the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.*" some courts have gone so far as to conclude the exact opposite.

It was enough for this Court to dismiss its most recent student speech case, *Morse v. Frederick, 551 U.S. 393* from consideration under the *Hazelwood* rule with the apparently dispositive statement that *"Kuhlmeier does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur." Morse* at 2627. The Second Circuit has also said as much In *Guiles ex Rel. Guiles v. Marineau*, 461 F.3d 320, cert denied:

> "The deferential standard of Hazelwood, which permits schools to regulate student speech so long as the regulation reasonably relates to "legitimate pedagogical concerns," Hazelwood,484 U.S. at 273, 108 S.Ct. 562, comes into play only when the student speech is "school-sponsored" or when a reasonable observer would believe it to be so sponsored, see id. at 273-74, 108 S.Ct. 562; Peck,426 F.3d at 628-29; Saxe,240 F.3d at 213-14 (noting that "Hazelwood's permissive `legitimate pedagogical concern' test governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself" (emphasis added)). No one disputes that the school did not sponsor Guiles's T-shirt or that the T-shirt could not reasonably be viewed as bearing the school's imprimatur." *Guiles* at 327.

Since a determination of whether or not the speech at issue could be seen to bear the "school's imprimature" is the fundamental element in a *Hazelwood* analysis, and both this Court and the Second Circuit have clearly said as much, it is unclear why the lower courts have not simply applied the law, and even more unclear as to why Putt would be entitled to Qualified Immunity given there seems to be longstanding agreement between this Court and the Second Circuit on this matter.

Collins does not agree that his classroom assignment is a "school-sponsored expressive activity" that could be seen to bear the imprimature of the school, but if this Court sees differently, it should still clarify, for the benefit of the circuit courts, whether or not viewpoint discrimination is permissible under *Hazelwood.* This Court opined that "*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.*" *Hazelwood* at 273. This might now be an oppotune moment to do so given the issues prevailing on campuses across the country.

AS TO QUESTION 2

Collins's far simpler proposition is that the rule of *Tinker* applies to this case and Putt's censorship of Collins was therefore unconstitutional because *"A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments." Tinker* at 503. The parties have muddied this clear water with arguments as to whether or not Collins's speech was "on-topic", "responsive" or a "critique" but ultimately, as Judge Menashi has pointed out, none of the foregoing arguments add up to a hill of beans: *"The court appears to assume that the responsiveness of Collins's posts to the assignment is dispositive of his viewpoint discrimination claim. In other words, the government would be free to censor it. That premise is inconsistent with Supreme Court and Second Circuit precedent."* (App., *infra*, 37a).

Collins's case is not a personal vendetta predicated on something as insignificant as a bad grade or a rude email, it is based on unlawful government censorship with implications far greater than his own interest. Colleges and universities also deserve the chance to fulfill their educational mission and should be relieved of the responsibility (and possible liability) for regulating personal viewpoint-based student speech that occurs in a classroom environment. *Tinker's* forebearance ends when student speech " *....intrudes upon the work of the schools or the rights of other students." Tinker* at 508, but there is no evidence that Collins's speech did either of those things, even prospectively. It is rather that colleges and universities have been intimidated by legal threats into granting a "privilege" to elitist cadres in their own ranks (and elsewhere) to police speech they find offensive at the expense of constitutionally protected student speech.

There simply isn't a fair and just alternative to *Tinker* presented anywhere in the record but instead the tacit endorsement of an amorphous speech code based purely on a censor's personal whims, opinions and beliefs. If *Tinker* is to remain relevant, especially for the foregoing reasons, it must be given some teeth. The appeals court contends that *Hazelwood* governs this matter because Collins's speech "*...was made specifically in response to a class assignment, under the supervision of a college faculty member, and on a message board that was provided by the college offering the class.*" (App., *infra*, 11a). This language effectively overrules *Tinker* because little classroom speech, if any, could be said to fall outside of those broad and encompassing generalities. So momentous a decision should come under this Court's review.

Tinker is nonetheless applicable here, and should control, both as a vital affirmation of students' liberty and a repudiation of the creeping dimunition of their speech rights, the consequences thereof to be borne by future generations. *Tinker* neither predicts nor requires perfect implementation, it is a brave decision which foreshadows possible disorder, however minimal, within its remit: *"Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk..." Tinker* at 506. It is now for this Court to once again take a risk and grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeremy Collins, Pro Se

December 23, 2020