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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-2149
(D.C. No. 1:16-CV-00272-JCH-KK) (D. N.M.)

[Filed November 14, 2019]

PAUL HUNT,

Plaintiff - Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO; SCOTT CARROLL, M.D., in his individual and official capacities; JOHN DOE; JANE DOE, Members of the Committee for Student Promotion and Evaluation, in their individual and official capacities; TERESA A. VIGIL, M.D., in her individual and official capacities; PAUL ROTH, M.D., in his individual and official capacities,

Defendants - Appellees.

ELECTRONIC FRONTIER FOUNDATION; THE JOSEPH L.

BRECHNER CENTER FOR FREEDOM OF INFORMATION; STUDENT PRESS LAW CENTER; THE NATIONAL COALITION AGAINST CENSORSHIP; FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; CATO INSTITUTE; PROFESSOR EUGENE VOLOKH,

Amici Curiae.

ORDER AND JUDGMENT*

Before **HOLMES**, **O'BRIEN**, and **MATHESON**, Circuit Judges.

Paul Hunt filed this 42 U.S.C. § 1983 action against the Board of Regents of the University of New Mexico (UNM) and various administrators at the University of New Mexico School of Medicine (UNMSOM), claiming violations of his free speech rights under the First Amendment and his due process rights under the Fourteenth Amendment. The district court granted

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

summary judgment for the defendants. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

BACKGROUND

In 2012, as a medical student at UNMSOM, Mr. Hunt was subject to the policies of both UNM and UNMSOM, including UNM's Respectful Campus Policy and UNMSOM's Social Media Policy. The Respectful Campus Policy noted, *inter alia*, that (1) "UNM strives to foster an environment that reflects courtesy, civility, and respectful communication because such an environment promotes learning, research, and productivity"; and (2) "a respectful campus environment"—that is, one that "exhibits and promotes" professionalism, integrity, harmony, and accountability—is "a necessary condition for success in teaching and learning, in research and scholarship, in patient care and public service, and in all other aspects of the University's mission and values." Aplt. App. at 42. The Social Media Policy addressed the use of "sites like Facebook" and cautioned students, *inter alia*, to: (1) "[e]xercise discretion, thoughtfulness and respect for your colleagues, associates and the university's supporters/community"; and (2) "[r]efrain from

[1] We previously entered an order provisionally granting motions for leave to file amicus curiae briefs by (1) the Joseph L. Brechner Center for Freedom of Information, the Student Press Law Center, the Electronic Frontier Foundation, and the National Coalition Against Censorship; and (2) the Foundation for Individual Rights in Education, the Cato Institute, and Professor Eugene Volokh. We now make permanent the provisional order and grant the amici's motions.

engaging in dialogue that could disparage colleagues, competitors, or critics." *Id.* at 41.

Shortly after the presidential election in November 2012, Mr. Hunt, then twenty-four years old, posted the following comment on his personal Facebook page:

> All right, I've had it. To all of you who support the Democratic candidates:
>
> The Republican Party sucks. But guess what. Your party and your candidates parade their depraved belief in legal child murder around with pride.
>
> Disgusting, immoral, and horrific. Don't celebrate Obama's victory tonight, you sick, disgusting people. You're abhorrent.
>
> Shame on you for supporting the genocide against the unborn. If you think gay marriage or the economy or taxes or whatever else is more important than this, you're fucking ridiculous.
>
> You're WORSE than the Germans during WW2. Many of them acted from honest patriotism. Many of them turned a blind eye to the genocide against the Jews. But you're celebrating it. Supporting it. Proudly proclaiming it. You are a disgrace to the name of human.
>
> So, sincerely, fuck you, Moloch worshiping assholes.

Id. at 37-38.

On November 15, 2012, Scott Carroll, MD, Chair of UNMSOM's Committee on Student Promotions and Evaluation (CSPE), sent a letter to Mr. Hunt, stating the Dean of Students was referring him to CSPE due to alleged unprofessional conduct relating to the Facebook post. Dr. Carroll stated that Mr. Hunt had "every right to [his] political and moral opinions and beliefs" but that "there is still a professionalism standard that must be maintained as a member of the UNM medical school community." *Id.* at 93. He then quoted the following excerpt from UNM's Respectful Campus Policy:

> Individuals at all levels are allowed to discuss issues of concern in an open and honest manner, without fear of reprisal or retaliation from individuals above or below them in the university's hierarchy. At the same time, the right to address issues of concern does not grant individuals license to make untrue allegations, **unduly inflammatory statements or unduly personal attacks, or to harass others**, to violate confidentiality requirements, or engage in other conduct that violates the law or the University policy.

Id. (emphasis in original) (italics and internal quotation marks omitted). After noting this policy "applied to communication through social media outlets such as Facebook[,] as stated in the UNMSOM Social Media Policy," he quoted from the latter: "UNMSOM does not routinely monitor personal websites or social media outlets" but "any issues that violate any established UNM Policy will be addressed," and

"[v]iolation of this or any UNM policy may result in disciplinary action, up to and including dismissal from UNM." *Id.* (italics and internal quotation marks omitted). Finally, the letter stated that CSPE would address "the allegations at its November 20th meeting" and that Mr. Hunt should "prepare a statement . . . and be prepared to answer questions from the committee members." *Id.*

At the CSPE meeting, Mr. Hunt (1) read a statement "acknowledging [his] 'guilt' and asking CSPE for help to overcome [his] 'deficiencies'"; and (2) responded to questions from CSPE members. *Id.* at 88.

Two months later, Dr. Carroll informed Mr. Hunt that CSPE found the Facebook post violated the policies at issue and was imposing "a professionalism enhancement prescription" consisting of an ethics component and a professionalism component, each with different faculty mentors. *Id.* at 95. For the ethics component, the mentor would "assign readings and supervise a reflective writing assignment on patient autonomy and tolerance." *Id.* The professionalism component entailed: (1) a writing assignment on the public expression of political beliefs by physicians; (2) an apology letter that Mr. Hunt could present to his "classmates, select individuals or no one"; (3) rewriting the Facebook post in a passionate yet professional manner; and (4) regular meetings with the faculty mentor over the course of a one-year period. *Id.* CSPE would need to approve final written products. *Id.*

Dr. Carroll also explained that the professionalism violation would be noted in the Dean's recommendation

letter for Mr. Hunt's residency applications, but that he could "choose to petition CSPE to remove the notation at some point in the future." *Id.* Dr. Carroll cautioned Mr. Hunt that (1) "any further professionalism lapses will result in referral to CSPE and may result in adverse action such as dismissal"; and (2) failure to fulfill the requirements of the professionalism prescription could result in "adverse action including dismissal." *Id.* at 95-96. The letter concluded by noting Mr. Hunt had the right to "request review by the Senior Associate Dean of Education" if he believed CSPE's decision was "fundamentally flawed, unfair or otherwise inappropriate." *Id.* at 96 (italics and internal quotation marks omitted).

Mr. Hunt did not seek such review. Rather, over the following year, he worked toward satisfying his professionalism prescription, meeting with his mentors and completing the written assignments. Mr. Hunt alleged that either CSPE or his mentor did not approve his first drafts but ultimately approved his second attempts. And in his revised Facebook post, Mr. Hunt "still expresse[d] [his] fervent opposition to abortion" but in a "calm and rational" tone and with "no expletives." *Id.* at 125.

On April 22, 2014, Dr. Carroll informed Mr. Hunt that he had satisfied the professionalism prescription but cautioned that any future professionalism issues would "be considered in light of [his] previous lapse in professionalism." *Id.* at 100. Dr. Carroll also reminded Mr. Hunt of the need to request removal of the notation from his Dean's letter and "suggest[ed] waiting until toward the end of Phase II" but before "the summer

before the 4th year of medical school, early in Phase III." *Id.* Mr. Hunt anticipated completing Phase II "on or about April 30, 2017." *Id.* at 17.

In January 2016, Mr. Hunt filed suit in state court against UNM's Board of Regents, Dr. Carroll, members of CSPE, and UNMSOM's Dean, raising claims under the First and Fourteenth Amendments and seeking monetary damages and injunctive and declaratory relief. The defendants removed the case to federal court under 28 U.S.C. § 1331 and filed a motion to dismiss or for summary judgment. The district court granted summary judgment for the defendants. In particular, the court: (1) dismissed the claims for damages against the individual defendants in their official capacities and the Board because they were not subject to suit under § 1983; (2) found the individual defendants were entitled to qualified immunity on Mr. Hunt's free speech claims because there was no clearly established law prohibiting the defendants' conduct; and (3) found the individual defendants were entitled to qualified immunity on Mr. Hunt's due process claim because the defendants' conduct was not unconstitutional. Mr. Hunt timely appealed.

DISCUSSION

The sole issues properly before this court are whether, in addressing the defendants' qualified immunity defense to Mr. Hunt's free speech claims, the district court erred by (1) declining to address the

constitutionality of the defendants' actions; and (2) determining the law was not clearly established.[2]

A. Standard of Review

This court "review[s] summary judgment decisions de novo," "view[ing] the evidence and draw[ing] reasonable inferences therefrom in the light most favorable to the nonmoving party." *Talley v. Time, Inc.*, 923 F.3d 878, 893 (10th Cir. 2019) (internal quotation marks omitted). Summary judgment is warranted

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[2] We do not consider Mr. Hunt's due process claim because he did not address it on appeal. *See Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997). We also decline to address the argument by Mr. Hunt and the amici that the governing policies were unconstitutionally vague and overbroad. As Mr. Hunt conceded in his opening brief, "he did not fully brief these arguments" in district court. Aplt. Opening Br. at 6. He attempted to retract this concession in his reply brief by quoting from his complaint and response to the summary judgment motion, but (1) the content or context of the quoted passages plainly demonstrates they concerned either his as-applied free speech claims or his due process claim, not a facial challenge to the policies themselves; and (2) he did not raise a First Amendment facial challenge in his complaint. While we may consider an issue raised for the first time on appeal, "the decision regarding what issues are appropriate to entertain . . . in instances of lack of preservation is discretionary." *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013). Because the resolution of this issue is not "beyond doubt" and does not involve "unusual circumstances," *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993), we decline to exercise our discretion to consider it. Finally, we decline to address any issues raised by the amici but not by Mr. Hunt, such as a compelled speech claim. *See Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1230 n.6 (10th Cir. 2009) (declining to address a compelled speech argument raised in an amicus brief).

when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To overcome a qualified immunity defense at the summary judgment phase, a plaintiff must show: "(1) that the defendant violated his constitutional . . . right[], and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity." *Estate of Reat v. Rodriguez*, 824 F.3d 960, 964 (10th Cir. 2016) (internal quotation marks omitted). Failure on either prong "is fatal to the plaintiff's cause." *Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Gutteridge v. Oklahoma*, 878 F.3d 1233, 1238 (10th Cir. 2018) (internal quotation marks omitted).

B. First Prong

Mr. Hunt and the amici contend that (1) the district court should have addressed the first prong of qualified immunity; and (2) this court should address the first prong. But the Supreme Court has afforded both district courts and courts of appeals the discretion to "decid[e] which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Indeed, the Supreme Court has admonished courts to "think hard, and then think hard again, before" addressing both prongs of qualified immunity. *Camreta v. Greene*, 563 U.S. 692, 707 (2011). And we have found addressing

both prongs "should be the exception" because of the doctrine of constitutional avoidance. *Kerns*, 663 F.3d at 1180-81 (internal quotation marks omitted).

Off-campus, online speech by university students, particularly those in professional schools, involves an emerging area of constitutional law. *See, e.g.*, *Keefe v. Adams*, 840 F.3d 523, 529-33 (8th Cir. 2016) (finding no First Amendment violation when a student was suspended from a nursing program at a public college for "on-line, off-campus Facebook postings" that the school deemed unprofessional and in violation of governing codes of conduct), *cert. denied*, 137 S. Ct. 1448 (2017). Accordingly, we find no fault with the district court's exercise of its discretion. And we, too, decline Mr. Hunt's request to address the first prong.

C. Second Prong

In confining its review to the second prong of the qualified immunity analysis, the district court determined that the law was not clearly established and that defendants, therefore, were entitled to qualified immunity. We agree.

"A right is clearly established when," based upon "the law at the time of the incident," "it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Estate of Reat*, 824 F.3d at 964 (internal quotation marks omitted). Because "qualified immunity protects all officials except those who are plainly incompetent or those who knowingly violate the law," *Apodaca v. Raemisch*, 864 F.3d 1071, 1076 (10th Cir. 2017) (internal quotation marks omitted), "existing precedent

must have placed the . . . constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted). "The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks and citation omitted).

"To make this determination, we consider either if courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct at issue." *Estate of Reat*, 824 F.3d at 964-65 (internal quotation marks, emphases, and alteration omitted). "[A] plaintiff may satisfy this standard by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (internal quotation marks omitted). "[C]learly established law should not be defined at a high level of generality" but, instead, "must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (internal quotation marks omitted). "Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (alterations and internal quotation marks omitted).

Here, we are faced with a medical student's free speech challenge to sanctions from his school in response to his off-campus, online speech. Based upon the case law as of 2012-2013, which the parties agree is the relevant time period, we cannot say that "every reasonable official" in the position of the defendants here would have known their actions violated the First Amendment. *Estate of Reat*, 824 F.3d at 964 (internal quotation marks omitted).

The Supreme Court first examined whether a high school could prevent students from wearing arm bands on campus to protest the Vietnam War. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The Court noted students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but recognized the rights must be "applied in light of the special characteristics of the school environment." *Id.* at 506. In a divided opinion, the Court held that schools can regulate speech that "would materially and substantially disrupt the work and discipline of the school," *id.* at 513, or that intrudes upon "the rights of other students," *id.* at 508. The Court concluded that the school could not prohibit the students' "silent, passive expression of opinion, unaccompanied by any disorder or disturbance," *id.* at 508, 514. Although the holding encompassed speech occurring "in class or out of it," *id.* at 513, it is clear *Tinker* addressed on-campus speech only, *see id.* at 512-13 (discussing speech "in the classroom" and also "in the cafeteria, or on the playing field, or on the campus during the authorized hours").

Three years later, the Court extended *Tinker* to the university setting, although that case concerned official recognition of a student group and not student discipline. *See Healy v. James*, 408 U.S. 169, 180, 189 (1972). The Court noted: (1) "state colleges and universities are not enclaves immune from the sweep of the First Amendment"; and (2) "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." *Id.* at 180 (quoting *Tinker*, 393 U.S. at 506). *Healy* acknowledged a college may "expect that its students adhere to generally accepted standards of conduct," *id.* at 192 (internal quotation marks omitted), but it rejected the notion 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," *id.* at 180.

After *Healy*, the Court addressed a free speech claim by a graduate-level journalism student expelled under a policy prohibiting "indecent . . . speech" for distributing on campus an underground newspaper containing: (1) "a political cartoon . . . depicting policemen raping the Statute of Liberty and the Goddess of Justice"; and (2) "an article entitled 'M----- f----- Acquitted,'" referring to an assault trial. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667-68 (1973) (per curiam). After reiterating public colleges are not immune from the First Amendment, the Court, echoing *Tinker*, explained "in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression." *Id.* at 670 & n.6. A divided Court held "the mere

dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670.

After *Papish*, the Court seemingly tacked in a different direction. First, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 677-78 (1986), the Court addressed a free speech challenge by a student who was suspended after giving a speech in which he described another student with "an elaborate, graphic, and explicit sexual metaphor." Chief Justice Burger, who dissented in *Papish*, authored the majority opinion, which observed that schools have a responsibility to teach "the shared values of a civilized social order," *id.* at 683, including that "the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences," *id.* at 681. Finding "especially relevant" the contention in the *Tinker* dissent that schools need not "surrender control" to their students, *id.* at 686 (internal quotation marks omitted), the Court held that schools may restrict on-campus speech that is "lewd," "vulgar," or "indecent," even absent any disruption, *id.* at 685.

Two years later, the Court rejected a claim by high school students that their school violated the First Amendment by censoring articles about pregnancy and divorce from the school newspaper. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262-73 (1988). After finding "equally relevant" the portion of the *Tinker* dissent quoted in *Fraser*, *id.* at 271 n.4, the Court expressly refused to apply *Tinker*, *see id.* at 272-73.

Instead, the Court held that schools may regulate "student speech in school-sponsored expressive activities," which "members of the public might reasonably perceive to bear the imprimatur of the school," "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 271, 273. The Court declined to decide whether the rule applied at universities. *Id.* at 273 n.7.

Lastly, in *Morse*, the Court rejected a free speech claim by a student who was suspended for waving a banner that read "BONG HiTS 4 JESUS" at an off-campus, school-approved activity. *Morse v. Frederick*, 551 U.S. 393, 396-98 (2007). In a 5-4 decision, the Court held: (1) "*Tinker* is not the only basis for restricting student speech," *id.* at 406; (2) the speech in *Fraser* "would have been protected" had it been "outside the school context," *id.* at 405; and (3) a school may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use," *id.* at 402.

Like the Supreme Court, our student speech cases mainly concern on-campus speech by K-12 students.[3]

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[3] *See Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 35, 38 (10th Cir. 2013) (finding no free-speech violation under *Tinker* where the school prohibited the distribution of rubber fetus dolls based on a "strong potential for substantial disruption"); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1222, 1228 (10th Cir. 2009) (finding no violation under *Hazelwood* where the school required a student, in order to receive her diploma, to apologize for discussing her religious views during her valedictory speech, explaining that "discipline, courtesy, and respect for authority" constitute legitimate pedagogical goals (internal quotation marks omitted)); *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918,

We have extended *Hazelwood* to "speech that occurs in a [university] classroom as part of a class curriculum." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004); *see, e.g.*, *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 988-90 (10th Cir. 2017) (upholding qualified immunity where a university student was "chastised" and told to rewrite a paper after "using inflammatory language" in an assignment). But we have not yet decided whether *Hazelwood* applies to "university students' extracurricular speech," *Axson-Flynn*, 356 F.3d at 1286 n.6, or non-curricular speech.

Mr. Hunt insists that because *Fraser*, *Hazelwood*, and *Morse* do not apply, "*Tinker* is the applicable standard," Aplt. Opening Br. at 18, and establishes that his "right to free speech was violated," *id.* at 21. However, in *Morse*, Justice Thomas observed the Court has not "offer[ed] an explanation of when [*Tinker*] operates and when it does not," *Morse*, 551 U.S. at 418 (Thomas, J., concurring), and the majority itself

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922, 934 (10th Cir. 2002) (finding no violation under *Hazelwood* where the school allowed students to decorate memorial tiles but prohibited "religious symbols, the date of the shooting, or anything obscene or offensive"); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (finding no violation under *Tinker* where the school prohibited the display of the Confederate flag because it "might cause disruption and interfere with the rights of other students to be secure and let alone"); *Seamons v. Snow*, 84 F.3d 1226, 1237-38 (10th Cir. 1996) (holding the student properly stated a free speech claim where the school denied him "the ability to report physical assaults in the locker room," finding that the school's "fear of a disturbance stemming from the disapproval associated with [the student's] unpopular viewpoint regarding hazing in the school's locker rooms" was insufficient under *Tinker*).

acknowledged "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents," *id.* at 401.

For example, it is inescapable that *Tinker* and its progeny involved speech occurring on campus or as part of a school-sanctioned activity. *See Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) ("The Supreme Court has yet to speak on the scope of a school's authority to regulate expression that . . . does not occur on school grounds or at a school-sponsored event."). Additionally, none of the Court's cases involved online speech. *See* Aplt. Opening Br. at 21 (conceding the Court has not "specifically addressed the scope of the [F]irst [A]mendment rights of a university student's off-campus social media speech"). The Court held in 1997 that the First Amendment applied to the Internet, *see Reno v. ACLU*, 521 U.S. 844, 849 (1997), but it only recently addressed its application to social media, *see Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Unsurprisingly, "[a] growing body of scholarship [has] call[ed] for the Supreme Court to take a case applying its school speech doctrine to a student's online speech." Elizabeth Nicoll, *University Student Speech and the Internet: A Clusterf****, 47 NEW ENG. L. REV. 397, 397 (2012). But as the Court has not taken such a case, "First Amendment doctrine" "[a]t the intersection of university speech and social media" remains "unsettled." *Yeasin v. Durham*, 719 F. App'x 844, 852 (10th Cir. 2018) (concluding the law was not clearly established for a free speech claim by a student expelled for off-campus, online speech that violated the

university's code of conduct and sexual-harassment policy).[4]

Moreover, though at first blush they might appear favorable to Mr. Hunt, even viewed in isolation, the Supreme Court's university cases of *Healy* and *Papish* fail to supply clearly established law. *Healy* reiterated *Tinker*'s warning that "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." *Healy*, 408 U.S. at 180 (quoting *Tinker*, 393 U.S. at 503). *Healy* also acknowledged a college may "expect that its students adhere to generally accepted standards of conduct." *Id.* at 192 (internal quotation marks omitted). Requiring a graduate student to meet standards of professionalism that would be expected of him upon his entry into the profession is quite different from restricting speech solely because of a generalized "need for order," *Healy*, 408 U.S. at 180, or "in the name alone of 'conventions of decency,'" *Papish*, 410 U.S. at 670. *Healy* and *Papish* appear to leave space for administrators to operate as the circumstances demand when confronted with speech by students in professional schools that appears to be at odds with customary professional standards. And neither decision would have sent sufficiently clear signals to reasonable medical school administrators that sanctioning a student's off-campus, online speech for the purpose of instilling professional norms is unconstitutional.

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[4] We cite *Yeasin*, an unpublished case, for its persuasive value. Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

Nor has Mr. Hunt shown that the clearly established weight of authority from other circuits supports his position. Mr. Hunt relies on a 2015 case which noted that five out "'of the six circuits to have addressed whether *Tinker* applies to off-campus speech . . . have held it does.'" Aplt. Opening Br. at 24 (quoting *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (en banc)). However, even though *Bell* identified pre-2012 circuit precedent (including from the Fifth), it is notable that its analysis revealed a circuit split, 799 F.3d at 393, which belies a suggestion of clearly established law. "If judges disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Poolaw v. Marcantel*, 565 F.3d 721, 741 (10th Cir. 2009) (internal quotation marks and ellipsis omitted).

Several decisions from the Third Circuit highlight the lack of clarity at the time of the defendants' actions at issue. In 2010, that court found that "[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools," but admitted that: (1) "it [was] difficult to explain how this principle should be applied in practice"; (2) "it [was] unlikely that any broad categorical rules will emerge from its application"; and (3) "[a]t a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities." *McCauley v. Univ. of V.I.*, 618 F.3d 232, 247 (3d Cir. 2010).

That court issued two decisions a year later that failed to bring definiteness to this area of the law. *See J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist.*, 650 F.3d 915, 920-31 (3d Cir. 2011) (en banc) (concluding a middle school could not punish a student for creating on her home computer a MySpace profile that mocked her principal, noting the student took steps to make the profile private and the school could not have reasonably forecast a disruption); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207-19 (3d Cir. 2011) (en banc) (concluding a high school could not punish a student for a parody MySpace profile of his principal that he created off campus but later accessed on campus). The opinions found in favor of the students but revealed a deep division over whether *Tinker* applies off-campus, with six judges saying it should, *Snyder*, 650 F.3d at 943 (Fisher, J., dissenting), five disagreeing, *id.* at 940 (Smith, J., concurring), and others insisting the "off-campus versus on-campus distinction is artificial and untenable in the world we live in today," *Layshock*, 650 F.3d at 220 (Jordan, J., concurring) (internal quotation marks omitted). Two judges feared the cases could "send an 'anything goes' signal to students, faculties, and administrators of public schools." *Layshock*, 650 F.3d at 222 (Jordan, J., concurring).

Mr. Hunt's Facebook post also occurred months after a state high court found a university had not violated a mortuary science student's free speech rights when it imposed sanctions, including a writing assignment, in response to Facebook posts the school deemed, *inter alia*, unprofessional. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 511-24 (Minn. 2012).

Upholding the discipline, the court held "a university may regulate student speech on Facebook that violates established professional conduct standards," provided "any restrictions . . . [are] narrowly tailored and directly related to established professional conduct standards." *Id.* at 521.

Against this backdrop, we conclude that the Supreme Court's K-12 cases of *Tinker*, *Fraser*, *Hazelwood*, and *Morse* and its university cases of *Papish* and *Healy* fail to supply the requisite on-point precedent. Moreover, decisions from our court and other circuits have not bridged the unmistakable gaps in the case law, including whether: (1) *Tinker* applies off campus; (2) the on-campus/off-campus distinction applies to online speech; and (3) *Tinker* provides an appropriate framework for speech by students in graduate-level professional programs, such as medical schools, *cf. Salehpoor v. Shahinpoor*, 358 F.3d 782, 787 & n.5 (10th Cir. 2004) (applying the public-employee analysis to speech by a graduate-level engineering student).

In the end, Mr. Hunt has "failed to identify a case where [a medical school administrator] acting under similar circumstances as [the defendants in this case] was held to have violated the [First] Amendment." *Pauly*, 137 S. Ct. at 552. Mr. Hunt and the amici have provided a patchwork of cases connected by broad legal principles, but the law in late 2012 and 2013 would not have given the defendants notice that their response to the Facebook post was unconstitutional. *See Anderson v. Creighton,* 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right."). Accordingly, the defendants were entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the district court's order is affirmed.

Entered for the Court

Jerome A. Holmes
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 16-272 JCH/KK

[Filed September 6, 2018]

PAUL HUNT,

Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO; SCOTT CARROLL, M.D., in his individual and official capacities; JOHN DOE and JANE DOE MEMBERS OF THE COMMITTEE FOR STUDENT PROMOTION AND EVALUATION, in their individual and official capacities, TERESA A. VIGIL, M.D., in her individual and official capacities; PAUL ROTH, M.D., in his individual and official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on *Defendants' Motion to Dismiss or for Summary Judgment* [Doc. 3]. In addition to the motion and supporting brief, the Court has considered the Plaintiff's response [Doc. 15] the Defendants' reply [Doc. 16], the evidence submitted by the parties, and the relevant legal authorities. The Court concludes that Defendants are entitled to qualified immunity on Plaintiff's constitutional claims against them, and that the motion for summary judgment should be granted.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are supported by the record and viewed in the light most favorable to the Plaintiff.

In November of 2012, Plaintiff Paul Hunt was a medical student at the University of New Mexico School of Medicine ("UNMSOM"). Doc. 1-1 at 1. UNMSOM has a Social Media Policy to address the use of social media sites such as Facebook, Twitter, YouTube and Flickr, which provides in pertinent part:

- Be mindful that all posted content is subject to review in accordance with UNMSOM policies and the Student Professional Code of Conduct.
  …
- Exercise discretion, thoughtfulness and respect for your colleagues, associates and the university's supporters/community (social media fans). Avoid discussing or speculating on internal policies or operations. Refrain

> from engaging in dialogue that could disparage colleagues, competitors, or critics.
>
> - Refrain from reporting, speculating, discussing or giving any opinions on university topics or personalities that could be considered sensitive, confidential or disparaging.
>
> …
>
> - UNMSOM does not routinely monitor personal websites or social media outlets, however any issues that violate any established UNM Policy will be addressed.
>
> - Violation of this or an UNM policy may result in disciplinary action, up to and including dismissal from UNM.

Doc. 3-2.

The University of New Mexico has also adopted a Respectful Campus Policy. It provides, in relevant part:

> Individuals at all levels are allowed to discuss issues of concern in an open and honest manner, without fear of reprisal or retaliation from individuals above or below them in the university's hierarchy. At the same time, the right to address issues of concern does not grant individuals license to make untrue allegations, unduly inflammatory statements or unduly personal attacks, or to harass others, to violate confidentiality requirements, or engage in other

> conduct that violates the law or University policy.

Doc. 3-3 at 2.

Shortly after the presidential election in November of 2012, Hunt posted the following statement on his personal Facebook page:

> All right, I've had it. To all of you who support the Democratic candidates: The Republican Party sucks. But guess what. Your party and your candidates parade their depraved belief in legal child murder around with pride.
>
> Disgusting, immoral, and horrific. Don't celebrate Obama's victory tonight, you sick, disgusting people. You're abhorrent.
>
> Shame on you for supporting the genocide against the unborn. If you think gay marriage or the economy or taxes or whatever else is more important than this, you're fucking ridiculous.
>
> You're WORSE than the Germans during WW2. Many of them acted from honest patriotism. Many of them turned a blind eye to the genocide against the Jews. Bur you're celebrating it. Supporting it. Proudly proclaiming it. You are a disgrace to the name of human.
>
> So, sincerely, fuck you, Moloch worshipping assholes.

Doc. 3-1. The Facebook post was not directed at any individual, nor did it contain any reference to UNM or UNMSOM. Doc. 15-1 at 1 ¶ 6.

On November 15, 2012, Defendant Scott Carroll, M.D. ("Carroll") wrote a letter to Hunt informing him that the Dean of Students had formally referred Hunt to the Committee for Student Performance and Evaluation ("CSPE"). The referral stemmed from allegations of unprofessional conduct made by other students against Hunt arising from his Facebook post. Doc. 3-2 at 9. In the letter, Carroll stated, "[w]hile you have every right to your political and moral opinions and beliefs, there is still a professionalism standard that must be maintained as a member of the UNM medical school community." *Id*. Carroll then quoted from the UNM Respectful Campus Policy that states, "the right to address issues of concern does not grant individuals license to make untrue allegations, unduly inflammatory statements or unduly personal attacks, or to harass others . . ." *Id*. Finally, the letter informed Hunt that "CSPE will be conducting an investigation into the allegations at its November 20th meeting at 3pm [sic] and we would like you to prepare a statement regarding the allegations and be prepared to answer questions from the committee members."

On November 20, 2012, Hunt appeared before the CSPE, where he recognized members of the NMSOM faculty, as well as some fellow students. Doc. 15-1 at 4, ¶ 17. He read a prepared statement acknowledging his "guilt" and asking for help. *Id*. at ¶ 18. Then he answered questions from members of the CSPE. *Id*. at 4.

On January 24, 2013, Carroll again wrote to Hunt informing him that after the November 20th meeting, the CSPE "substantiated that [Hunt's] Facebook post

was in fact unprofessional conduct due to violations of the UNM Respectful Campus Policy (2240) and the UNM School of Medicine Social Media Policy. Doc. 15-1 at 11. Carroll told Hunt that he would be given a two-part "professional enhancement prescription." *Id*. The first, focusing on ethics, involved mentorship by a faculty member who would "assign readings and supervise a reflective writing assignment on patient autonomy and tolerance." *Id*. The second, focused on professionalism, was comprised of four parts: (1) a reflective writing assignment on the public expression of political beliefs by physicians, (2) an apology letter, which Hunt could present to anyone of his choice, or no one at all, (3) rewriting the Facebook post in a passionate, yet professionally appropriate way, and (4) ongoing meetings with Dr. Tim Nelson over a one-year period. *Id*. Next, the letter informed Hunt that the professionalism violation would be noted in the recommendation letter the Dean would provide to residency training programs, but that in the future Hunt could petition CSPE to remove the notation. *Id*. The letter stated the further professionalism lapses or failure to fulfill any of the professionalism requirements described in the letter could result in adverse action, including dismissal from the UNMSOM. *Id*. at 11-12. Finally, Carroll's letter quoted the UNMSOM Promotions and Due Process Policy, informing Hunt that if he believed the CSPE's decision imposing corrective action was flawed, he could request in writing that the Senior Associate Dean of Education review the decision. *Id*. at 12. Hunt did not utilize the review process. Doc. 3-2 at 2, ¶ 5.

Over the next twelve months, Hunt met with his "professionalism mentor," Dr. Nelson, twelve times as prescribed in the January 24, 2013 letter. Doc. 15-1 at 5, ¶ 25. In addition, Hunt rewrote his Facebook post as required by CSPE; however, it rejected his first attempt. *Id*. at ¶ 29; Doc. 15-1 at 12 (Ex. D). However, the CSPE accepted Hunt's second rewrite. Doc. 15-1 at 6, ¶ 30; Doc. 15-1 at 14 (Ex. E). The second rewrite still expresses Hunt's fervent opposition to abortion, but the tone of the piece is calm and rational, and it contains no expletives.

On April 22, 2014, Defendant Carroll notified Hunt that his professionalism enhancement prescription was completed but that "any future reports of unprofessional behavior to CSPE will be considered in light of your previous lapse in professionalism." Doc. 15-1 at ¶ 31; Doc. 15-1 at 16 (Ex. F). Dr. Carroll also noted, "If you would like this notation removed from your Dean's letter, you will need to submit a written petition to CSPE requesting its removal at a future date." *Id*.

On January 15, 2016, Plaintiff Paul Hunt ("Hunt") filed his First Amended Complaint in the Second Judicial District Court, Bernalillo County, New Mexico. In Counts I, II, and III of his amended complaint, Hunt asserts claims for violation of his First Amendment rights (freedom of speech, viewpoint discrimination, and retaliation, respectively). In Count IV, Hunt asserts that his Fourteenth Amendment right to due process was violated. Hunt asserts the first four counts against the UNM Board of Regents, unnamed CSPE members, and Carroll pursuant to 42 U.S.C. § 1983.

Count V does not assert a cause of action, but rather contains a request for declaratory judgment and injunctive relief against the Board of Regents, Defendant Teresa Vigil, M.D. ("Vigil"), and Defendant Paul Roth, M.D. ("Roth"), presumably as a remedy for the causes of action set forth in the first four counts. Specifically, Hunt asks for a declaration that his constitutional rights have been violated and an injunction requiring Vigil, as the current interim chair of the CSPE, to recommend to Roth, as Dean of the School of Medicine, to remove all references to the Facebook matter from Hunt's permanent record. Doc. 1-1 at ¶ 57. Similarly, in Count VI Hunt does not assert a cause of action but requests another remedy: imposition of punitive damages against unnamed CSPE members and Carroll.

On April 8, 2016, the Defendants removed the case to this federal district court, asserting federal question jurisdiction under 28 U.S.C. § 1331.

LEGAL STANDARD

Defendants have filed their motion as one to dismiss for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6), or in the alternative for summary judgment under Fed. R. Civ. Pro. 56.

"A motion to dismiss pursuant to Rule 12(b)(6) is treated as a motion for summary judgment when premised on materials outside the pleadings, and the opposing party is afforded the same notice and opportunity to respond as provided in Rule 56." *Hall v. Bellmon*, 935 F.2d 1106, 1110-11 (10th Cir. 1991). Here, Defendants have attached to their motion and

asked the Court to consider affidavits, university policies, and other matters outside the pleadings. Hunt, in turn, has done the same in his response brief. Accordingly, the Court will treat the motion as one for summary judgment under Rule 56.

Summary judgment should be granted "if the movant shows that there is no genuine issues as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the non-moving party bears the burden of proof, as here, summary judgment is warranted by demonstration of an absence of facts to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When qualified immunity is involved, "a defendant asserts a qualified immunity defense" then "the burden shifts to the plaintiff, who must meet a heavy two-part burden." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001)). The plaintiff first must establish that "the officer's conduct violated a constitutional right," and then the plaintiff must show that "the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

DISCUSSION

I. Constitutional Claims Against the Board of Regents and the Individual Defendants In Their Official Capacities

Section 1983 provides a claim for relief against "any person who, under color of state law, deprives another of rights protected by the Constitution." *Ellis ex rel. Estate of Ellis v. Ogden City*, 589 F.3d 1099, 1101 (10th Cir. 2009). Defendants argue that Hunt's claims for money damages for alleged violations of his

constitutional rights under 42 U.S.C. § 1983 against the Board of Regents and the individual defendants in their official capacities should be dismissed. The Court agrees. As the Tenth Circuit and Supreme Court have made clear, "Neither states nor state officers sued in their official capacity are 'persons' subject to suit under section 1983." *Duncan v. Gunter*, 15 F.3d 989, 991 (10th Cir. 1994) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989)). Hunt therefore may not seek damages from the Board of Regents or the individual defendants in their official capacities, and those claims will be dismissed. State officers sued in their individual capacities, however, "are 'persons' subject to suit under section 1983." *Duncan*, 15 F.3d at 991. Accordingly, the Court will consider Hunt's claims against the individual defendants in their individual capacities for both monetary and injunctive relief.

While Hunt recognizes the unavailability of damages against the Board of Regents and the individual defendants in their official capacities, he contends that he may still seek injunctive and declaratory relief from the Board of Regents. Defendants, in turn, argue that because Hunt has not named the individual regents in his amended complaint, he has failed to state a claim against a person covered by Section 1983.[1] The Court agrees with Defendants. Hunt has not named any individual members of the Board of Regents, but rather only the Board itself. As explained above, the Board of Regents

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[1] Both sides recognize that, having agreed to the removal of the case to federal district court, the Board of Regents has waived its Eleventh Amendment immunity to suit in this Court.

is an entity, not a "person" that may be held liable under Section 1983. *See McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168, 1172 (10th Cir. 2000) ("Having sued only the Board rather than the individual trustees, Mr. McLaughlin has failed to state a claim against a person covered by section 1983."). Accordingly, the Board of Regents is not subject to suit under § 1983, and Hunt's claims against the Board of Regents for injunctive and declaratory relief will be dismissed for failure to state a claim.

As a result of the foregoing discussion, what remains are Hunt's § 1983 claims in Counts I through IV against Carroll, Vigil, and Roth in their individual capacities.[2] As previously discussed, Counts V and VI do not assert causes of action, but rather request particular remedies.

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[2] According to the First Amended Complaint [Doc. 1-1], Hunt asserts his first four counts against "Board of Regents, CSPE members, and Scott Carroll, M.D." Hunt alleges that Defendant Vigil "is the interim chair of the CSPE," *Id*. at 4, ¶ 5, and therefore the complaint can reasonably be read to assert his constitutional claims in Counts I through IV against her. According to the First Amended Complaint, Defendant Roth is the Dean of the UNMSOM, that he "has the ultimate authority to remove all references to the Facebook mater from Plaintiff's academic record," and that he is a named defendant because "he has the ability to provide prospective injunctive relief for Plaintiff." *Id*. at ¶ 6. Thus, it not clear that Hunt is asserting his constitutional claims against Roth in his individual capacity. However, the parties do not address this question in their briefs. Resolution of this issue not being essential to the resolution of the motion, the Court will not address it here.

II. First Amendment Claims Against Defendants In Their Individual Capacities

As explained above, the Defendants have raised the defense of qualified immunity. As a result, Defendants have shifted the burden to Hunt to demonstrate that Defendants violated his First Amendment (freedom of speech) and Fourteenth Amendment (due process) rights, and that those rights were clearly established at the time of the violation. Courts have discretion to decide the order in which to engage in the two-prong qualified immunity analysis. *Tolan v. Cotton*, —— U.S. ——, 134 S. Ct. 1861, 1866 (2014) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). Here, the Court exercises its discretion to address only the clearly established prong of the standard as to the First Amendment claim. The issue before the Court is whether—assuming Carroll violated Hunt's First Amendment right to post on Facebook by subjecting him to discipline—this right was clearly established in late 2012 and in 2013, when that discipline was imposed. As discussed below, the Court finds an absence of controlling authority that specifically prohibits Carroll's conduct.

A. Clearly Established Law

Qualified immunity attaches when an official's conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. ——, 136 S. Ct. 305, 308 (2015). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

In other words, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. The Supreme Court very recently reminded us,

> Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined at a high level of generality. As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."

White v. Pauly, 137 S. Ct. 548, 552 (2017) (internal citations and quotations omitted).

B. Analysis

To the Court's knowledge, at the time of the disciplinary action at issue in this case, neither the Supreme Court nor the Tenth Circuit had considered whether graduate and professional schools specifically (or universities generally) can regulate off-campus, online speech by students that the university deems to be unprofessional or which violate its applicable rules of professionalism. Hunt has not provided any such authority to the Court, nor has the Court been able to locate any such authority.[3] Rather, Hunt contends that

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[3] November of 2012 is the relevant time frame regarding the clearly established law in this case. It appears that the U.S. District Court for the District of Kansas, which encountered a similar issue, also failed to find controlling Tenth Circuit or

at the time it was clearly established that the Supreme Court's opinion in *Tinker v. Des Moines Ind. Cnty. Sch. Dist.*, 393 U.S. 503 (1969) prohibits Carroll's conduct in this case. The Court disagrees with Hunt's analysis.

1. *Tinker* and Its Progeny Do Not Apply Here

In *Tinker*, the plaintiffs were high school and middle school students who planned to wear black armbands to express their hostility to the Vietnam war and their support for a truce. *Id.* at 504. The principals at the plaintiffs' schools learned of the plan and in response adopted a policy prohibiting the armbands. *Id.* Included in the policy was a provision that any student who refused to remove a black armband would be suspended until he or she returned without it. *Id.* Despite knowing the policy, the plaintiffs wore their armbands to school and were suspended accordingly. *Id.* The Supreme Court found that the plaintiffs' First Amendment rights had been violated. *Id.* at 513-14. The Court noted that a student's First Amendment rights are not limited to the classroom or to school hours, but that student speech which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. The school authorities in *Tinker* failed to show facts that might have reasonably led

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Supreme Court authority during the 2013-2014 time frame. *See Yeasin v. Durham*, 224 F.Supp.3d 1194, 1202 (D. Kan. 2016) ("[N]either the Supreme Court nor a panel of the Tenth Circuit has considered whether universities can regulate off-campus, online speech by students.").

them to believe that wearing the armbands would lead to substantial disruption of school activities, or that any such disruption actually occurred. *Id.* at 514. Thus, the school officials' restraint of the plaintiffs' expression violated the constitution. *Id.*

Hunt contends that it is *Tinker*'s "substantial disruption" standard that applies in this case. Doc. 15 at 8, 12, 21. He contends that because his off-campus, online speech did not cause disruption at UNMSOM, Carroll was not entitled to regulate that speech. In support of that argument, he relies on two Tenth Circuit decisions, *Seamons v. Snow*, 84 F.3d 1226, 1237 (10th Cir. 1996) and *Taylor v. Roswell Ind. Sch. Dist.*, 713 F.3d 25, 35-36 (10th Cir. 2013). In *Seamons*, the plaintiff was a high school student who was assaulted by five of his football teammates in the locker room. *Id.* at 1230. They grabbed him as he came out of the shower and bound his naked body, including his genitals, to a towel rack with adhesive tape. *Id.* The plaintiff reported this assault to school administrators, the principal, and the football coach, who then accused him of "betraying the team by bringing the incident to the attention of the administration" and requiring him to apologize to the team. *Id.* When he refused, the coach dismissed the plaintiff from the team. *Id.* The teenager asserted that the school officials violated his First Amendment right to freedom of speech by discouraging him from making statements to the press about the incident, and by removing him from the football team because he refused to apologize for informing authorities of the incident. *Id.* at 1236. Relying on *Tinker*, the court concluded that the plaintiff had properly stated a claim for violation of the

First Amendment and that the school officials were not entitled to qualified immunity:

> Brian's speech was responsibly tailored to the audience of school administrators, coaches, family and participants who needed to know about the incident. Brian's behavior neither disrupted classwork nor invaded the rights of other students. His speech was not part of a school-sponsored expressive activity such that listeners might believe that Brian's speech had the imprimatur of school sponsorship. We simply see no overriding school interest in denying Brian the ability to report physical assaults in the locker room. At most, the school's interest here was based on its fear of a disturbance stemming from the disapproval associated with Brian's unpopular viewpoint regarding hazing in the school's locker rooms. Under *Tinker*, that is not a sufficient justification to punish Brian's speech in these circumstances.

Id. at 1238.

Like *Seamons*, *Taylor* also took place in a high school setting. There, students sued the school district and superintendent alleging that school officials violated their First and Fourteenth Amendment rights by preventing them from distributing 2,500 rubber fetus dolls to other students. They also challenged the school district's policies requiring preapproval before distributing any non-school-sponsored material on school grounds. *Taylor*, 713 F.3d at 29. The defendants presented evidence that the plaintiffs had distributed about 300 of the dolls before they were stopped, and

that the dolls had created significant disruption at the school. *Id*. at 30-31. The Tenth Circuit noted that "this case does not turn on whether the content of Plaintiffs' message warrants First Amendment protection—there is no question that it does. The record shows Plaintiffs meant to convey a religious and political message when they distributed the rubber dolls, and the Constitution requires they be permitted to express these views at school in some form." *Id*. at 35. However, citing *Tinker* (which the court noted applies to "student speech in public schools"), *id*., the court concluded that the plaintiffs' free speech challenges failed because school officials reasonably forecasted that the distribution would cause substantial disruption, and because the distribution did in fact cause substantial disruption. *Id*. at 35, 38. The Tenth Circuit distinguished the distribution of the dolls from the "silent, passive expression that merely provokes discussion in the hallway" that a school could not properly prohibit under *Tinker*. *Id*. at 37. It further held that plaintiffs' free exercise and equal protection claims failed because the decision to stop the distribution was not based on religion, and plaintiffs failed to show they were treated differently from similarly situated students. *Id*. at 54.

Tinker, *Seamons*, and *Taylor* all address the free speech rights of secondary school students on school grounds, during school hours, or relating to a school activity. These cases do not fit in the context presented here, which is online speech by a university, graduate, or professional school student which is alleged to violate the school's rules of professionalism. Although law in this arena has been developing, the Court

cannot conclude that it was clearly established at the time the Defendants acted in this case.

2. Cases Addressing the Type of First Amendment Claim Presented By Hunt Were Not Clearly Established at the Relevant Time

A government official violates clearly established law when the contours of a right at the time of the challenged conduct are sufficiently clear so that a "reasonable official would understand that what he is doing violates that right." *Panagoulakos v. Yazzie*, 741 F.3d 1126, 1129 (10th Cir. 2013) (quoting *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013)). A plaintiff may establish this prong "by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, 'the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.' " *Cox v. Glanz*, 800 F3d 1231, 1247 (10th Cir. 2015) (quoting *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010)). When the clearly established requirement is "properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Most recently, the Supreme Court, in *Mullenix v. Luna*, explained that "[t]he dispositive question 'is whether the violative nature of particular conduct is clearly established.' This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' " 136 S.Ct. 305, 308 (2015) (citing *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201

(2001))). It must have been clear to a reasonable person in Defendant's position "that [their] conduct was unlawful in the situation [they] confronted." *Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014).

There have been a few cases dealing with the right to regulate online speech by university or professional school students in an effort to enforce professional standards or university policies, though none are Supreme Court or Tenth Circuit cases that had been published prior to late 2012 or in 2013, the relevant time period in this case. Thus, they cannot be used to demonstrate "clearly established law" within the meaning of a qualified immunity analysis.

In one recent Eighth Circuit case, a nursing student made statements on his personal Facebook page that another student found threatening. *Keefe v. Adams*, 840 F.3d 523, 526 (8th Cir. 2016). The student talked about his anger issues, giving someone a hemopneumothorax (a trauma to the lung), and called another student a "stupid bitch" for reporting his posts. *Id*. at 527. After reading the posts, the schools Director of Nursing became concerned and addressed the issue with Keefe, who was not receptive to her concern that the posts were unprofessional and attempted to downplay them as jokes. *Id*. In the face of Keefe's inability to recognize that his posts were unprofessional, the Director of Nursing decided to remove Keefe from the program and told him that he could appeal the decision. *Id*. She cited his violations of the nursing program's handbook, which stated that "students who fail to meet the moral, ethical, or professional behavioral standards of the nursing

program are not eligible to progress in the nursing program," and that these included "transgression of professional boundaries" and "behavior unbecoming of the Nursing Profession." *Id*. at 528. Further, the court noted that the Nurse's Association Code of Ethics "precludes any and all forms of prejudicial actions, any form of harassment or threatening behavior, or disregard for the effect of one's actions on others." *Id*.

The Eighth Circuit rejected Keefe's First Amendment claim. It noted that "many courts have upheld enforcement of academy requirements of professionalism and fitness, particularly for a program training licensed medical professionals. Fitness to practice as a health care professional goes beyond satisfactory performance of academic course work." *Id*. at 530. Thus, given the strong state interest in regulating the health professions, the Eight Circuit held that "teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school's curriculum that do not, at least on their face, run afoul of the First Amendment." *Id*. Furthermore, the court observed that a student may demonstrate an unacceptable lack of professionalism not only by conduct, but also by speech—including online speech. Administrators in a professional school may require compliance with applicable professionalism standards, even for off-campus activities, so long as their actions are reasonably related to pedagogical concerns. *Id*. at 531.

Yeasin v. Durham, 224 F. Supp. 3d 1194 (D. Kan. 2016)—a case arising from within the Tenth Circuit—is one in which a university punished a student for off-

campus speech. Plaintiff Yeasin dated a fellow university student until the summer of 2013, when their relationship ended with a consent protection order prohibiting Yeasin from having any contact with his former girlfriend. *Id*. at 1199. Over a period of four months, Yeasin sent out fourteen Tweets that referenced but did not name his ex-girlfriend. That fall, she complained to the university that the tweets violated the no-contact order, and it agreed, warning him via email that any further violation might result in his expulsion. *Id*. In October of 2013, the university determined that Yeasin had sexually harassed his ex-girlfriend and had violated the Student Code of Conduct. After a formal hearing, the university found that Yeasin "had committed non-academic misconduct based on the June 2013 incident, the threatening statements made to [his ex-girlfriend], the tweets, and violation of the No Contact Letter." *Id*. at 1200. Finding Yeasin's conduct to be so severe, pervasive, and offensive that it interfered with his ex-girlfriend's education, the university expelled him and banned him from campus. The *Yeasin* court considered whether the defendant, a university official, was entitled to qualified immunity on Yeasin's claim that his expulsion for Twitter posts violated his First Amendment rights.

The court pointed out that not only do colleges have a legitimate interest in preventing disruption on the campus, the Tenth Circuit and other Federal Circuit Courts of Appeals had found that less rigorous student-speech standards apply to college students. *Id*. at 1202 (citing *Keefe*, *supra*, and *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286-90 (10th Cir. 2004). In finding that the

law in this area was not clearly established in 2013, the *Yeasin* court stated:

> The law in this area is constantly developing, and when Plaintiff was expelled in 2013, it was even more unclear what standards applied. This case can hardly be categorized as a clear case of a content-based restriction in violation of the First Amendment. Most importantly, circuit courts have come to conflicting conclusions on whether a school can regulate off-campus, online student speech where such speech could foreseeably cause a material disruption to the administration of the school. The Tenth Circuit has not addressed off-campus, online student speech at the public school or university level.

224 F. Supp. 3d at 1202-03.

The lack of on-point legal authority that formed the basis of qualified immunity in *Yeasin* also persists here. During the period of late 2012 and into 2013, when Carroll and other members of the CSPE imposed corrective action on Hunt, there was no clearly established law prohibiting their actions. Defendants found that the inflammatory nature of Hunt's Facebook post violated university policies and as a result they imposed additional training requirements and required him to rewrite the post to express the same viewpoint, but in a more professional manner. They also made a notation of the incident in Hunt's file. What precludes a finding that Carroll violated clearly established due process rights is the lack of prior decisions classifying reprimands of professional students as academic or disciplinary, and the lack of uniformity in the decisions

that do exist. There was no controlling authority in this Circuit or a "consensus of cases of persuasive authority" in others on which the Defendants could have relied to determine whether they should be held to the standards of disciplinary, as opposed to academic, dismissals. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Officials are not liable for bad guesses in gray areas.

The absence of controlling authority that specifically prohibited Carroll's conduct is dispositive. The motion for summary judgment on the basis of qualified immunity will be granted.

III. Fourteenth Amendment Procedural Due Process Claim Against Defendants In Their Individual Capacities

Hunt also argues that the Defendants imposed discipline upon him in violation of his right to procedural due process. He alleges that the Board of Regents (now dismissed, as discussed in Part I, *supra*), CSPE members (who are not named individually as defendants in this case), and Defendant Carroll "failed to provide any guidelines as to appropriate standards for the hearing, or for the sanctions which were imposed on Plaintiff." Doc. 1-1 at ¶ 53. He further alleges that he was not informed he was entitled to be represented at the hearing, and that his "due process rights were violated because he was subjected to arbitrary and capricious government action, without notice of what standards were in effect." *Id*. at ¶ 54. He contends that UNMSOM's policies "were vague, and contained no notice of the consequences of violating the policies." *Id*. The Court interprets this to be a claim

that Carroll violated Hunt's right to procedural due process. After reviewing the law and the summary judgment evidence, the Court concludes that Hunt has failed to demonstrate that Carroll violated his constitutional due process rights, and therefore he is entitled to qualified immunity.

There are cases addressing the discipline of students and the process to be afforded them. In *Goss v. Lopez*, 419 U.S. 565, 581 (1975), the Supreme Court addressed the academic suspension of students, holding that even a short disciplinary suspension requires that the student "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." In *Bd. Of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 80-82 (1978), a student was dismissed from medical school following extensive review by a Council on Evaluation in accordance with established university procedures that did not include a pre-dismissal hearing. The student argued that procedural due process also required "the fundamental safeguards of representation by counsel, confrontation, and cross examination of witnesses." *Id.* at 86 n.2. The Court agreed that the university's elaborate procedures had complied with the procedural requirements of *Goss*. *Id.* at 85. The Court further noted that "far less stringent procedural requirements" apply to an "academic" dismissal. *Id.* at 86. This dicta addressed a reality that did not affect the Court's procedural due process decision in *Horowitz*—that academic dismissals, though accompanied by extensive procedural safeguards, often do not include a pre-dismissal face-to-

face hearing between the student and academic decision-makers.

The Court notes that, unlike in the cases above, the discipline that UNMSOM imposed upon Hunt did not extend to the level of a suspension or a dismissal. UNMSOM's "Due Process Policy and Procedure," [Doc. 16-1], distinguishes between "adverse actions," which may include dismissal, suspension, or repetition of all or part of the curriculum. *Id*. at Doc. 16-1, p. 1 of 6. Conversely, "corrective actions" are less serious and include "requiring a student to take a specified course, … monitoring a student more closely by placement on a 'watch' list, assigning an academic advisor with whom the student is required to meet and requiring a contract in which the student agrees to take certain actions in order to continue in medical school." *Id*. Under this policy, it appears that UNMSOM imposed a corrective action upon Hunt. The policy further provides that while adverse actions may be appealed, corrective actions such as those imposed upon Hunt may not but rather upon the student's request may be reviewed by the Senior Associate Dean of Education. *Id.* and *id*. at p.5 of 6. Hunt did not request this review.

As the Supreme Court has stated, due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotation omitted). When conduct that leads to an adverse academic decision is of a disciplinary nature, due process may require the procedural protections of *Goss v. Lopez* in determining whether the student was guilty of the misconduct in

question. In this case, the Court concludes that Hunt, like the student in *Horowitz*, was "awarded at least as much due process as the Fourteenth Amendment requires." 435 U.S. at 85, 98 S.Ct. 948. First, Hunt was given written notice of the charges against him. Carroll's November 15, 2012 letter to Hunt informed him that his Facebook post regarding abortion and the election had resulted in complaints of unprofessional conduct from Hunt's fellow students. Carroll's letter quoted from the UNM Respectful Campus Policy that states, "the right to address issues of concern does not grant individuals license to make untrue allegations, unduly inflammatory statements or unduly personal attacks, or to harass others . . ." *Id*. It also quoted from the Respectful Campus Policy. Finally, the letter informed Hunt that "CSPE will be conducting an investigation into the allegations at its November 20th meeting at 3pm [sic] and we would like you to prepare a statement regarding the allegations and be prepared to answer questions from the committee members." Thus, Hunt was informed in writing of the allegations against him, as well as the basis for those allegations, and the campus policies that he was alleged to have violated. Second, Hunt was given a hearing where he had an opportunity to present his side of the story and to make his own position clear. On November 20, 2012, Hunt appeared before the CSPE, where he recognized members of the NMSOM faculty, as well as some fellow students. Doc. 15-1 at 4, ¶ 17. He read a prepared statement acknowledging his "guilt" and asking for help. *Id*. at ¶ 18. Then he answered questions from members of the CSPE. *Id*. at 4.

Under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985), *Goss*, and *Horowitz*, this was all the process that was due to Hunt. *See Loudermill*, 470 U.S. at 546 (concluding that procedural due process entitles one to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."). Thus, there was no violation of Hunt's constitutional right to due process, and Carroll is entitled to qualified immunity.[4]

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[4] Hunt also contends, at the conclusion of his argument regarding procedural due process, that he was discriminated against and punished based upon the *content* of his Facebook post, rather than for violation of any university policy. Doc. 15 at 29. In support of his argument, Hunt attaches copies of Facebook posts allegedly made by other UNMSOM students who he asserts also violated university policies but were not punished by the university. None of those posts contains opinions in opposition to abortion, unlike Hunt's original post. *See* Doc. 15-2 at p. 1-5.

As a preliminary matter, the Court is not certain how this argument regarding content discrimination relates to Hunt's claim for a violation of procedural due process. However, leaving aside the specific legal claim to which it relates, a claim of content discrimination must show that a similarly situated person was treated differently than Hunt based on the content of their speech. *See, e.g., Pahls v.Thomas*, 718 F.3d 1210, 1238 (10th Cir. 2013) ("[P]urposeful discrimination requires more than intent as awareness of consequences. It follows, under this standard, that if the evidence shows only that a defendant is aware of disparate treatment of two similarly situated groups—but nothing more—then a § 1983 or Bivens claim for viewpoint discrimination must fail as a matter of law.") (internal citations and quotations omitted). For a plaintiff to succeed, there must be additional evidence—direct or circumstantial—that the defendant acted "for the purpose of discriminating on account of" viewpoint. *Ashcraft v. Iqbal*, 556 U.S. 662, 677 (2009).

CONCLUSION

In light of the foregoing, the Court concludes that Defendants are entitled to summary judgment on all of Hunt's claims against them. As explained above, the Board of Regents is an entity, not a "person" that may be held liable under Section 1983. Similarly, state officers sued in their official capacities are not "persons" subject to suit under section 1983. Defendant Carroll in his individual capacity is entitled to qualified immunity on Hunt's First Amendment claims because the law was not clearly established. In addition, Carroll is entitled to qualified immunity on Hunt's procedural due process claim because Hunt failed to demonstrate that his due process rights were violated. Finally, because Defendants prevailed on Hunt's substantive claims, Hunt cannot assert a right against Defendants Vigil and Roth for injunctive or declaratory relief, nor against Carroll for punitive damages. Defendants' motion will be granted.

Assuming for the sake of argument that the cited Facebook posts from other UNMSOM students did violate the Respectful Campus Policy or the Social Media Policy, just as Hunt's allegedly did, then Hunt might be able to prove a prima facie case of viewpoint discrimination if he offered evidence that UNMSOM knew about those posts but failed to address them. However, Hunt comes forward with no evidence that any complaints about the cited posts were ever made to UNMSOM or that Carroll or any other university official knew about the posts. In the absence of evidence that any official at UNMSOM knew about the posts, they cannot be held liable for failing to address them in the same manner that they addressed Hunt's Facebook post.

IT IS THEREFORE ORDERED that *Defendants' Motion to Dismiss or for Summary Judgment* [Doc. 3] is hereby **GRANTED** in its entirety.

s/_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 16-272 JCH/KK

[Filed September 6, 2018]

PAUL HUNT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO; SCOTT CARROLL, M.D., in his individual and official capacities; JOHN DOE and JANE DOE MEMBERS OF THE COMMITTEE FOR STUDENT PROMOTION AND EVALUATION, in their individual and official capacities, TERESA A. VIGIL, M.D., in her individual and official capacities; PAUL ROTH, M.D., in his individual and official capacities,	)
	)
Defendants.	)

FINAL JUDGMENT

Having granted Defendants' motion for summary judgment in a Memorandum Opinion and Order entered contemporaneously with this Final Judgment,

IT IS HEREBY ORDERED that final summary judgment is entered in favor of Defendants on all of Plaintiff's claims, which are dismissed with prejudice.

s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

November 15th, 2012

Paul Hunt
Address
Albuquerque, NM zip

Dear Mr. Hunt,

Dr. Espey, the Dean of Students, has formally referred you to the Committee for Student Performance and Evaluation (CSPE) due to allegations of unprofessional conduct made by other students related to a recent post you made on Facebook regarding your opposition to abortion and the recent election results. While you have every right to your political and moral opinions and beliefs, there is still a professionalism standard that must he maintained as a member of the UNM medical school community. According to the UNM Respectful Campus Policy (2240):

Individuals at all levels are allowed to discuss issues of concern in an open and honest manner, without fear of reprisal or retaliation from individuals above or below them in the university's hierarchy. At the same time, the right to address issues of concern does not grant individuals license to make untrue allegations, ***unduly inflammatory statements or unduly personal attacks, or to harass others,*** *to violate confidentiality requirements, or engage in other conduct that violates the law or University policy.*

The Respectful Campus Policy also applies to communication through social media outlets such as Facebook as stated in the UNMSOM Social Media Policy:

UNMSOM does not routinely monitor personal websites or social media outlets, however any issues that violate any established UNM Policy will be addressed. Violation of this or any UNM policy may result in disciplinary action, up to and including dismissal from UNM.

CSPE will be conducting an investigation into the allegations at its November 20th meeting at 3pm and we would like you to prepare a statement regarding the allegations and be prepared to answer questions from the committee members. Please notify the Office of Student Affairs by 5pm on Monday, November 19th, if you are unable to attend the meeting. Please see the attached copies of the Respectful Campus Policy and the Social Media Policy.

Sincerely,

Scott Carroll, MD
Chair, CSPE

Cc: Student file

APPENDIX D

January 4th, 2013

Paul Hunt
Address
Albuquerque, NM zip

Dear Mr. Hunt,

Thank you for attending the November 20th meeting of the Committee for Student Promotion and Evaluation (CSPE) to address allegations of unprofessional conduct related to your Facebook posts (see attached screen shots). After an extensive discussion, the committee substantiated that your Facebook post was in fact unprofessional conduct due to violations of the UNM Respectful Campus Policy (2240) and the UNM School of Medicine Social Media Policy.

However, instead of dismissing you from the school of medicine, the committee has chosen to impose a professionalism enhancement prescription composed of two components: an ethic component and a professionalism component, each with its own mentor.

The ethics component, which will focus on patient autonomy and the virtue of tolerance, will be mentored by Cynthia Geppert MD PhD. Dr. Geppert will assign readings and supervise a reflective writing assignment on patient autonomy and tolerance. The final product will be presented to the CSPE in two to four months. CSPE will evaluate the final product to determine if it

satisfies this component of your prescription. Please contact Dr. Geppert at cgeppert@salud.unm.edu as soon as possible to begin the prescription.

The professionalism component, which has four parts, will be mentored by Tim Nelson, MD. Part one is a reflective writing assignment on the public expression of political beliefs by physicians with final product presented to CSPE in a three to six month timeframe. Part two is an apology letter, due to CSPE in one month. You will then have the option of presenting the apology letter to your classmates, select individuals or no one as you choose. Part three is to rewrite your original Facebook post in a passionate, but professionally appropriate way with the final product due to CSPE in a six to eight month time frame. Finally, part four is to have ongoing meetings, at least monthly, with Dr. Nelson for the next 12 months. All written products will be submitted to CSPE within the specified windows at which time CSPE will determine if they satisfy this component of your prescription.

In addition, CSPE also voted to require notation of your professionalism violation in your Dean's Recommendation Letter provided to residency training programs. However, you may choose to petition CSPE to remove the notation at some point in the future. Also, please be aware that any future professionalism lapses will result in referral to CSPE and may result in adverse action such as dismissal from the UNM School of Medicine. Further, if you fail to fulfill the ethics and professionalism requirements set forth in this letter, you may be subject to adverse action, including dismissal from the School of Medicine.

As noted in the UNMSOM Promotions and Due Process Policy, "*If the student believes that the decision imposing corrective action (educational prescription) is fundamentally flawed, unfair or otherwise inappropriate, the student can request review by the Senior Associate Dean of Education (Dr. Craig Timm). The student shall present his or her reasons for disputing the action in writing. The Senior Associate Dean of Education may meet with the student and may discuss the matter with members of the CSPE and other faculty, as the Senior Associate Dean deems appropriate. The decision of the Senior Associate Dean of Education is final for the School of Medicine and for the University of New Mexico.*"

Sincerely,

Scott Carroll, MD
Chair, CSPE

Cc: Student file

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIVIL NO. 16-272 MCA/KK

[Filed May 4, 2016]

PAUL HUNT,

Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO; SCOTT CARROLL, M.D., in his individual and official capacities; JOHN DOE AND JANE DOE MEMBERS OF THE COMMITTEE, FOR STUDENT PROMOTION AND EVALUATION, in their individual and official capacities; TERESA A. VIGIL, M.D., in her individual and official capacities; and PAUL ROTH, M.D., in his individual and official capacities,

Defendants.

AFFIDAVIT OF PAUL HUNT (No. 1)

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

1. I am the Plaintiff in this lawsuit.

2. I am a medical student at the University of New Mexico School of Medicine (SOM).

3. In November, 2012, I was 24 years old. I was a full time student at SOM.

4. Following the United States presidential election in November, 2012, I posted on my personal Facebook account a statement which was critical of celebration of President Obama's re-election, critical of the Republican Party, and critical of abortion. *See* **Exhibit A.**

5. The Facebook post was not directed at any individual.

6. The Facebook post contained no references to the University of New Mexico, nor any references to SOM. I did not identify myself as a student at UNM or SOM.

7. The Facebook post contained no threats towards any person or organization.

8. On November 15, 2012, I was in my tutorial section for Genetics and Neoplasia, when a person from the Health Science Center's Registrar's office escorted me to the office of Eve Espey, MD. Dr. Espey was the Associate Dean of Students for SOM.

9. Dr. Espey handed me a printed copy of my Facebook post and demanded that I "explain this posting."

10. I began to say that I wanted people to understand how truly wrong abortion is.

11. Dr. Espey cut me off and threatened to suspend me "under [her] emergency powers as Dean of Students."

12. Dr. Espey then advised that she received three complaints from students who had apparently read the Facebook post, and provided copies of the post to her. She also advised that she had reported me to the Committee on Student Performance Enhancement (CSPE) as a second offender, based on a prior incident. The prior occurrence, which took place two months earlier, involved a discussion that began in an a clinical class. Specifically, I had voiced my opinion that the medical literature suggested that routine infant circumcisions were not medically necessary procedures. Following that class, I sent Dr. Stephanie Nevarez y Fernandez, M.D., my preceptor for Foundations of Clinical Practice who was teaching the class, an email to explain my opinion regarding circumcision. Dr. Nevarez y Fernandez apparently had been offended by my email. Dr. Espey invited me to discuss the issue and I sent a written apology, as requested by Dr. Espey, to Dr. Nevarez y Fernandez. At the time, Dr. Espey explicitly told me that I was "not in trouble," and that nothing official would be placed on my record regarding this incident. I was surprised that Dr. Espey intended to report me as a second offender to CSPE.

13. At the conclusion of my meeting with Dr. Espey regarding the Facebook post, she told me I would have to appear before CSPE. She said that CSPE might expel me from SOM, suspend me from SOM, order neuropsychological testing, or impose some other form of punishment because of the Facebook post. A copy of the letter dated November 15, 2014, indicating that CSPE was conducting an investigation into the Facebook post as a violation of both the UNM Respectful Campus Policy and UNMSOM's Social Media policy, that I would have to appear at a hearing, and that I should prepare a written statement, is attached hereto as **Exhibit B.**

14. Dr. Espey also cautioned me that if I appeared before CSPE and argued the first amendment (she referred to it as a "free speech angle") that "things will go very poorly" for me. Dr. Espey did not offer me any information regarding sources of support or assistance in dealing with CSPE. Rather, Dr. Espey told me she has "immense sway" in how CSPE makes its findings.

15. Deeply concerned by this event, I sought out Gregory Franchini, MD, a member of the SOM faculty, to ask for his guidance. Dr. Franchini told me that CSPE did not allow anyone to represent or accompany a student who was in a CSPE hearing – not a lawyer, not a faculty member, not a fellow student. He said I would have to appear by myself and I should consider writing a statement of apology that I could read at the hearing. I also consulted with Mr. Bradley Singer, then a third-year medical student, in his capacity as then Student Chairman of the Committee for the

Advancement of Professionalisms and Ethics (CAPE). He advised me that the best course of action was to "throw [myself] on [my] sword," demonstrate remorse and apologize to avoid any severe repercussions. I was deeply concerned about the possible consequence of being expelled or suffering some other consequence that could affect my medical school education. As a result, I consulted with Dr. Espey, Dr. Franchini, and Mr. Singer in the drafting of the statement I would read at the hearing. This appeared to be the best course of action to avoid being penalized in any way that would affect my ability to obtain a medical degree.

16. On November 20, 2012, I appeared before CSPE. While I was waiting, one of the administrative staff asked me, "I'm sorry, I'm just curious – is this where they decide whether or not you get to stay in school? I often see students leaving crying."

17. When I entered the conference room there were about twenty people seated around a large conference table. I recognized some as SOM faculty and some as SOM students.

18. I read the statement I had written acknowledging my "guilt" and asking CSPE for help to overcome my "deficiencies"

19. When I was finished, Victor Strasburger, M.D. began the questioning. He asked me, "how do you feel about Jews?"

20. I was not aware that I would have to defend myself against a charge of antisemitism. I answered his question to the best of my ability, advising that I had no such prejudice.

21. Dr. Strasburger then asked me how I felt about African Americans. I again advised that I had no such prejudice. Thereafter, I was asked a series of questions related to my view on violence against doctors who perform abortions and other abortion-related subject matter.

22. My appearance before CSPE lasted about thirty to forty-five minutes.

23. On January 24, 2013, the Chairman of CSPE, Scott Carroll, M.D., notified me in writing that "the committee substantiated that your Facebook post was in fact unprofessional conduct due to violations of the UNM Respectful Campus Policy (2240) and the UNM School of Medicine Social Media Policy." A copy of that letter is attached hereto as **Exhibit C.** In sum the letter states that instead of dismissing me from SOM, the committee was imposing "a professionalism enhancement prescription composed of two components: an ethics component and a professionalism component, each with its own mentor." Specifically, the ethics component required that I meet with Cynthia Geppert, MD PhD for a period of two to four months, during which time I would be assigned readings and would ultimately be required to write a "reflective" paper on patient autonomy and tolerance. The letter indicated that the final product would be presented to CSPE, who would determine whether the paper satisfied this ethics requirement.

The professionalism requirement contained four parts and would be mentored by Tim Nelson, M.D. : 1) I was required to write a "reflective" paper on "public expression of political beliefs by physicians, which

would be presented to CSPE for its approval in a three to six month time frame; 2) drafting of an apology letter to CSPE which had to be submitted within one month; 3) rewriting of the Facebook post "in a passionate but professionally appropriate way" which had to be submitted to CSPE in a six to eight month time frame; and 4) attend meetings on a monthly basis with Dr. Nelson for a period of one year.

24. In addition, the letter indicated that CSPE had voted to require notation of a professionalism violation in my Dean's Recommendation Letter which is a mandatory part of residency training program applications, that I could petition its removal at some unspecified future date, and that if I had any more similar transgressions like the Facebook post, I would be in danger of being expelled from SOM.

25. After CSPE ordered me to undergo "professionalism enhancement training," I met twelve times during the next twelve months with Timothy Nelson, M.D., who was assigned to be my "professionalism mentor."

26. Dr. Nelson told me that any attempt to appeal the decision of CSPE would be fruitless.

27. I was instructed to meet with Sally Fortner, M.D., who would be another professionalism mentor. She told me it would look good to CSPE if I took her course, "Crucial Confrontations," so I took her class.

28. I was instructed to meet with Cynthia Geppert, M.D., PhD in her office at the Veterans Administration Hospital. She is an ethics advisor to SOM. She was assigned to be one of my ethics mentors.

She told me it was of no importance to her if SOM had violated my constitutional rights. Instead, her focus was to teach me how to comport myself as a "professional."

29. In November, 2013 CSPE required me to re-write the Facebook post. I met with Dr. Nelson and Sheila Hickey, M.D. Dr. Hickey had succeeded Dr. Espey as Associate Dean of Students. They approved my re-write. CSPE rejected it. *See* **Exhibit D.**

30. I re-wrote the re-write of the Facebook post, and on April 22, 2014, Dr. Carroll notified me that CSPE had accepted the re-write of the re-write. *See* **Exhibit E.**

31. On April 22, 2014, CSPE notified me that my professionalism enhancement prescription was completed.

32. The same day, Dr. Carroll emailed me and advised that I should not petition to have the notation of professionalism violation removed from my student file until I had completed Phase II of my medical education and was ready to be promoted to Phase III. A copy of that email is attached hereto as **Exhibit F.** I expect to be promoted to Phase III in September, 2017. Therefore, based on what I have been told by multiple faculty members (Dr. Carroll, Dr. Espey, Dr. Hickey, and Dr. Fortner) who advised me not to petition until Phase III is about to begin, I plan to petition in August, 2017 and at the time ask that the notation be removed. I do not know what the criteria or standards are for removing the notation, because to the

best of my knowledge the SOM and the University do not publish these standards anywhere.

Further, Affiant sayeth not.

s/_____
PAUL HUNT

SUBSCRIBED AND SWORN to before me this 29th day of April, 2016, by **PAUL HUNT,** who is personally known to me and\or made proper identification of himself to me with an appropriate government issued photo identification.

s/_____
Seal NOTARY PUBLIC

My commission expires: 3/24/2019

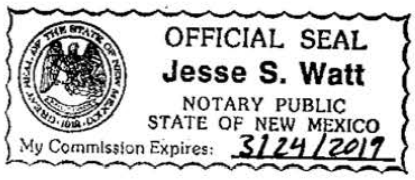

EXHIBIT D

To the supporters of Democratic candidates;

I have many disagreements with the Republican Party, and to be honest, I find some of their positions as ill-conceived and detrimental as the most ardent Democrat. However, I find myself disturbed in the defense of the party and the rejoicing in its victory tonight. This is, of course, because as one of its core positions, the Democratic Party supports the legality of the murder of children. This belief, by some, is worn with shame. However, too often, supporters of the Democrats parade their support of this particular issue as a high virtue. It is lauded with great pride.

This act of abortion, feticide, murder, pregnancy termination – whatever you wish to call it – is disgusting and immoral. Human beings at their most innocent and vulnerable are being killed. Many of you are celebrating President Obama's re-election with great joy because of his support for the continued legality of abortion, and frankly, this exuberant jubilation disgusts me. I have many friends who think that legal means have been exhausted, and that there is essentially no difference between Republicans and Democrats on this issue. Republicans use it to get votes, and the legality of abortion is firmly entrenched. I disagree, but I sympathize with this position and understand why someone would vote Democratic accordingly. However, every other issue, healthcare reform, marriage equality, the economy, or taxes pales in comparison to the murder of 1.3 million human beings every year.

To those who support the Democratic Party specifically because of its position on abortion, I say to you, "Shame!" Many have stood by in history during genocide and other mass murders with tacit approval. Some have stood by in fear to speak up for their own lives and safety. Others participate and goad on. I urge those of you engaged in promoting and continuing this atrocity to reconsider your positions.