

**STATE OF RHODE ISLAND
PROVIDENCE, SC.**

SUPERIOR COURT

WILLIAM FELKNER,

Plaintiff,

v.

**RHODE ISLAND COLLEGE,
JOHN NAZARIAN, individually and in his
official capacity as President of Rhode Island
College; SCOTT KANE, individually and in
his official capacity as Dean of Students at
Rhode Island College; CAROL BENNETT-
SPEIGHT, individually and in her official
capacity as Dean of the School of Social
Work; JAMES RYCZEK, individually;
ROBERTA PEARLMUTTER, individually
and in her official capacity as Professor of
Social Work; and S. SCOTT MUELLER,
individually and in his official capacity as
Assistant Professor of Social Work,**

Defendants.

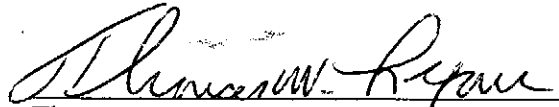
C.A. No. 07-6702

Plaintiff's Objection to Defendants' Summary Judgment Motion

Pursuant to Super.R.Civ.P. 56, plaintiff William Felkner objects to defendants' motion for summary judgment on the grounds that there are material issues of disputed fact and defendants' memorandum misstates the applicable law.

Mr. Felkner relies upon his verified complaint, Mr. Felkner's affidavit, the affidavit of Richard J. Gelles, all the other supporting materials as listed in the Table of Contents of the accompany appendix, and the accompanying memorandum of law in support of Mr. Felkner's objection.

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I hereby certify that on this 23 day of September, 2008, a copy of the within was sent to the above by regular mail, postage prepaid.



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**Plaintiff's Memorandum of Law in Support of His
Objection to Defendants' Summary Judgment Motion**

It is difficult to imagine a motion for summary judgment laden with more material
disputed facts than this one. For that reason alone, the Court should deny the motion.
See, e.g., Pacheco v. Massachusetts Casualty Insurance Co., 610 A.2d 111 (R.I.
1992)(dispute over whether insurance agent made a certain representation was a factual
dispute that prevented summary judgment); Industrial National Bank v. Peloso, 121 R.I.
305, 397 A.2d 1312 (1979)(dispute over existence of subsequent oral agreement was a
material factual dispute in action to enforce a promissory note). However, defendants

also ignore or mischaracterize the applicable law and, accordingly, have no appropriate grounds for their motion.

In addition, although the subject motion appears to seek summary judgment on all claims, it fails to address the claims against the corporate defendant, Rhode Island College, and it fails to address Mr. Felkner's rights under the College's "Student Bill of Rights." Verified Complaint, ¶¶2, 3, 4, et seq.

Statement of Disputed Facts

Plaintiff William Felkner ("Mr. Felkner") has filed a highly detailed, verified complaint that sets forth his position as to the facts. The complaint is over 30 pages long and includes over 100 paragraphs of specific, factual allegations. In addition, plaintiff attaches his affidavit ("Felkner Affidavit") to authenticate various communications he had with defendants and to respond to various points defendants raise not addressed in his verified complaint.

In essence, plaintiff, a former graduate student at Rhode Island College in the School of Social Work, alleges that defendants-Rhode Island College and various current and former faculty members-collectively and individually forced upon plaintiff a political orthodoxy with which he disagreed and that defendants stigmatized and otherwise punished plaintiff for failing to adhere to that orthodoxy. Among other things, defendants individually or collectively refused to communicate with Mr. Felkner about academic matters except by methods or at times very inconvenient to Mr. Felkner, organized a class discussion specifically critical of Mr. Felkner's political views, denied him the opportunity to work on projects consistent with his views, and otherwise

interfered with his academic progress. These actions violated Mr. Felkner's constitutional and other rights.

This is a sample of some of the most important facts Mr. Felkner sets forth in his verified complaint and affidavit, though he refers the Court to the complaint and affidavit themselves for the complete facts and will cite to the complaint and affidavit in this memorandum.

1. At all relevant times, plaintiff William Felkner ("Mr. Felkner") was a student in defendant Rhode Island College's ("RIC") Master of Social Work program operated by RIC's School of Social Work ("SSW"). Verified Complaint, ¶6.
2. Defendant Rhode Island College is a domestic non-profit corporation that provides higher public education. It is funded largely or entirely by the taxpayers of the State of Rhode Island. Verified Complaint, ¶7.
3. The individual defendants, John Nazarian, Scott Kane, Carol Bennett-Speight, James Ryczek, Roberta Pearlmuter and S. Scott Mueller, were at all relevant times, administrators and/or instructors at Rhode Island College including the School of Social Work. Verified Complaint, ¶¶8-12.
4. Rhode Island College has a "Student Bill of Rights" that includes the following provisions, among others:
 - a. Article I, Section 1, entitled "Freedom of Expression and Association," states in part: "Students shall be free to examine and discuss all questions of interest to them and to express opinions publicly and privately."
 - b. Article II, "Freedom of Communication," provides student editors and managers of "means of communication (such as... web pages)...shall not be arbitrarily suspended because of faculty disapproval of the editorial policy or content of the communications."
 - c. Article X, "Freedom in the Classroom," states:
Section 1. The instructor in the classroom and in conference should encourage free discussion, inquiry and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct unrelated to academic standards. Students are

protected through orderly procedures against prejudiced or capricious academic evaluation.

Section 2. Students are free to express differences of opinion or to disagree with data or views offered in any course of study. However, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

Verified Complaint, ¶¶ 2, 3, 5.

5. Soon after matriculating at SSW in September 2004, Mr. Felkner found his conservative political perspectives were at odds with those of many faculty members. For example, he had an exchange of emails with Ryczek, who was one of his instructors, about a film SSW was showing, "Fahrenheit 9/11," that took a position against the war in Iraq. Ryczek said, *inter alia*:

As I have mentioned in class, and I assume you've heard in other classes, Social Work is a value-based profession that clearly articulates a socio-political ideology about how the world works and the world should work. In fact, NASW, the professional organization, puts out a position paper on just about everything in the realm of public discourse and debate. We also have a PAC specifically organized to promote certain candidates with whom we share the same political agenda and outlook...and as you may have guessed, is working actively to defeat Bush. So, as a social worker, I don't find it at all unusual that a film like 9/11 might officially be sponsored by the school, and that the alternative view film might not be sponsored. In short, by and large as a profession we do take sides... and indeed in this school, we have a mission devoted to the value of social and economic justice...

Yet, if a student finds that they are consistently and regularly experiencing opposite views from what is being taught and espoused in the curriculum, or the professional "norms" that keep coming up in class and in field, then their fit with the profession will not get any more comfortable, and in fact will most likely become increasingly uncomfortable.

I will be the first one to admit a bias toward a certain point of view. But I don't characterize my "bias" in this instance as a pejorative thing. In fact, I think the biases and predilections I hold toward how I see the world and how it should be are why I am a social worker. In the words of a colleague, I revel in my biases. So, I think anyone who consistently holds antithetical views to those that are espoused by the profession might ask themselves whether social work is the profession

for them...or similarly, if one finds the views in the curriculum at RIC SSW antithetical to those they hold closely, then this particular school might not be a good fit for them.... (emphasis added). Felkner Affidavit, ¶4.

6. Mr. Felkner contacted Prof. Dan Weisman who sponsored the showing of “Fahrenheit 9/11” and they had a cordial exchange of emails, during which Prof. Weisman said:

I want to correct a perception you seem to have: the SSW is not committed to balanced presentations, nor should we be. We are not a debating society; we are a values-based profession and we are responsible to promote the values that underlie social work. For the most part, Republican ideology is oppositional to the profession’s fundamental values. Felkner Affidavit ¶5.

7. In one of Pearlmutter’s classes that Mr. Felkner took, Advanced Policy Practice, the syllabus stated: “Students will learn how to plan, develop, implement, and evaluate social welfare policies and programs that focus on social justice and the redistribution of power and wealth in our society.” Felkner Affidavit ¶25 (emphasis added).

8. Troubled by these and other faculty comments, Mr. Felkner established a website, www.collegebias.com, where he posted his experiences of liberal “bias” at RIC SSW, including faculty comments, used the website as a forum to criticize these comments, advocated for an Academic Bill of Rights, and recorded his discriminatory treatment by the faculty. (Representative printouts of this website are attached to the Felkner Affidavit). He also criticized the faculty perspective in online magazines, newspapers, radio talk shows and a TV news show. Verified Complaint, ¶21, 26, 44, 45, 59, 72, 82. Felkner Affidavit ¶26.

9. Mr. Felkner met with Profs. Mildred Bates and Lenore Olsen, chairs of the Bachelors School of Social Work and Masters School of Social Work, respectively. He asked that the SSW show the film “FarenHYPE 911,” which is a response to “Fahrenheit 9/11.” Prof. Bates replied, “It’s not going to happen.”¹ She added: “We hope all social workers are liberal.” Verified Complaint, ¶25.

10. One of the SSW courses taught by Ryczek involved lobbying at the State House, including lobbying for a Senate Bill 525 respecting the Family Independence Program, that would amend the State’s welfare program. However, after researching the data supporting the bill, he concluded he could not support the bill and wanted to lobby against it.

¹ Mr. Felkner acknowledges that the school eventually did show “FarenHYPE 911,” but not until the day before the 2004 election.

However, Ryczek told Felkner that RIC “is a perspective school and we teach that perspective.” Ryczek added: “if you are going to lobby on that bill, you’re going to lobby in our perspective.” Verified Complaint, ¶¶34-43.

11. Defendants responded to this situation, not by allowing Mr. Felkner to lobby according to his political beliefs in that class, but by transferring him to a different class. Verified Complaint, 34-43, 60.
12. In a variety of other ways, defendants collectively and individually retaliated against or punished Mr. Felkner for expressing his political views, for objecting to the political “bias” at RIC SSW, and for publicizing defendants’ actions. For example, Ryczek told Mr. Felkner that Ryczek would not approve any field placement necessary for graduation unless the placement would implement SSW’s “progressive social change perspective” and that the objectives of Mr. Felkner’s proposed concentration required him to advocate for liberal, progressive politics. When Mr. Felkner said this was unconstitutional, Ryczek replied: “until there is a court case that says we need to do this, this is the law we are operating under.” Ryczek subsequently told Mr. Felkner that due to his refusal to work for progressive policies, Mr. Felkner would “not be able to meet the academic requirements necessary to obtain a degree.” Verified Complaint, ¶¶89-90.
13. Ryczek refused to communicate with him by email or by telephone except during regular office hours which was very difficult for Mr. Felkner because he lives in Ashaway, Rhode Island, worked during the day and his employer restricted personal phone calls. Verified Complaint, ¶¶24, 82.
14. During one class Mr. Felkner had with Pearlmutter, she led a fifty-minute in-class discussion criticizing Mr. Felkner’s political views and the postings on his website and she allowed other students to criticize his views without allowing him to respond. Verified Complaint, ¶73.
15. Mr. Felkner was pressured into taking down his website because the faculty filed charges against him. Verified Complaint, ¶¶21-23, 74.
16. Ryczek and Mueller refused to let Mr. Felkner do an internship in the Governor’s office working on welfare reform because Ryczek said the internship would not implement SSW’s “progressive social change perspective” and Mueller said the topic was “toxic,” and that by preventing Mr. Felkner from focusing on this topic it “avoids conflict between the governor’s office and the school...” Verified Complaint, ¶¶89-96, see also ¶¶34-43; Felkner Affidavit ¶3.

17. Although Mr. Felkner has completed all the classes required for his master's degree, defendants' actions resulted in Mr. Felkner not being able to complete the Integrative Project also required and the SSW has since dismissed him from the master's program. Verified Complaint, ¶102-03; Felkner Affidavit ¶24.
18. In addition, defendants' actions unconstitutionally restricted Felkner's freedom of speech and expression and his rights under the Student Bill of Rights as well as causing him great distress. Verified Complaint, ¶¶2-4, 105-131.
19. In a conversation with Professor Mueller, Mr. Felkner stated that he felt that the SSW was a very harassing environment, and that, as a result, Mr. Felkner rarely spoke up in class anymore. Felkner Affidavit ¶1.
20. Dean Richard Gelles, Dean of the University of Pennsylvania School of Social Policy and Practice, states in the attached affidavit ("Gelles Affidavit") that the circumstances and events described by Mr. Felkner in his verified complaint are "contrary to the concepts of academic freedom and constitute a substantial departure from the norms of academic debate and scholarship that should prevail in schools of sociology in our colleges and universities." Gelles Affidavit ¶9.

Other examples of defendants' actions are detailed in the Verified Complaint.

It is apparent that defendants have a completely different version of the "facts."

In fact, much of defendants' memorandum and accompanying affidavits explicitly dispute the specific, material factual allegations of Mr. Felkner's Verified Complaint.

For example:

1. James Ryczek affidavit, Paragraph 2: "Plaintiff's complaint is full of falsehoods and misrepresentations about which I have personal knowledge."
2. Ryczek affidavit, Paragraph 10: "In his complaint paragraph 24 Plaintiff falsely asserts that: Defendant Ryczek refused to communicate any further with Mr. Felkner by e-mail or by phone."
3. Roberta Pearlmutter affidavit, Paragraph 2: "I have reviewed Plaintiff's Verified Complaint and there are a variety of misstatements of facts contained therein about which I have personal knowledge."

4. Pearlmutter affidavit, Paragraph 41: "Plaintiff falsely asserts in paragraph 73 that I led a fifty-minute in-class discussion 'assailing Mr. Felkner's conservative views and the postings on his website.'"
5. Pearlmutter affidavit, Paragraph 49: "However, Plaintiff's [sic] falsely asserts in the remainder of paragraph 74 that: 'As the basis for these charges, Defendant Pearlmutter cited to: ... his attempts to lobby for the ABOR [Academic Bill of Rights].'"
6. Scott Mueller affidavit, Paragraph 2: "I have reviewed Plaintiff's Verified Complaint and there are a variety of misstatements of fact contained therein about which I have personal knowledge."
7. Mueller Affidavit, Paragraph 3: "Plaintiff's assertion that I prohibited him from working on the 'governor's welfare reform program' is simply false."
8. Deborah Siegel affidavit, Paragraph 2: "I have reviewed Plaintiff's Verified Complaint and there are a variety of false and/or misleading statements contained therein about which I have personal knowledge."
9. Siegel affidavit, Paragraph 3: "Plaintiff's claim in paragraphs 96 through 103 that he is not responsible for his failure to finish his Integrative Project is not true."
10. Carol Bennett-Speight affidavit, Paragraph 3: "I have reviewed Plaintiff's Verified Complaint and there are a variety of false and/or misleading statements contained therein about which I have personal knowledge."
11. Bennett-Speight affidavit, Paragraph 4: "Specifically, Plaintiff's assertion in paragraph 101, that Vice President Dan King, during a September 21, 2006 meeting among Plaintiff, King and me, approved Mr. Felkner's request to work on welfare reform is not true."

Presumably, defendants view all these "facts" as material, otherwise, they would not bother disputing them in this motion. It would be very difficult to list every other "fact" set forth in defendants' motion and affidavits that plaintiff disputes. Plaintiff will refer to at least some of these factual disputes throughout this memorandum.

**I. The Court Cannot Grant This Motion for Summary Judgment
Where There Are Numerous Issues of Disputed Facts**

The Court cannot grant summary judgment where there are numerous issues of material disputed fact. Rule 56(c) states: “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Super.R.Civ.P. 56(c)(emphasis added). The Rhode Island Supreme Court has said:

The function of the motion justice considering a proposed summary judgment is not to cull out the weak cases from the herd of lawsuits waiting to be tried. Rather, only if the case is legally dead on arrival should the court take the drastic step of administering last rites by granting summary judgment. Here, however, weak, improbable or unlikely [the objector’s] assertions of gift-giving and loan forgiveness may have appeared to the motion justice, they still created material issues of material fact concerning whether [movants’] actions prevented them from attempting to collect Charles’ \$25,000 debt to the trust....

Mitchell v. Mitchell, 756 A.2d 179, 185 (R.I. 2000). Moreover, the trial court must view the pleadings, affidavits and other relevant documents in the light most favorable to the opposing party. Mullins v. Federal Dairy Co., 568 A.2d 759 (R.I. 1990).

Here, as set forth above, defendants’ affidavits and memorandum explicitly set forth innumerable issues of material fact. Moreover, to the extent there are factual disagreements, the Court must view them in the light most favorable to plaintiff.² For these reasons alone, it would be improper (and probably impossible) for the Court to attempt to sort them out on summary judgment and decide this motion in defendants’ favor.

² Defendants’ filed their motion without conducting any discovery to determine the other factual bases of Felkner’s complaint.

II. Based on Defendants' Answer, the Court Should Deem Admitted the Allegations of the Complaint and Strike Defendants' Affidavits

Defendants answered every single paragraph of the verified complaint by stating:

Defendants neither admit nor deny the allegations contained in paragraph [1] of Plaintiff's Complaint and leaves [sic] Plaintiff to his proof; to the extent that any allegation in this paragraph could create or support liability on the part of any Defendant, such allegation is denied.

Notably, defendants made this response to allegations about their positions at the school, the communications they had with plaintiff and the school's curriculum, all subjects about which they should have personal knowledge, at the very least. Now, defendants submit affidavits and a memorandum in support of their motion that attempt to contradict the allegations of the verified complaint.

Rule 8(b) of the Superior Court Rules of Civil procedure states:

A party shall state in short plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the affect of a denial.

Rule 8(d) states: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading."

No Rhode Island case has addressed the requirements of these rules. However, cases from other jurisdictions have. See, Biggs v. Public Service Coordinated Transport, 280 F.2d 311, 313-314 (3rd Cir. 1960); Motors Insurance Corp. v. The State of South Carolina, 313 S.C. 279, 437 S.E.2d 555 (S.C.App. 1994). In Biggs, plaintiff filed a diversity suit in federal district court alleging in one paragraph of her complaint that she was citizen of Pennsylvania and the defendant was a New Jersey corporation. Defendant

made a general denial of the allegations of this paragraph and others. Apparently, in response to a jurisdictional challenge, the district court allowed the plaintiff to introduce *ex parte* and after trial a certificate signed by the New Jersey Secretary of State showing the defendant's New Jersey citizenship. The defendant challenged this procedure on appeal. The Third Circuit responded:

We cannot for a moment believe that the defendant's counsel was denying in good faith that his client was a New Jersey corporation. [footnote omitted]. We think the only fair interpretation of the pleading in this case is that the denial does not run to the allegations of defendant's citizenship. Therefore, that allegation must be deemed to be admitted. Fed.R.Civ.P. 8(d). Thus the certificate added nothing to the case and we can ignore it.

280 F.2d 313-314.

In Motors Insurance, the plaintiff sued to determine title to a vehicle. It alleged that defendants had put the body of a Chevy Blazer on the frame of another vehicle and then sold this combined vehicle for salvage. The South Carolina Court of Appeals said:

In their Answer, Willing and B&W do not deny these facts. They merely deny "any wrongdoing" concerning the "vehicle described in the Complaint."

The court noted that:

[t]he Answer did not deny that the Blazer's body is now a part of the salvaged vehicle. If Willing and B&W lacked sufficient knowledge to form a belief as to the truth or falsity of the facts alleged in the Complaint, they should have so stated. SCRAP 8(b). Because they did not, these particular allegations of the Complaint are deemed to be admitted.

Id. at 281, 437 S.E.2d at 557.

Here, defendants answered every allegation of the complaint by neither admitting nor denying but leaving plaintiff to his proof. They said they only denied those allegations "that would create or support liability...of any Defendant..." The defendants in this case have evaded their obligations under Rule 8(b). The Court should deem

admitted the allegations of the complaint under Rule 8(d) and should strike any contrary assertions in defendants' affidavits.

III. Defendants' Summary Judgment Motion Misstates the Applicable Law

A. Plaintiff is not required to exhaust administrative remedies

Defendants' argument that Mr. Felkner must exhaust administrative remedies has no basis in law. Mr. Felkner is not required to exhaust administrative remedies before suing to protect his constitutional rights. Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); O'Connors v. Helfgott, 481 A.2d 388, 391-92 (R.I. 1984); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970)(no exhaustion of administrative remedies necessary when plaintiff confronted with an unconstitutional statute). Defendants do not address these controlling precedents.

In Patsy, an applicant for employment with a state university filed suit under 42 U.S.C. §1983 alleging she was the victim of reverse discrimination and that her constitutional rights had been violated. The defendants argued that plaintiff had failed to exhaust her administrative rights. Justice Thurgood Marshall wrote for the majority:

This contention need not detain us long. Beginning with McNeese v. Board of Education, 373 U.S. 668, 671-673, 83 S.Ct. 1433, 1435-36, 10 L.Ed.2d 622 (1963), we have on numerous occasions rejected the argument that a §1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. [citations omitted]..... Respondent may be correct in arguing that several of those decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated categorically that exhaustion is not a requirement to an action under §1983, and we have not deviated from that position in the 19 years since McNeese.

457 U.S. at 500-01. The Court then went on to consider the argument that it should reconsider McNeese and concluded:

Based on the legislative histories of both §1983 and §1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983. We decline to overturn our prior decisions holding that such exhaustion is not required.

Id. at 516.

Here, Mr. Felkner has premised his claims in part on Section 1983. See, e.g., Verified Complaint, ¶¶ 116, 122, 128, 134 and 140. Just as the law had not changed in the 19 years between McNeese and Patsy, it has not changed in the 26 years since Patsy. Federal law does not require Mr. Felkner to exhaust administrative remedies.

Rhode Island law is the same. In O'Connors, the Rhode Island Supreme Court addressed the constitutionality of representation on the Foster-Gloucester Regional School Committee. The trial justice (then-Superior Court Justice Torres) held that plaintiff did not have to exhaust the available administrative remedies before filing suit. Justice Kelleher wrote for a unanimous court. He said:

The United State Supreme Court has recently had the opportunity to consider the propriety of requiring exhaustion in the face of a deprivation of federal constitutional rights. In Patsy [citation omitted], the Court initially noted that it was the purpose of the Civil Rights Act to open the doors of the courthouse to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights. [citation omitted]. The Court therefore held that a civil rights action does not require exhaustion of administrative remedies prior to proceeding in court.

The right infringed upon here is as precious as any secured by the Constitution. The fact that the election is for a school committee member as opposed to a United State Senator is of little importance....If the [administrative remedy] is required prior to the bringing of legal action, the result will be further delay with further injury to a constitutional right.

481 A.2d at 391-92. The Court affirmed Justice Torres' decision.

The cases upon which defendants rely have no bearing here. In Chase v. Mousseau, 448 A.2d 1221 (1982), the plaintiff alleged a violation of statutory, not

constitutional, rights. Moreover, it was decided two years before O'Connors v. Helfgott, supra, so its ruling is no longer applicable to constitutional claims, if it ever was. In Woodford v Ngo, 548 U.S. 81 (2006), the Supreme Court held that the Prison Litigation Reform Act, 42 U.S.C.A. §1997e(a), specifically required prisoners to exhaust administrative remedies before filing suit. Apparently, the plaintiff did not argue that Patsy applied to his claims nor did any majority, concurring or dissenting opinion feel the need to address Patsy because it is not cited.

Accordingly, defendants have no legal basis for their argument that Mr. Felkner must exhaust administrative remedies before pursuing this lawsuit.

B. The Court should not abstain from reviewing plaintiff's complaint

Defendants' argument that the Court should abstain from addressing Mr. Felkner's claims defies logic, justice and the Constitutions of both the United States and the State of Rhode Island. Essentially, defendants argue the Court should abandon Mr. Felkner to the punishments inflicted by those governmental officials whom he alleges are violating his constitutional rights. This is what happens in tyrannies that do not have the rule of law. It is an argument that denies the existence of constitutional rights themselves. Moreover, defendants completely misconstrue the concept of abstention.

Abstention is a collection of federal doctrines under which the federal courts occasionally refrain from addressing a legal dispute, usually because the dispute should first be addressed in state adjudications. See, e.g., Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)(Federal courts should abstain from addressing domestic relations issues pending in state court); Grove v. Emison, 507 U.S. 25 (1993)(Under

Pullman doctrine, federal courts should let state courts address first the constitutionality of state statutes); New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989)(Federal court sitting in equity must decline to interfere with proceedings or orders of state administrative agencies under Burford abstention doctrine); Younger v. Harris, 401 U.S. 37 (1971)(Federal courts should abstain from granting declaratory relief as to the constitutionality of a state statute when litigation involving the statute is pending in state court).

Here, Mr. Felkner is litigating his claims in state court. To plaintiff's knowledge there is no case law anywhere holding that a state court should decline to hear these kinds of constitutional claims and effectively leave a plaintiff without a remedy. Notably, defendants cite no decision by a Rhode Island court holding that a state court should abstain from deciding a college student's constitutional claims. To plaintiff's knowledge, there are no Rhode Island Supreme Court decisions adopting any abstention doctrine of any kind.

The cases defendants cite do not support their argument that the court should abstain from deciding this case. For example, in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), Horowitz sued claiming that she was denied due process when the University's medical school allegedly failed to provide her with procedural due process before it dismissed her from the school. After a full trial, the federal district court concluded the plaintiff had been afforded all the rights guaranteed her by the Fourteenth Amendment and dismissed her complaint. Ultimately, the Supreme Court reviewed the procedures the medical school followed before dismissing Horowitz and held:

We need not decide, however, whether respondents' dismissal deprived her of a liberty interest in pursuing a medical career. Nor need we decide whether respondent's dismissal infringed any other interest constitutionally protected against deprivation without due process. Assuming the existence of a liberty or property interest, respondent has been awarded a least as much due process as the Fourteenth Amendment requires.

435 U.S. at 84-85. The portions of the decision thereafter that defendants cite are purest dictum. Moreover, the decision does not pertain to this case because Mr. Felkner has not made a procedural due process claim. Finally, the trial court addressed Horowitz's claims after a full trial. In other words, there was no abstention in Horowitz nor did the Supreme Court hold there should have been abstention. Thus, the Horowitz decision is irrelevant here.

The other Supreme Court decision defendants cite, Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985), is much the same case as Horowitz to which the Ewing Court refers in coming to substantially the same decision. Ewing sued the University claiming his due process rights were violated when he was dismissed from the medical school. After a four-day bench trial, the District Court made detailed findings of fact respecting Ewing's "unfortunate academic history." Notably, "Ewing accumulated an unenviable academic record characterized by low grades, seven incompletes, and several terms during which he was on an irregular or reduced course load." Then, he took the tests administered by the National Board of Medical Examiners, failed five of seven subjects and received a total score of 235 when the passing score was 345. Ewing pursued an administrative appeal of the school's initial decision to dismiss him, and after a hearing, the decision was affirmed.

The District Court found no violation of Ewing's due process rights. As the Supreme Court reiterated:

The trial record, [the District Court] emphasized, was devoid of any indication that the University's decision was "based on bad faith, ill will or other impermissible ulterior motives"; to the contrary, the "evidence demonstrate[d] that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration." (citation omitted). To "leave no conjecture" on his decision, the District Judge expressly found that "the evidence demonstrate[d] no arbitrary or capricious action since [the Regents] had good reason to dismiss Ewing from the program."

474 U.S. at 220.

Ewing could not be less apposite. Here, Mr. Felkner is alleging "impermissible ulterior motives" as well as "arbitrary or capricious action." Here, Mr. Felkner has not had a trial. Finally, and most importantly, the Supreme Court did not hold that the District Court should have abstained from addressing plaintiff's claims. The University did not raise that argument. Once again, defendants rely only on purest dictum for their argument.³ Again, they have no legal basis to argue the Court should abstain from deciding Mr. Felkner's claims.

C. Defendants' actions violated plaintiff's freedom of expression

Based on his Verified Complaint, Mr. Felkner has set forth facts that demonstrate defendants violated his freedoms of speech and expression.⁴ Colleges and universities are unique forums for the expression of controversial ideas. As the Sixth Circuit has said:

The university is a special place for purposes of First Amendment jurisprudence. The danger of "chilling...individual thought and

³ The third decision defendants cite, Wayne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991) relies in part on Ewing in upholding the decision to dismiss a medical student with dyslexia because he was failing to make sufficient academic progress. Again, the issue of abstention was no part of the Court's holding.

⁴ Throughout this memorandum plaintiff will refer to his rights to freedom of speech and expression under the First Amendment of the United States Constitution and Article I, Section 21 of the Rhode Island coterminously as plaintiff is not aware of any pertinent differences between the provisions.

expression...is especially real in the University setting where the State acts against a background and a tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”

Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) quoting Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 835 (1995). Indeed:

[T]he 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.”

Papish v. Board of Curators of the University of Missouri, 410 U.S. 667, 670 (1973). In Rosenberger, the Supreme Court said:

When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. [citation omitted]. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker was the rationale for the restriction.

515 U.S. at 829.

In Papish, a graduate student was expelled for publishing a newspaper with a cartoon showing policemen raping the Statue of Liberty and the Goddess of Justice with the words “mother fuckers” in the caption. The Supreme Court reversed lower court decisions upholding the expulsion and said:

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University’s action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed.

410 U.S. at 671.

Even the cases on which defendants primarily rely, Brown v. Li, 308 F.3d 939 (9th Cir. 2002), and Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995), recognize an important distinction that pertains here. The Brown opinion quotes Settle:

So long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her view of the merits of the students' work...So long as the teacher limits speech or grades speech in the classroom in the name of the learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.

Like judges, teachers should not punish or reward people on the basis of inadmissible factors-race, religion, gender, political ideology...(emphasis added).

Brown, 308 F.3d at 948, quoting Settle, 53 F.3d at 155.

In Brown, plaintiff prepared and submitted a master's thesis according to long-standing guidelines established by the university. After the thesis was approved, plaintiff secretly added a "Disacknowledgements" section and attempted to submit the paper for filing in the university's library, as required to earn a degree. The "Disacknowledgments" section began: "I would like to offer special *Fuck You's* to the following degenerates for being an ever-present hindrance during my graduate career..." It then identified the Dean and staff of the graduate school, the Regents of the University, a former governor and "Science." The university refused to let him file it and revoked the approval of the thesis. The Ninth Circuit upheld the university's actions finding its actions did not violate plaintiff's First Amendment rights as a graduate student. This is a very different situation than Mr. Felkner has described in his verified complaint.

Here, Mr. Felkner is not claiming that defendants punished him for a completely irrelevant and juvenile act that failed to comply with pre-established guidelines, such as the "Disacknowledgements" section in Brown. Rather, Mr. Felkner has set forth facts in

his verified complaint demonstrating that the defendants violated “positive law or school policy,” i.e. the First Amendment and the Student Bill of Rights, and that they limited Mr. Felkner’s speech and stigmatized him as a pretext for punishing his political persuasion or political ideology.

For example, RIC’s Student Bill of Rights states, inter alia, in Article I, entitled “Freedom of Expression and Association”: “Students shall be free to examine and discuss all questions of interest to them and to express opinions publicly and privately.” Article X, “Freedom in the Classroom,” states:

Section 1. The instructor in the classroom and in conference should encourage free discussion, inquiry and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct unrelated to academic standards....

Section 2. Students are free to express differences of opinion or to disagree with data or views offered in any course of study. However, they are responsible for maintaining standards of academic performance established for each course in which they enrolled.

In addition, Article II, “Freedom of Communication,” provides that student managers of “means of communication (such as...web pages)...shall not be arbitrarily suspended because of faculty disapproval of the editorial policy or content of the communication.” See, Verified Complaint, ¶¶2, 3, 5.

Notwithstanding these protections and those of the First Amendment, defendants engaged in a series of actions constituting retaliation against Mr. Felkner for both his political views and for his criticisms of defendants’ political views. For example:

-Ryczek told Mr. Felkner in an email that he and his colleagues “reveled” in their political “biases” and that students with different points of view would find their positions at the School for Social Work “increasingly uncomfortable.” Felkner Affidavit ¶4.

-Weisman told Mr. Felkner in an email that “the SSW is not committed to balanced presentations, nor should we be. We are not a debating society; we are a values-based profession and we are responsible to promote the values that underlie social work. For the most part, Republican ideology is oppositional to the profession’s fundamental values.” Felkner Affidavit ¶5.

-Ryczek gave Mr. Felkner a failing grade on a paper when Mr. Felkner did not write the paper from the perspective Ryczek supported. Verified Complaint ¶44.

-When Mr. Felkner objected to having to lobby the General Assembly in favor of welfare legislation that he opposed, instead of letting him lobby according to his personal political beliefs, the School transferred him to a different class. Verified Complaint ¶¶34-43, 60.

-When Mr. Felkner asked to work on welfare reform as an intern in the Governor’s office, the School denied him the permission to do so because that project was “toxic.” Verified Complaint ¶¶89-96.

Hence, even under the legal standards set forth in Brown and Settle, Mr. Felkner has established a prima facie case that defendants violated his rights under the Student Bill of Rights, the First Amendment and Article I, Section 21 of the Rhode Island Constitution by punishing him for expressing his political views and criticizing theirs.

Plaintiff acknowledges that even within schools not all forums are the same for First Amendment purposes. However, even within the so-called “non-public forum,” which is neither traditionally open to public expression nor designated for such expression by the State, restrictions on speech must be “viewpoint neutral.” Peck v. Baldwinsville Central School District, 426 F.3d 617, 626 (2nd Cir. 2005). This is true even at the kindergarten level. Id. In Peck, Antonio Peck’s kindergarten teacher was instructing her students on “simple ways to save the environment, such a preserving trees and animals, using water and other natural resources sparingly and wisely, keeping the environment clean, et cetera.” She said “each student should be working on his

environmental poster to be hung up [in the school]. Ideas should involve ways to save our earth and it should be the child's work."

Antonio did a poster reflecting his (or his mother's) belief that, as he told his mother, "the only way to save the world was through Jesus." His poster showed a robed figure kneeling and raising his hands to the sky, two children on a rock bearing the word "Savior" and the Ten Commandments. The poster included the phrases "the only way to save our world," "prayer changes things," "Jesus loves children," "God keeps his promises," and "God's love is higher than the heavens." The teacher declined to display this poster "for religious reasons" and because she thought it did not demonstrate Antonio's learning of the environmental lessons.

Antonio did a second poster showing the same robed figure, a church with a cross, people picking up trash and placing it in a recycling bin, children holding hands encircling the globe, clouds, trees, a squirrel and grass. The poster was displayed by the school but with the robed figure and part of the church folded under so they were not visible. The teacher subsequently testified that a non-religious figure would not have been folded over because other parents would not have been offended by a figure that had no religious significance.

The Second Circuit said it was true that: "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 628 quoting Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988)(emphasis added). However, the court said that while schools can determine the content of school-sponsored speech, they cannot

determine the viewpoint. *Id.* at 627, 633. It held that there was a material issue of fact as to whether the school censored Antonio's poster because of its religious imagery and therefore the district court should not have granted summary judgment. *Id.* at 625.

Similarly, here, defendants went beyond determining the content of Mr. Felkner's speech. For example, they tried to dictate the viewpoint of his speech by attempting to determine the position he would take in lobbying with respect to welfare legislation supported by the School's instructors. They led class discussions critical of Mr. Felkner's political beliefs. As Mr. Felkner stated to Mueller, Mr. Felkner felt that he was in a very harassing environment, and as a result, he hardly spoke up in class anymore. They pressured him into taking down his website. These cannot be "legitimate pedagogical concerns" in our state colleges and universities where teachers are supposed to promote the "marketplace of ideas," not cast a "pall of orthodoxy" over the student body. Defendants violated Mr. Felkner's freedom of speech and expression.

D. Defendants unconstitutionally attempted to compel plaintiff to make speech

Defendants cannot compel Mr. Felkner to express political opinions with which he disagrees. Just as the First Amendment bars the government from restricting free speech and expression, it also bars the government and its officials from compelling certain speech. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In Barnette, during the height of World War II, the Supreme Court overturned a decision it had rendered just three years earlier, Minersville School District v. Gobitis, 310 U.S. 586 (1940). In Gobitis, the Court had held that a local school district, pursuant to legislation by the state of Pennsylvania, could compel elementary school children who

were Jehovah's Witnesses to salute the national flag and recite the Pledge of Allegiance despite the children's religious objections. 310 U.S. at 599.

In response to the Gobitis decision, the State of West Virginia amended its statutes to require all schools in the state to conduct courses in history, civics, and the state and federal Constitutions "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." It directed the state Board of Education to prescribe courses of study covering these subjects. The Board ordered that the salute to the national flag become a "regular part of the program of activities in the public schools" and that all teachers and pupils "be required to participate in the salute honoring the Nation represented by the Flag..." Failure to participate was deemed "insubordination" and could be punished by expulsion. Some Jehovah's Witnesses challenged the constitutionality of the West Virginia laws and regulations.

Justice Jackson wrote the majority opinion in Barnette that overturned Gobitis. He observed: "The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child." 319 U.S. at 631. He went on:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 637. Further:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men...Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public education officials shall compel youth to unite in embracing....Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 640-41. The Court concluded:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein... We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control.

Id. at 642.

Similarly, here, the defendants engaged in coercive elimination of Mr. Felkner's dissent in violation of his constitutional rights. They attempted to prescribe orthodoxy in politic perspective and to force Mr. Felkner "to confess by word or act [his] faith therein."

The Tenth Circuit recently addressed the application of the "compelled speech" doctrine to the curriculum of a state university. Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004). Axson-Flynn, a Mormon, was applying to the University of Utah's Actor Training Program (ATP). During the application process, she attended an audition conducted by ATP instructors who asked if there was anything she would feel uncomfortable saying or doing as an actor. Axson-Flynn replied that she would not remove her clothing, "take the name of God in vain," "take the name of Christ in vain,"

or “say the four-letter expletive beginning with the letter F.” She was admitted to the program.

As part of a class exercise, an instructor asked Axson-Flynn to perform a scene from a play. Axson-Flynn requested permission to substitute other language for the words “goddam” and “fucking” that appeared in her character’s lines. The instructor told her she would either perform the scene as written or receive a grade of zero for the exercise. After Axson-Flynn refused, the instructor relented, and Axson-Flynn performed the scene with substitute language and received a high grade.

At the end of the first semester, Axson-Flynn had a review with the instructors who told her that her requests to substitute language were “unacceptable behavior.” The instructors recommended that she “talk to other Mormon girls who are good Mormons, who don’t have a problem with this.” They said: “You can choose to continue in the program if you modify your values. If you don’t, you can leave.” Axson-Flynn started the second semester but faced continued pressure from her instructors to use language she found offensive. The director of the program affirmed the instructors’ position. Axson-Flynn withdrew from the program because she believed it was only a matter of time before she would be asked to leave.

Axson-Flynn then filed suit under Section 1983 alleging that defendants had violated her First Amendment rights by compelling her to speak words she found offensive. The district court granted defendants’ summary judgment motion. Axson-Flynn v. Johnson, 151 F.Supp.2d 1326 (D.Utah 2001). The Tenth Circuit reversed.

The Circuit Court acknowledged the argument defendants make here that schools have the right to determine what to teach and how to teach it in their classrooms.

Nonetheless, it analyzed whether defendants' action violated plaintiff's rights. It decided that the ATP classrooms constituted a nonpublic forum, meaning that school officials could regulate the speech that takes place there in "in any reasonable manner." 356 F.3d at 1285, quoting Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 270 (1988).

The Tenth Circuit then addressed what kind of speech was involved, the possibilities being "pure student expression that the school must tolerate unless it can reasonably forecast that the expression will lead to 'substantial disruption of or material interference with school activities,'" *id.* at 1285 quoting Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 514 (1969); "government speech, such as the principal speaking at a school assembly," *id.*; or "school sponsored speech" which is "speech that a school 'affirmatively...promotes,' as opposed to speech that it tolerates." *Id.* quoting Hazelwood, 484 U.S. at 270-71. The Tenth Circuit concluded that Axson-Flynn's speech constituted "school-sponsored speech."

It commented that "school-sponsored speech" comprises "expressive activities" that: "may be fairly characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 1286 quoting Hazelwood, 484 U.S. at 271. "School officials may place restrictions on school-sponsored speech 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" *Id.* quoting Hazelwood, 484 U.S. at 273. "Age, maturity, and sophistication level of the students will be factored in determining whether the restriction is 'reasonably related to legitimate pedagogical concerns.'" *Id.* at 1289 citing Ward v. Hickey, 996 F.2d 449, 453 (1st Cir. 1993).

The Tenth Circuit concluded that the university could compel an acting student to speak the words of a script as written unless the school's purported pedagogical concern is pretextual. *Id.* at 1293, citing Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225 (1985)(Courts should not override a faculty member's professional judgment "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."). The Court found there was evidence to support a claim that the ATP instructors forced Axson-Flynn to speak the lines because of "anti-Mormon sentiment" based on their comments about what other "good Mormon girls" were willing to say. The Tenth Circuit said these comments constituted a genuine issue of material fact as to whether defendants' justification for the script adherence requirement was truly pedagogical or was a pretext for religious discrimination.

Here, Mr. Felkner has set forth numerous facts that raise a genuine issue whether defendants' actions were truly pedagogical or were a pretext for their compelling him to espouse their beliefs and discriminate against him based on his political view. For example, one of Mr. Felkner's SSW courses involved lobbying at the State House, including lobbying for Senate Bill 525 that would amend the State's welfare program. However, after researching the data supporting the bill, Mr. Felkner concluded that he could not support the bill and wanted to lobby against it. Ryczek told Felkner that RIC "is a perspective school and we teach that perspective." Ryczek added: "if you are going to lobby on that bill, you're going to lobby in our perspective." Verified Complaint ¶¶34-43. Here, defendants were not only compelling Mr. Felkner to espouse beliefs that he did

not agree with, but they were compelling him to do so in a way that could have resulted in legislation with which he did not agree.

Accordingly, even under those decisions that support a school's requirement that students consider the opposite point of view, the school cannot impose the requirement in retaliation for a student's political perspective. Here, as in Axson-Flynn, there is compelling evidence that the defendants did exactly that. Therefore, the court should deny the defendants' motion.

E. Defendants' actions violate their own profession's norms of academic freedom and debate

Not only do the defendants' actions violate the United States Constitution, the Rhode Island Constitution, and RIC's Student Bill of Rights, but they also violate their own professional norms. Professor Richard Gelles, Dean of the University of Pennsylvania School of Social Policy and Practice, states in his attached affidavit that the circumstances and events described by Mr. Felkner in his verified complaint are "contrary to the concepts of academic freedom and constitute a substantial departure from the norms of academic debate and scholarship that should prevail in schools of sociology in our colleges and universities." Gelles Affidavit ¶9.

Additionally, the *Joint Statement on Rights and Freedoms of Students* ("Joint Statement"), composed by a committee of, among others, representatives from the American Association of University Professors, states that: "In order to protect the freedom of students to learn, as well as enhance their participation in the life of the academic community, students should be free from exploitation or harassment." Exhibit Y. This standard was violated in Pearlmutter's class when she led a fifty-minute in-class discussion criticizing Mr. Felkner's political views and the postings on his website and

she allowed other students to criticize his views without allowing him to respond.

Verified Complaint, ¶73.

The *Joint Statement* further states that:

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards... [and] [s]tudents should have protection through orderly procedures against prejudiced or capricious academic evaluation.

An example of the defendant's violation of this standard occurred when Ryczek gave Mr. Felkner failing grades on his policy paper and debate simply because Ryczek did not agree with the conservative stance of Mr. Felkner's arguments. Verified Complaint ¶44.

The *Joint Statement* then goes on to say that:

College and university students are both citizens and members of the academic community. As citizens, students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy and, as members of the academic community, they are subject to the obligations that accrue to them by virtue of this membership. Faculty members and administration officials should ensure that institutional powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus.

Defendants' actions are also contrary to the Educational Policy and Accreditation Standards of the Council on Social Work Education. Section 1.2 of these standards, entitled *Achievement of Purpose*, states: "Preparing social workers to formulate and influence social policies and social work services in diverse political contexts." (emphasis added). Further, Section 6, entitled *Nondiscrimination and Human Diversity*, states that: "The program makes specific and continuous efforts to provide a learning context in which respect for all persons and understanding of diversity (including age, class, color, disability, ethnicity, family structure, gender, marital status, national origin,

race, religion, sex, and sexual orientation) are practiced.” Presumably, students with conservative political views are entitled to the same respect and understanding.

Further, the SSW’s Master’s Program field manual states under its *Policies Statement on Oppression*, that:

In accordance with the NASW CODE OF ETHICS, the faculty of the school of social work condemns any and all oppression of individuals or groups on the basis of race, ethnicity, gender, religion, sexual orientation, socio-economic status, age or handicapping condition. In addition, we reaffirm the code’s precepts that social workers have a duty to fight discrimination and other forms of injustice. *Academic & Field Manual*, MSW Department, Rhode Island College School of Social Work, p. 34. (emphasis added).

Mr. Felkner was not treated like the other students and has been oppressed simply because of his conservative beliefs and expressions. He was told by Ryczek that he could only lobby the statehouse on welfare reform if he did so from SSW’s liberal perspective. Verified Complaint ¶43. Further, Mueller stated to Mr. Felkner that he was not allowed to lobby on this issue because it was a “toxic” subject, and that he would not be allowed to pursue it in order to prevent conflict between the governor’s office and RIC. Felkner Affidavit ¶3. Defendants’ actions individually and collectively violate the norms of academic debate and scholarship at RIC and other colleges and universities. Accordingly, their actions cannot be reasonably related to legitimate pedagogical concerns.

F. Defendants unconstitutionally withheld plaintiff’s benefits because he would not surrender his rights

The government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech. United States v. American Library Association, Inc., 539 U.S. 194, 210 (2003); Board of Commissioners of Wabuansee

County v. Umbehr, 518 U.S. 668, 674 (1996); Perry v. Sindermann, 408 U.S. 593, 597 (1973).

In Perry, a junior college professor sued the college's Board of Regents alleging the college failed to renew his teaching contract because of his public disagreements with the Board's policies. The District Court granted defendants' summary judgment motion on the grounds that the professor did not have a right to have his contract renewed. The Circuit Court reversed and the Supreme Court affirmed the Circuit Court.

The Supreme Court began its analysis by stating:

For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons on which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' [citation omitted]. Such interference with constitutional rights is impermissible.

408 U.S. at 597. The Court went on:

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment.

Id. at 598.

Here, defendants denied numerous benefits to Mr. Felkner in retaliation for his publicly expressed political opinions. The defendants denied him the grades that he truly deserved for his schoolwork, they denied him the opportunity to lobby the Rhode Island

General Assembly on the issue of welfare reform, and they denied him the benefit of his master's degree. Verified Complaint ¶¶44-49, 34-43, 102-03; Felkner Affidavit ¶24.

If the Court were to grant defendants' summary judgment motion it would similarly foreclose Mr. Felkner's opportunity to prove defendants denied him benefits for exercising his constitutional rights.

G. Defendants denied plaintiff equal protection of the laws

Defendants have unconstitutionally treated Mr. Felkner differently than other students because he exercised his rights to Freedom of Speech under the federal and state Constitutions as well as the "Student Bill of Rights." This different treatment violates his right to equal protection of the laws. Valley Outdoor, Inc. v. City of Riverside, 446 F.3d 948, 955 (9th Cir. 2006); Rocky Mountain Christian Church v. Board of County Commissioners of Boulder County, Colorado, 481 F.Supp.2d 1213, 1219 (D.Colo. 2007); Esperanza Peace and Justice Center v. City of San Antonio, 316 F.Supp.2d 433 (W.D.Tex. 2001); see, also, Ad-Hoc Committee of the Baruch Black and Hispanic Alumni Association v. Bernard M. Baruch College, 835 F.2d 980, 982 (2nd Cir. 1987); Davis v. Goode, 995 F.Supp. 82 (E.D.N.Y. 1998). All of these cases, and many others, stand for the proposition that government officials may not treat one person differently than others because that person exercises his First Amendment rights.

In Esperanza, a gay and lesbian community group alleged it was denied funding by the City because it was "too political" and it promoted a social or political viewpoint to which the City objected. The District Court said: "In other words, unconstitutional criteria such as viewpoint discrimination cannot be among the criteria used to allocate funding." 316 F.Supp.2d at 455, citing, Rust v. Sullivan, 500 U.S. 173 (1991). The court

explained: “The constitution requires viewpoint neutrality in order to prevent government suppression of controversial or otherwise disfavored speech because the categorization of speech as “political” or “controversial” is usually determined according to the values and attitudes of the decisionmaker.” 316 F.Supp.2d at 457.

Once the plaintiff shows that defendants’ decision was motivated in part by a constitutionally impermissible motive, the burden shifts to the defendants to justify their decision. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270n.21 (1977); Barnard M. Baruch College, 835 F.2d at 983.⁵ Suffice to say, Mr. Felkner has produced abundant evidence that defendants’ treatment of him was motivated at least in part by an impermissible motive, i.e. retaliation for his exercise of his First Amendment rights. For example, Ryczek stated in his October 15, 2004 email to Mr. Felkner that:

[I]f a student finds that they are consistently and regularly experiencing opposite views from what is being taught and espoused in the curriculum, or the professional “norms” that keep coming up in class and in field, they their fit with the profession will not get any more comfortable, and if fact will most likely become increasingly uncomfortable... I revel in my biases. So, I think anyone who consistently holds antithetical views to those that are espoused by the profession might ask themselves whether social work is the profession for them...or similarly, is one finds the views in the curriculum at RIC SSW antithetical to those they hold closely, then this particular school might not be a good fit for them.... Felkner Affidavit ¶4.

These statements clearly predicted that if Mr. Felkner continued to adhere to and espouse his conservative beliefs, and did not fall in line with the liberal beliefs of the SSW and Mr. Ryczek, then Mr. Felkner would be viewed as someone who should not be in the

⁵ Notably, defendants do not cite Village of Arlington Heights or any other law in support of their argument in part because they misconstrue Felkner’s “Equal Protection claim [as] simply a restatement of his First Amendment arguments...” Defendants’ Memorandum at p. 23. This is a mischaracterization of the factual allegations and the law and for those reasons, must fail.

program and would not be allowed the same opportunities to present his views as students who hold liberal views. Ryczek also told Mr. Felkner that he would not approve any field placement necessary for graduation unless the placement would implement SSW's "progressive social change perspective." Ryczek subsequently told Mr. Felkner that due to his refusal to work for progressive policies, Mr. Felkner would "not be able to meet the academic requirements necessary to obtain a degree." Verified Complaint, ¶¶89-90.

Further, during a class Mr. Felkner had with Pearlmutter, she led a fifty-minute in-class discussion criticizing Mr. Felkner's political views and the postings on his website. Verified Complaint, ¶73. During this discussion, Pearlmutter allowed other students to criticize Mr. Felkner's views without allowing him to respond, all the while allowing other students to interrupt Mr. Felkner when he attempted to defend himself.

In addition, during a conversation between Mr. Felkner and Pearlmutter, Mr. Felkner suggested that instead of working with classmates to lobby for a cause with which he disagreed, he could complete the required lobbying assignment with students from other colleges to lobby for a cause with which he agreed. Specifically, Mr. Felkner, unaware of the significance of the College's Student Bill of Rights, suggested to Defendant Pearlmutter that he be able to lobby the College to adopt an Academic Bill of Rights ("ABOR") that would protect the free speech and association rights of students. Defendant Pearlmutter, possibly unaware the College already had a Student Bill of Rights, told Mr. Felkner he could lobby for the ABOR on his own time or use it for the individual project but he could not lobby for the ABOR for the group organizing project because it did not have a direct impact on the "poor and oppressed" and did not advance

“social justice.” However, Defendant Pearlmuter allowed another student to lobby the College to include geriatric studies in the curriculum for her group project. Verified Complaint ¶¶66-67.

Mr. Felkner was not being treated in the same manner as students with a liberal ideology and was punished for exercising his First Amendment rights. Accordingly, the burden shifts to defendants to justify their actions. They have failed to do so.

H. Plaintiff's complaint does not affect defendants' academic freedom

Whatever constitutes the vague right of “academic freedom,” it does not give defendants the right to punish Mr. Felkner for his political views by stigmatizing him, for example. To the contrary, the concept of “academic freedom” supports Mr. Felkner's claims.

As the Second Circuit recently said: “The First Amendment guarantee of academic freedom rests on a recognition of ‘the vital role in a democracy that is played by those who guide and train our youth.’” Burt v. Gates, 502 F.3d 183, 190 (2nd Cir. 2007), quoting, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). The Sweezy plurality explained:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (emphasis added).

Id. The purpose of the “academic freedom” doctrine is to “protect the ‘marketplace of ideas’ in the university and prevent government intrusion that would otherwise ‘cast a

pall of orthodoxy over the classroom.” Burt v. Gates, 502 F.2d at 191, quoting, Keyishian v. Board of Regents of the University of New York, 385 U.S. 589, 603 (1967). As the Supreme Court said in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943): “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.” Id.

Thus, whatever else it means, the doctrine of “academic freedom” protects students as well as teachers and it prevents state college officials, including teachers, from imposing a “pall of orthodoxy” upon their students. Unfortunately, that is precisely what Mr. Felkner has set forth in his verified complaint.

The meaning of this doctrine is further explained by another Second Circuit case involving a university professor. In Levin v. Harleston, 966 F.2d 85 (2nd Cir. 1992), a professor at a state university had written three articles in which he made denigrating comments concerning the intelligence and social characteristics of blacks. The university responded by creating an alternative section of the professor’s Philosophy 101 class for those students who might want to transfer out of his class, by creating an ad hoc committee to investigate whether the professor’s views affected his teaching ability, and by announcing that the committee would review whether speech, both in and out of the classroom, may go beyond the protection of academic freedom and constitute “misconduct” (which could be grounds for dismissal).

The professor filed suit alleging violations of his First Amendment rights. After a bench trial, the district court found that the university’s creation of an alternative section of his class was “established with the intent and consequence of stigmatizing Professor

Levin solely because of his expression of ideas.” Levin v. Harleston, 770 F.Supp. 895, 915 (S.D.N.Y. 1991). The Second Circuit commented with respect to the creation of the ad hoc committee: “It is settled that government action which falls short of a direct prohibition on speech may violate the First Amendment by chilling the free exercise of speech.” 966 F.2d at 89. It affirmed the District Court’s findings.

The facts set forth in the verified complaint show that defendants were attempting to use power to intimate and stigmatize Mr. Felkner for his controversial views much as the university attempted to punish Levin. The First Amendment protects both professor and student. As one treatise has said:

Had Professor Levin engaged in attacks against individual students in class, however, the university would have had the right, if not indeed the duty, to discipline him for engaging in speech calculated to stigmatize or embarrass specific students.

Smolla, Smolla and Nimmer on Freedom of Speech, §17:38, p. 17-79 (Thomsen/West 2008), citing, Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954); California v. Bakke, 438 U.S. 265, 357-58 (1978)(Brennan, J., concurring in the judgment in part and dissenting in part). That is precisely what Mr. Felkner alleges occurred to him. For example, defendant Pearlmutter assailed Mr. Felkner’s political views in a class and allowed other members of the class to criticize Mr. Felkner without a chance to respond. Verified Complaint ¶73.

The citations by Smolla to Brown and Bakke are critical because both those landmark decisions attacked the stigmatizing affects of unequal treatment in our schools and universities. See, Brown, 347 U.S. at 494 (“To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a

way unlikely ever to be undone.”). While race was the illegitimate classification in both Brown and Bakke, it is also true that stigmatizing students based on their political beliefs can have very harmful affects. For that reason (and others), it is also unconstitutional.

I. Plaintiff has suffered cognizable harm

Defendants’ argument that Mr. Felkner has suffered no cognizable harm has no legal or factual basis. Actually, defendants’ cite no law for this argument, essentially admitting they have no legal basis for it. Mr. Felkner has set forth numerous examples of how defendants’ interfered with his constitutional rights and his rights under RIC’s “Student Bill of Rights” and how they punished him for asserting his rights. Verified Complaint, ¶¶ 2-5, 73, 106-140. He has set forth how defendants’ actions prevented him from attaining his master’s degree. Verified Complaint, ¶¶89-110. Mr. Felkner has set forth how defendants’ action caused him great distress, among other affects. Verified Complaint, ¶105. All these verified allegations set forth “cognizable harm.”

Interference with constitutional rights is an injury that would entitle plaintiff to at least equitable relief. Elrod v. Boras, 427 U.S. 347, 373 (1976)(plurality opinion)(“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury”). Moreover, Mr. Felkner has set forth tort-type injuries that would also entitle him to damages. Carey v. Piphus, 435 U.S. 247 (1978)(common law of torts determines damages under §1983).

J. There is at least a material issue of fact whether defendants have qualified immunity

Defendants are not entitled to qualified immunity based on their motion for summary judgment. “Qualified immunity shields public officials from [section] 1983

liability if their actions did not ‘violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ Pino v. Higgs, 75 F.3d 1461, 1467 (10th Cir. 1996), quoting, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). When a defendant makes a qualified immunity claim on summary judgment, the plaintiff has the burden initially to show that the defendant’s conduct violated the law and that the law was clearly established when the alleged violation occurred. Cummins v. Campbell, 44 F.3d 847, 850 (10th Cir. 1994). The court reviews the evidence in the light most favorable to the plaintiff. Behrens v. Pelletier, 516 U.S. 299 (1996). To get summary judgment on this issue, the defendant must show there are no material issues of disputed fact. Cummins at 850. The Tenth Circuit in Axson-Flynn found there was a material issue of dispute fact as to the objective reasonableness of defendants’ actions and therefore a material issue of disputed fact as to the qualified immunity defense. 356 F.3d at 1300.

As an initial matter, Mr. Felkner notes Rhode Island College’s “Student Bill of Rights.” This explicitly provides him with certain rights described as “Freedom of Expression and Association” (Article I), “Freedom of Communication” (Article II), and “Freedom in the Classroom” (Article X), which protect Mr. Felkner’s right to express his opinions within and without the classroom and to be protected from retaliation such as occurred here. These rights were “clearly established” at the time of these events giving rise to Mr. Felkner’s claims. For this reason alone, there is at least a material issue of fact regarding defendants’ claim to qualified immunity.

Moreover, the analyses of extensive precedent set forth above respecting Mr. Felkner’s freedom of expression in the university setting demonstrates that he had

“clearly established” rights that defendants violated. Accordingly, there is at least a material issue of disputed fact under the case law. See, Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004); Chiu v. Plano Independent School District, 339 F.3d (5th Cir. 2003)

K. Defendants can be individually liable

Plaintiff does not object to that portion of the summary judgment motion seeking dismissal of the claims against Defendant Kane in his individual capacity.

Plaintiff does object to that portion of the summary judgment motion seeking dismissal of the claims against Defendant Nazarian in his individual capacity. The cases defendants cite on this issue are inapposite because these cases address the issue of official liability, not personal liability. Cases on point clearly allow for personal liability of state officials.

In Hafer v. Melo, 502 U.S. 21 (1991), the Pennsylvania's Auditor General was subject to a lawsuit in his personal capacity under §1983 for allegedly improper discharge of commonwealth employees. The United States Supreme Court held that: “state officials, sued in their individual capacities, are “persons” within the meaning of §1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under §1983 solely by virtue of the “official” nature of their acts.” 502 U.S. at 31.

During the events at issue in this case, defendant Nazarian was the president of a state college, RIC, and was, therefore, a state official. Mr. Felkner informed Defendant Nazarian of the harassment, stigmatization and punishment being inflicted upon him by

the other defendants. Felkner Affidavit ¶27. 14. Defendant Nazarian can be held individually liable for his failure to intervene and prevent the other defendants' actions.

Conclusion

The Constitutions of the United States and the State of Rhode Island provide college and university students, such as Bill Mr. Felkner, with the freedoms of speech and expression. Rhode Island College's Student Bill of Rights protects those rights in several very specific and pertinent ways. The Constitutions and the Student Bill of Rights prohibit the faculty of Rhode Island College from casting a "pall of orthodoxy" over the student body. They bar faculty members from punishing a student because the student may disagree with the faculty members' political perspectives and may express different perspectives.

Unfortunately, there is substantial evidence that defendants did exactly that. Defendant Ryczek wrote Mr. Felkner that, he, Ryczek "revel[ed] in his biases" and that students who are "experiencing opposite views from that being taught and espoused in the curriculum...will most likely become increasingly uncomfortable." For such students, "this particular school might not be a good fit for them." Ryczek also told Mr. Felkner that due to his refusal to work for "progressive policies," Mr. Felkner would "not be able to meet the academic requirements necessary to obtain a degree." (And, that is exactly what happened.)

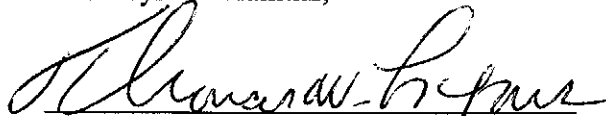
The written syllabus for Advanced Policy Planning, presumably approved by the School, states: "Students will learn how to plan, develop, implement, and evaluate social welfare policies and programs that focus on social justice and the redistribution of power and wealth in our society." (emphasis added). Prof. Weisman wrote Mr. Felkner:

“[T]he SSW is not committed to balance presentations, nor should we be.... For the most part, Republican ideology is oppositional to the profession’s fundamental values.” Prof. Bates said: “We hope all social workers are liberals.” Ryczek told Mr. Felkner that SSW “is a perspective school and we teach that perspective.... if you are going to lobby on that bill, you’re going to lobby in our perspective.” Prof. Pearlmutter led a class discussion criticizing Mr. Felkner’s political views and the postings on his website. Prof. Mueller would not let Mr. Felkner work on the Governor’s welfare reform project because it was “toxic,” and that he was doing this in order to prevent conflict between the Governor’s office and RIC.

These are just a few examples of how defendants punished Mr. Felkner for expressing his political views. He has provided ample evidence that defendants violated his rights under the Constitutions of the United States and the State of Rhode Island as well as RIC’s Student Bill of Rights, and that defendants’ actions were contrary to and a substantial departure from well established norms of academic freedom and academic debate that should take place in schools of sociology.

Accordingly, except as noted in Section K above, the Court should deny defendants’ summary judgment motion because there are numerous material issues of disputed fact and the law does not support defendants’ arguments.

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I hereby certify that on this 23 day of September, 2008, a copy of the within was sent to the above by regular mail, postage prepaid.



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