No. - ____

In the

Supreme Court of the United States

WILLIAM FELKNER,

Petitioner,

v.

JOHN NAZARIAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
To the Rhode Island Supreme Court

APPENDIX

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TABLE OF APPENDICES

Appendix A

SUPREME COURT OF THE UNITED STATES

No. 22A1080

WILLIAM FELKNER,

Plaintiff,

v.

RHODE ISLAND COLLEGE et al.,

Defendants.

Before

Justice Jackson

Order

June 14, 2023

Re: William Felkner
v. Rhode Island College
Application No. 22A1080

Dear Ms. Little:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Jackson, who on June 14, 2023, extended the time to and including September 17, 2023.

This letter has been sent to those designated on the attached notification list.

Sincerely,
Scott S. Harris, Clerk
by */s/ Rashonda Garner*
Rashonda Garner
Case Analyst

NOTIFICATION LIST

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Appendix B

SUPREME COURT OF RHODE ISLAND

No. 2021-267-Appeal

WILLIAM FELKNER,

Plaintiff,

v.

RHODE ISLAND COLLEGE et al.,

Defendants.

Before

Suttell, Chief Justice,
Goldberg, Robinson, Lynch Prata, and Long,
Justices.

Opinion

April 20, 2023

Lynch Prata, J. This case came before the Supreme Court on December 6, 2022, on appeal by the plaintiff, William Felkner (Felkner or plaintiff), from entry of summary judgment in favor of the defendants, Rhode Island College (RIC), John Nazarian (Nazarian), Carol Bennett-Speight (Dean Bennett-Speight), James Ryczek (Professor Ryczek), Roberta Pearlmutter (Professor Pearlmutter), and S. Scott Mueller (Professor Mueller), (collectively, defendants).[1] Before this Court, the plaintiff argues that the hearing justice erred in granting summary judgment on the grounds of qualified immunity. The plaintiff also contends that the hearing justice disregarded this Court's mandate when the case was remanded to the Superior Court. Finally, the plaintiff argues that the hearing justice improperly resolved questions of material fact in granting summary judgment. For the reasons set forth herein, we affirm the judgment of the Superior Court.

Facts and Travel

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[1] More specifically, defendants are: John Nazarian, President of RIC at the time Felkner was enrolled at the School of Social Work (SSW); Carol Bennett-Speight, Dean of the SSW at relevant times; James Ryczek, an adjunct professor at the SSW at relevant times; Roberta Pearlmutter, a professor of social work at the SSW at relevant times; and S. Scott Mueller, an assistant professor of social work at the SSW at relevant times. *Felkner v. Rhode Island College*, 203 A.3d 433, 440 n.2 (R.I. 2019) (*Felkner I*).

This is not the first time Felkner has appeared before this Court. A full rendition of the original facts and travel can be found at Felkner v. Rhode Island College, 203 A.3d 433 (R.I. 2019) (Felkner I). We will, however, recite the facts and travel pertinent to the instant appeal. Felkner, who describes himself as a "conservative libertarian," began pursuit of a Master of Social Work degree at RIC in 2004. Shortly thereafter, he learned that the School of Social Work (the SSW) would be sponsoring a showing of the movie Fahrenheit 9/11.[2] Felkner objected to the showing of the film to Professor Ryczek, his instructor for a foundational course, and requested that the SSW show a rebuttal film that represented the conservative view-point. Professor Ryczek responded that the SSW has a mission dedicated to social and economic justice and suggested 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, then their fit with the profession will not get any more

[2] Fahrenheit 9/11 is a documentary film written and directed by filmmaker, author, and political commentator Michael Moore that takes a liberal, critical look at the presidency of George W. Bush, the war in Iraq, and its coverage in the media. Fahrenheit 9/11 (Michael Moore 2004).

> comfortable, and in fact will most likely become increasingly uncomfortable."

The sponsor of the film presentation, Professor Daniel Weisman (Professor Weisman), responded to Felkner that the SSW was "not committed to balanced presentations" and that, "[f]or the most part, Republican ideology is oppositional" to the fundamental values of the social work profession. Nevertheless, Professor Weisman did show the rebuttal film suggested by Felkner to the same classes that saw the first film because he felt it was "the reasonable thing to do."

In Professor Ryczek's course, students were assigned a group project in which they were to advocate for a social welfare issue in class and compose a policy paper promoting the group's position. According to Felkner, Professor Ryczek provided a list of issues the students could choose from, all of which involved, in Felkner's words, "a leftist position on social welfare issues." Professor Ryczek indicated that the students would advocate on behalf of their selected issue and lobby the General Assembly in the next semester's course. Felkner joined a class group advocating for passage of Senate Bill 525 (SB 525), a proposed amendment to a "temporary cash assistance program for Rhode Islanders having a difficult time making ends meet." Felkner later requested permission from Professor Ryczek to advocate in opposition to SB 525 in the class debate because, according to Felkner, "SB 525 did not

actually help people get off welfare with higher-paying jobs * * *." Professor Ryczek refused to allow Felkner to change his debate position and required Felkner to argue in favor of SB 525. According to Felkner, Professor Ryczek told him that RIC was a "perspective school" and that if Felkner was to lobby on SB 525, it would need to be "in [RIC's] perspective."[3] Additionally, Felkner wrote his policy paper from a perspective opposing the passage of SB 525.

After complaints from group members that Felkner was not participating in accordance with class expectations, Professor Ryczek disaggregated Felkner's grade from the group. He went on to give Felkner a failing grade for the debate and on his paper, and ultimately gave Felkner a C-plus grade for the course. Felkner appealed his failing grades for the paper and the debate to the Academic Standing Committee (ASC).

On January 20, 2005, a hearing was held before the ASC on Felkner's appeal of his grades. According to Felkner, he did not have the opportunity to question Professor Ryczek at the hearing because Professor Ryczek left the room immediately after his testimony. Felkner believed that Professor Ryczek

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[3] This issue was ultimately resolved as stated in Felkner I: "There is no dispute that, although Professor Ryczek initially told Felkner he would be required to lobby from a perspective contrary to his own views, Felkner never was compelled to lobby or testify at a public hearing." *Felkner I*, 203 A.3d at 452.

had given inaccurate testimony to the ASC regarding conversations between them and announced that he would hereafter record all of his conversations with RIC professors in order to document them accurately. The ASC denied Felkner's appeal, and he further pursued the case to the chair of the Master of Social Work (MSW) program, Dr. Lenore Olsen, and then to the dean of the SSW, Dean Bennett-Speight.

The decision of the ASC was upheld in both instances. Felkner approached the Foundation for Individual Rights in Education (FIRE)[4] about his alleged mistreatment. RIC's then-President, Nazarian, received a letter from FIRE, dated January 28, 2005, stating that RIC should reconsider the appeal and withdraw its policies because they are unconstitutional. In a letter, Nazarian replied to FIRE that no RIC student had been punished for failing to embrace a certain political position.

At the end of the course, Professor Ryczek informed Dr. Olsen that he would not teach the second half of the class the next semester because, as an adjunct faculty member, managing Felkner

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[4] FIRE describes itself as a tax-exempt nonprofit organization under Section 501(c)(3) of the Internal Revenue Code with a mission to defend and promote the value of free speech for all Americans in courtrooms, on campuses, and in American culture. FIRE's Mission, https://www.thefire.org/about-us/mission (last visited December 15, 2022). FIRE has since modified its name to the Foundation for Individual Rights and Expression.

required too much of his time. Felkner was moved to a section of the course taught by a full-time instructor. In an assignment that required approval by Professor Pearlmutter, Felkner proposed that he would form a group with students from other colleges to lobby RIC for an Academic Bill of Rights. Professor Pearlmutter rejected this proposal. Felkner then submitted a project request to lobby in favor of the then-governor's proposed welfare-reform program. This suggestion was also rejected.

Subsequently, Professor Pearlmutter permitted Felkner to work on a project lobbying for the defeat of SB 525. Professor Pearlmutter told Felkner that she would penalize his grade on the project if he did not work on it with students from her class. Felkner, however, chose to work in a group with two individuals from outside of RIC.[5] Additionally, Felkner audio-recorded an exchange with Professor Pearlmutter without her knowledge and went on to post a rough transcript of the conversation to the website he had created to expose what he characterized as the "liberal bias" at RIC. Several students approached Professor Pearlmutter about the confidentiality of the class being compromised by Felkner's website postings. She allowed students to discuss their concerns about the website one day in class. Felkner asserted that his political ideology was "assail[ed]" in the classroom and that Professor

[5] Felkner partnered with a student from Brown University and a local talk radio personality.

Pearlmutter would not give him the opportunity to respond. Felkner further asserted that Professor Pearlmutter unmistakably communicated that only liberal ideas could help the poor and advance the cause of social justice.

Professor Pearlmutter filed a complaint with the ASC, asserting that Felkner violated the National Association of Social Workers (NASW) Code of Ethics. On April 27, 2005, the ASC held a hearing on Professor Pearlmutter's complaint, that Felkner committed unethical and unprofessional conduct. Thereafter, the ASC issued a written decision determining that Felkner's deceptive conduct in recording his conversation with Professor Pearlmutter violated one of the three sections of the Code of Ethics alleged by Professor Pearlmutter in her complaint. The ASC recommended that Felkner declare immediately, in writing, that he would refrain from any deceptive audio or video copying of conversations with social work colleagues and refrain from any audio or video copying without express permission. The ASC further advised that Felkner be dismissed from the MSW program if he failed to carry out such a declaration. Felkner wrote a letter to Dean Bennett-Speight, dated May 11, 2005, indicating that he would refrain from making audio or video recordings of his conversations with his SSW colleagues unless he first obtained their consent to record.

At the end of the spring semester, Felkner selected the Social Work Organizing and Policy (SWOP) concentration for completion of his degree. As a MSW student, Felkner was required to complete a field placement and integrative project in order to fulfill the program requirements. For Felkner's field placement and integrative project, he obtained an internship in then-Governor Donald L. Carcieri's office, assigned to welfare-reform legislation. Felkner alleged that Professor Ryczek, who coordinated field placements, denied Felkner's placement because it would not promote progressive social change. Felkner claimed that Professor Ryczek informed him that the SWOP-concentration objectives required him to defend liberal policies and that Felkner's views might be best served in another academic discipline, such as political science. Felkner met with Dean Bennett-Speight about his challenges in the SWOP-concentration field placement process, claiming he was singled out because of his conservative views. Thereafter, Dean Bennett-Speight assigned Professor Mueller to be Felkner's field placement supervisor. Professor Mueller initially rejected Felkner's proposed field placement and project, but eventually RIC approved the field placement in the Governor's office.

According to Felkner, Professor Mueller refused to authorize Felkner's submission of an integrative project on welfare reform because it was a "toxic" subject. Felkner reluctantly conceded to initiate work

on health care. Felkner alleged that working on health-care reform put him at a disadvantage relative to other SSW students because he was unable to use his field placement research for his integrative project. Felkner worked on his integrative project throughout 2006 and 2007. On November 26, 2007, Felkner requested more time to complete his integrative project. In January 2008, Dean Bennett-Speight granted Felkner an extension until May 11, 2009, to complete his degree requirements. The extension was subject to Felkner submitting a section of the project by April 15, 2008, a requirement with which he did not comply. On March 17, 2008, Felkner sought an additional six-week extension, but both Professor Pearlmutter and Dean Bennett-Speight denied this request.

In December 2007, Felkner filed the instant action in Providence County Superior Court, alleging multiple violations of the Rhode Island and United States constitutions. Felkner sought equitable relief and damages under 42 U.S.C. § 1983 and § 1988, alleging that defendants' conduct toward him during his enrollment in the MSW program violated his First and Fourteenth Amendment rights.[6] Summary judgment was entered on November 4, 2015, which

[6] This Court stated in *Felkner I*, "Felkner has not drawn this Court's attention to any distinction between the application of Rhode Island and federal law regarding his free speech and expression, equal protection, and due process claims. Therefore, we address only the application of federal law to these claims." *Felkner I*, 203 A.3d at 446 n.9.

was then appealed to this Court. In *Felkner I*, the Court affirmed summary judgment on claims of retaliation based on recording activities; equal protection; procedural due process; and civil conspiracy pursuant to 42 U.S.C. § 1985(3). *Felkner I*, 203 A.3d at 452, 456, 458, 460. The Court further affirmed the order granting a motion to strike plaintiff's claim for punitive damages.[7] *Id.* at 461. This Court vacated the judgment as to claims for violation of Felkner's First Amendment free-speech and expression rights based on political viewpoint; retaliation for exercising his First Amendment rights, other than those related to recording; compelled speech contrary to his political beliefs; and the imposition of unconstitutional conditions for obtaining his Master's degree. *Id.* at 450, 452-53, 462. Additionally, the Court noted that the hearing justice had not addressed defendants' qualified immunity arguments. *Id.* at 460. Specifically, the Court stated, "[p]art of the Superior Court's task on remand will be, therefore, to consider whether any of the defendants are entitled to qualified immunity, should defendants continue to press this argument." *Id.* Subsequently, in October 2019, defendants filed a motion for summary judgment based on qualified immunity.

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[7] In *Felkner I*, this Court also determined that all claims pursuant to the Rhode Island Civil Rights Act, G.L. 1956 chapter 112 of title 42 ("RICRA"), and claims for equitable relief were waived. *Felkner I*, 203 A.3d at 446 n.10.

After written memoranda from the parties, supplemental briefing, and a hearing on the issue of qualified immunity, the hearing justice issued a written decision on defendants' motion for summary judgment. She applied a two-step analysis and determined that it was uncontested that Felkner met the first step of a qualified immunity claim, having alleged the deprivation of an actual constitutional right; thus, the hearing justice proceeded to the first aspect of the second step of the analysis. The hearing justice concluded that defendants' actions had not been clearly established as constitutional violations during the relevant time frame and that the relevant caselaw favored the concept that courts should not intrude into purely academic matters and should defer to educators. Therefore, she found, the second step was not satisfied.

With regard to the second aspect of the second step, the hearing justice proceeded to opine on whether a reasonable defendant would have understood that his or her conduct violated Felkner's constitutional rights. She determined that, at the time of the alleged violations, the law was not clear on the subject matter of Felkner's allegations and that, therefore, a reasonable defendant would not have had fair warning that Felkner's constitutional rights might be violated by their decisions.

Upon a finding that defendants were entitled to qualified immunity, the hearing justice granted

summary judgment in favor of defendants. Felkner thereafter filed a notice of appeal.[8]

Standard of Review

"This Court reviews a decision granting a party's motion for summary judgment de novo." *Citizens Bank, N.A. v. Palermo*, 247 A.3d 131, 133 (R.I. 2021) (quoting *Boudreau v. Automatic Temperature Controls, Inc.*, 212 A.3d 594, 598 (R.I. 2019)). We assess the matter "from the vantage point of the trial justice[,] * * * view[ing] the evidence in the light most favorable to the nonmoving party, and if we conclude that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law, we will affirm * * *" *Id.* (quoting *Boudreau*, 212 A.3d at 598). "Although summary judgment is recognized as an extreme remedy, * * * to avoid summary judgment the burden is on the nonmoving party to produce competent evidence that proves the existence of a disputed issue of material fact." Id. (quoting *Boudreau*, 212 A.3d at 598).

Discussion

On appeal, Felkner argues that the hearing justice violated the law of the case by exceeding this Court's mandate on remand. Felkner asserts that the

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[8] Felkner filed a premature notice of appeal on September 20, 2021; final judgment was entered on October 12, 2021. Therefore, we will treat the appeal as timely. See *Goddard v. APG Security-RI, LLC*, 134 A.3d 173, 175 (R.I. 2016) (treating a premature notice of appeal as timely filed).

hearing justice found that defendants had not violated Felkner's constitutional rights, in direct contravention of this Court's decision. Felkner also maintains that defendants are not entitled to qualified immunity as a matter of law. Further, Felkner argues that qualified immunity does not apply to his request for equitable relief and that defendants are not entitled to qualified immunity because Felkner's constitutional rights were established by caselaw. Felkner also maintains that defendants' insurance coverage precludes the application of qualified immunity. Finally, Felkner suggests that the hearing justice impermissibly resolved questions of material fact.

In response, defendants argue, inter alia, that the hearing justice correctly decided that the law was not clearly established as to the alleged constitutional violation. According to defendants, the facts presented by Felkner did not support his assertion that defendants violated a clearly established right, and, therefore, defendants were not given fair warning that they were acting in an unconstitutional manner.

Qualified immunity is an immunity typically afforded to government officials on the federal level. *Ensey v. Culhane*, 727 A.2d 687, 690 (R.I. 1999). The United States Supreme Court has stated that "government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.' " *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). This Court has acknowledged that the defense of qualified immunity may be available in some circumstances. Specifically, former Chief Justice Weisberger wrote, "[w]e are of the opinion that, in an appropriate case, the doctrine of qualified immunity might well be applied by this Court." *Ensey*, 727 A.2d at 690. We deem it applicable to the claims remaining in this case.

In a qualified-immunity analysis, "the first step in evaluating a claim * * * is to 'determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.' " *Monahan v. Girouard*, 911 A.2d 666, 674 (R.I. 2006) (deletion omitted) (quoting *Wilson*, 526 U.S. at 609, 119 S.Ct. 1692). "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged

misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). A clearly established constitutional right "means that, at the time of the [official's] conduct, the law was 'sufficiently clear that every reasonable official would understand that what he is doing' is unlawful." *District of Columbia v. Wesby*, —— U.S. ——, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018) (quoting *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074)). If the answer to the second question is also yes, then the Court must determine the second aspect of the second step, whether a reasonable official, situated similarly to the defendants, would have understood that the conduct at issue, if proven, contravened the clearly established law. See *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. The determination of whether defendants may avail themselves of qualified immunity considers the conduct in question from the perspective of "objective reasonableness." See *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

It is undisputed by the parties, and it was recognized by the hearing justice, that the first step in the qualified-immunity analysis was satisfied by Felkner when he alleged that his First Amendment right to free speech was violated. Therefore, we must determine whether the rights at issue were clearly established at the time of defendants' alleged misconduct.

The United States Supreme Court has created certain benchmarks concerning First Amendment rights in academia as they relate to students and to educational institutions. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (ruling that the school could not preclude students from wearing black armbands in class to demonstrate against the Vietnam War); see also *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (holding that schools may restrict students' First Amendment rights by exercising editorial power "so long as [the schools'] actions are reasonably related to legitimate pedagogical concerns"); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682-83, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (noting that students have First Amendment free-speech rights, but that schools may limit speech that is "lewd, indecent, or offensive")

This Court noted in *Felkner I* that, while freedom of speech is vital in American classrooms, "[r]ights guaranteed by the First Amendment, however, are not unlimited in the context of academia." *Felkner I*, 203 A.3d at 448 (citing *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562). This Court went on to note that, under *Hazelwood*, "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.* (quoting *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562).

Generally, academic decisions concerning grades, coursework, and progress within an academic program are accorded great deference and are not subject to judicial review. See *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 89-90, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Id.* at 96 n.6, 98 S.Ct. 948 (Powell, J., concurring). Furthermore, courts "should show great respect for the faculty's professional judgment. Plainly, [courts] may not override [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." *Felkner I*, 203 A.3d at 449 (quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985)).

The Supreme Court has stated that "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231, 129 S.Ct. 808. Thus, the precedent encompassing academic decisions by public

institutions, including *Horowitz*, *Hazelwood*, *Ewing*, and *Fraser*, convinces us that the law was not sufficiently clear, such that a reasonable educator would have understood what they were doing amounted to violations of a student's constitutional rights. See *Wesby*, 138 S. Ct. at 589. The core of Felkner's argument is that he was not allowed to complete Master's-level assignments on topics he chose, as opposed to the topics that were assigned to him. Further, that when he pursued his chosen topic against the wishes of the faculty, he was retaliated against with poor grades. To expect faculty to decipher "a sufficiently clear foundation in then-existing precedent" would be improper. *Wesby*, 138 S. Ct. at 589. Felkner failed to show that the law is clearly established; furthermore, a reasonable person in defendants' position would not have had fair warning that their conduct potentially violated his constitutional rights. See *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. We decline to disturb the findings of the hearing justice.

Felkner argues that there are active claims against RIC, for which the defense of qualified immunity cannot be raised. This Court determined that all claims pursuant to the Rhode Island Civil Rights Act, G.L. 1956 chapter 112 of title 42 ("RICRA") and for equitable relief were waived. *Felkner I*, 203 A.3d at 446 n.10. The only claims against RIC in the amended complaint were for equitable relief. Accordingly, no claims against RIC

remain as an institution because RIC is not a person, pursuant to § 1983. "This Court has recognized that 'neither a State nor its officials acting in their official capacities are "persons" under § 1983.' " *Zab v. Rhode Island Department of Correction*s, 269 A.3d 741, 746 (R.I. 2022) (quoting *Pontbriand v. Sundlun*, 699 A.2d 856, 868 (R.I. 1997)). Therefore, only the § 1983 claims against the individual defendants remained.

Lastly, Felkner's contention that the existence of insurance coverage for defendants precludes the application of qualified immunity is without merit. This argument is not supported by caselaw and is inconsistent with the underpinnings of qualified immunity. *Harlow*, 457 U.S. at 814, 818, 102 S.Ct. 2727 (noting that qualified immunity strikes a balance between the need to vindicate constitutional harms and social costs associated with bringing suit against government officials.).[9]

Conclusion

For the reasons stated herein, we affirm the final judgment of the Superior Court. The papers in this case shall be returned to the Superior Court.

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[9] Felkner submitted citations of supplemental authorities and defendants submitted a response after oral argument pursuant to Article I, Rule 16(e) of the Supreme Court Rules of Appellate Procedure. We acknowledge receipt of those authorities; however, it has not impacted our analysis.

Appendix C

SUPERIOR COURT OF RHODE ISLAND

No. PC 2007-6702

WILLIAM FELKNER,

Plaintiff,

v.

RHODE ISLAND COLLEGE et al.,

Defendants.

Before

Judge McGuirl

Decision

August 31, 2021

DECISION

McGUIRL, J. This action is on remand from the Rhode Island Supreme Court. *See Felkner v. Rhode Island College*, 203 A.3d 433, 460 (R.I. 2019).

I

Facts and Travel

A detailed summary of the factual allegations in the case is provided here, relating to the issue before the Court concerning Defendants' claim for qualified immunity. Plaintiff William Felkner (Plaintiff) enrolled in Defendant Rhode Island College's Masters of Social Work degree program in the fall of 2004. (Am. Compl. ¶ 13.) At the time, Rhode Island College was the only post-secondary institution in the state that offered a master's degree in social work. *Id.* ¶ 1. The School of Social Work designed the degree to be completed by a full-time student within two years. *Id.* ¶ 85. Plaintiff entered the program with the personal belief that market economies best serve the interests of all members of society across socioeconomic boundaries, as opposed to government welfare programs. *Id.* ¶ 12. Rhode Island College describes the School of Social Work as dedicated to the core value of "social justice," in addition to other values.[1] (Defs.'

[1] Black's Law Dictionary 1035 (11th ed. 2019) defines "social justice" as "1. Justice that conforms to a moral principle, such as that all people are equal. 2. One or more equitable resolutions sought on behalf of individuals and communities who are disenfranchised, underrepresented, or otherwise excluded from

Mem. 11-12.) Plaintiff would later describe his enrollment as "a great lesson in oppression" that caused him to "feel stronger in his convictions" than ever before. (Ex. 20, Part 3, at 2.) Plaintiff and the faculty of the School of Social Work began clashing during October of Plaintiff's first semester over the School-sponsored showing of Michael Moore's *Fahrenheit 9/11*. (Am. Compl. ¶ 16.) *See Felkner*, 203 A.3d at 440 n.5.

Plaintiff objected to the sponsored showing of the film via email to Defendant James Ryczek (Ryczek) and suggested also showing *FahrenHYPE 9/11* as a rebuttal. (Am. Compl. ¶ 16.) Ryczek responded the same day:

> "I don't think anyone here would want to quash alternative views. Again, as I have said in class … I want us to have an open discussion and debate about issues. In fact, questioning is an extremely important social work skill, and I know that I am doing a great deal of questioning with students about how they have traditionally

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meaningful participation in legal, economic, cultural, and social structures, with the ultimate goal of removing barriers to participation and effecting social change."

Black's definition of the term also quotes classical liberal philosopher Friedrich A. Hayek: "'Social justice' can be given a meaning only in a directed or 'command' economy (such as an army) in which the individuals are ordered what to do; and any particular conception of 'social justice' could be realized only in such a centrally directed system." *Id.* (quoting 2 Friedrich A. Hayek, *Law, Legislation, and Liberty* 69 (1976)).

thought about certain issues … and that is challenging for both me and the student.

"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 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. I don't want you to think that I am suggesting that you are such a person … but, then again, you may be … only you can make that determination*. It is not uncommon that the educational process here lends itself to such reflections on the part of many students.

"Please, let me know if you want to talk further with me about these things." (Ex. 5 ¶ 9 (emphasis added)).

In addition to these statements to Plaintiff, at some point in Plaintiff's first semester, Ryczek advertised that the National Association of Social Workers, which many of the School of Social Work faculty members were involved in, was "working actively to defeat [then-President George W.] Bush." (Ex. 13 at 133:14-24.)

Plaintiff eventually learned that Professor Daniel Weisman sponsored the showing of *Fahrenheit 9/11*; Plaintiff similarly contacted Weisman about showing *FahrenHYPE 9/11* as a rebuttal. (Am. Compl. ¶ 19.) Professor Weisman responded thus on October 29, 2004:

> "Thank you for leaving me the film. I have followed through on my promise to contact the other professors whose classes saw Fahrenheit. I'm awaiting their responses. 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. Republican social workers face a challenge of how to reconcile the conflict. Most of the few I've met have figured out how to separate their personal and professional lives. I'm not sure how the others manage.
>
> "I've offered to show the film not because I'm open minded, but for two specific reasons: 1) I know what it's like to have minority views about things, and 2) like to stir up students to make

> them think. I do not share most of the analysis you offered in your note.
>
> "As for your assertion that showing this film is a chance to prove my intentions, it is not my intent to prove myself to you or anyone else. I made the offer because, for me, it was the reasonable thing to do." (Ex. 3.)

Professor Weisman did show *FahrenHYPE* 9/11 to two of his classes, and Ryczek offered to show the film outside of class. (Ex. 5 ¶ 6.) Plaintiff thereafter created a now defunct website dedicated to critique the left-wing bias that he perceived as a School of Social Work student, in addition to utilizing other media platforms. (Second Am. Compl. ¶¶ 20-21.) Plaintiff published his email correspondence with Ryczek and Professor Weisman on his website, which caused Ryczek to cease communicating via email. *Id.* ¶ 23. Plaintiff also met with two additional professors in the School (who are not parties to this action) about the films, one of whom stated to Plaintiff that she hoped "all social workers are liberal." *Id.* ¶ 24.

During November 2004, Plaintiff communicated with Defendant John Nazarian (Nazarian) and Dr. Dan King, then Rhode Island College's Vice President for Academic Affairs and not a party here, over Plaintiff's issues with the School of Social Work faculty. *Id.* ¶¶ 26-27. These communications did not assuage Plaintiff's concerns. *Id.* On November 14, 2004, Plaintiff submitted the first of several articles to *The Providence Journal* about his experiences as a

student. *Id.* ¶ 28. Plaintiff similarly spoke on two radio talk shows. *Id.* ¶ 29.

Plaintiff also experienced issues with Ryczek over his final assignment as a member of Ryczek's class during his first semester. (Am. Compl. ¶ 33.) Per Plaintiff, Ryczek assigned students to form groups to lobby the Rhode Island General Assembly for social welfare programs from a specific list of topics approved by Ryczek. *Id.* However, in an affidavit, Ryczek contends that two group assignments existed: one to debate a social welfare issue; and a second to write a policy research paper "based on the perspective the student chose within her/his debate group." *See* Ex. 5 ¶ 19; *see also* Ex. 7. Per Ryczek, he provided a list of "'suggested' issues that were part of the 'One-RI Platform' . . . and other 'hot topic' issues that were coming up in the next legislative session." (Ex. 5 ¶ 20.) Ryczek stated that he "never characterized the list as exhaustive or 'approved' nor the only issues that could be chosen." *Id.* ¶ 21.

Regardless, Plaintiff felt that none of the topics dovetailed with his personal views, except for a proposed "Education and Training Amendment to the Family Independence Program," a temporary cash assistance program for Rhode Islanders experiencing financial issues. (Am. Compl. ¶ 36.) As part of the group project, Plaintiff discovered that two studies contradicted the research that the program utilized. *Id.* ¶¶ 37-39; Ex. 5 ¶ 37. Plaintiff approached Ryczek about these contradictory studies and requested to

argue against the program, which Ryczek denied out of concerns of fairness and to allow Plaintiff an opportunity to learn how to advocate for a position that he did not agree with. (Am. Compl. ¶¶ 40-41; Ex. 5 ¶¶ 38-40.) According to Plaintiff, when denying his request to advocate against the program, Ryczek stated that "Rhode Island College 'is a perspective school and we teach that perspective'" and "'if you are going to lobby on [the program], you're going to lobby in our perspective.'" (Am. Compl. ¶ 42.)

Plaintiff wrote his paper against passage of the program, contrary to Ryczek's instructions, and received an "F" failing grade on both the paper and associated classroom debate. *Id.* ¶ 43; Ex. 5 ¶ 41.) Ryczek offered to allow Plaintiff to re-write the paper for a better, passing grade, but Plaintiff appealed the grade, which caused Ryczek to eventually enter a "C+" passing grade. (Am. Compl. ¶ 50; Ex. 5 ¶ 43.) As part of Plaintiff's appeal, the Rhode Island College Academic Standing Committee conducted a hearing on January 20, 2005, at which Ryczek testified. (Am. Compl. ¶¶ 49, 51-52.) However, Plaintiff did not have an opportunity to question Ryczek, because Ryczek left the hearing after testifying as to his side of the narrative. *Id.*

While conducting research for his paper in December 2004, Plaintiff emailed Defendant Roberta Pearlmutter (Pearlmutter) regarding her research in favor of the cash assistance program. (Ex. 8 at 1.) Plaintiff's emails questioned the statistical grounds of

Pearlmutter's research, to which Pearlmutter replied and explained. *Id.* at 1-3. Pearlmutter also replied that:

> "[S]ome of the questions you have asked require a knowledge and understanding of statistical and research techniques that other questions indicate you do not yet have. If you would care to discuss these issues further, I would prefer to do so in person. It is far too difficult to discuss them through e-mail when I cannot clarify or specifically respond to your questions in a way that assures your understanding of what I am talking about." *Id.* at 3.

Plaintiff attempted to refute Pearlmutter's explanation of her statistical model as being flawed, culminating in his statement to her that "[i]f you are confused by the limitations of descriptive studies or the value of those such as the mrdc [*sic*] report, *I might suggest you walk down to the psychology department and take a refresher course*[.]" *Id.* at 4 (emphasis added). Plaintiff also took issue with being characterized as lacking an understanding of the statistical issues, ultimately stating at the end of his email to Pearlmutter that he felt he was being discriminated against because he lived an hour away and the faculty were refusing to correspond via email. *Id.* at 4-5. Plaintiff later apologized for his remarks after being contacted about them by Professor Lenore Olsen, then- Chair of the Social Work Master's program. (Am. Compl. ¶¶ 44-45; Ex. 21 at 1; Ex. 22.)

Going into his second semester, Plaintiff contacted the Foundation for Individual Rights in Education (FIRE) about his situation; FIRE then corresponded with Nazarian. (Am. Compl. ¶ 57; Ex. 18 at 1.)

To complete an assignment as a student in Pearlmutter's class, Plaintiff desired to work on a lobbying and student organizing project related to an Academic Bill of Rights.[2] (Ex. 18 at 1.) However, Pearlmutter denied Plaintiff's request because she did not "see how [the project] fit" with her class's goal of positively and directly impacting "people who are in vulnerable populations" and advancing "social and economic justice." *Id.* Further, at the time, Rhode

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[2] Conservative activist and author David Horowitz promulgated the concept of an "Academic Bill of Rights" in 2004 "in response to a growing concern that modern university curricula have become overly political and ideological. Supporters of the Academic Bill of Rights cite studies revealing that most faculty members are members of the Democratic Party, profess doubts about the existence of God, and identify themselves as liberals." Michael P. Bobic, *Academic Bill of Rights*, The First Amendment Encyclopedia, https://www.mtsu.edu/first- amendment/article/855/academic-bill-of-rights (last visited Jul. 30, 2021).

However, organizations such as the American Association of University Professors describe the "Academic Bill of Rights" as "a grave threat to fundamental principles of academic freedom." American Association of University Professors, *Academic Bill of Rights*, Reports and Publications, https://www.aaup.org/report/academic-bill-rights (last visited Jul. 30, 2021).

Island College had a Student Bill of Rights. (Am. Compl. ¶ 66.) Plaintiff then suggested the "governors [*sic*] welfare reform bill" as an alternative project, which Pearlmutter also did not accept.[3] (Ex. 18 at 3; Am. Compl. ¶ 67.)

Eventually, Plaintiff and Pearlmutter agreed that he could advocate against the cash assistance program legislation from his previous semester in a group consisting of himself, a Brown University student, and "a local radio personality." (Am. Compl. ¶¶ 68-69.) However, Pearlmutter deducted points from Plaintiff's presentation with these two non-Rhode Island College students during their final presentation because "Mr. Felkner did not have an authorized group." (Ex. 19 at 75:6-24.) Plaintiff also claims that he and his group members were ridiculed by classmates for their beliefs, with Pearlmutter's permission, during their presentation. (Am. Compl. ¶ 82.)

Plaintiff thus began posting class discussions on his website. (Ex. 19 at 179:1-3.) Two students approached Pearlmutter about the postings and expressed concerns that Plaintiff would reveal students' names. *Id.* at 179:20-25. The two students felt that Plaintiff inhibited class discussions because

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[3] Page 4 of Exhibit 18 contains an editorial by Plaintiff regarding the conversation: "(note: in class when I mentioned the bill in class she described it as 'tearing apart what TANF has been able to do'. Why would any student join a group the professor has already publicly chastised?)[.]"

he could post anything from class on his website. *Id.* The two students requested "the opportunity to talk about [the postings] in class," which Pearlmutter provided. *Id.* at 179:3-6. Plaintiff described Pearlmutter's "opportunity" for class discussion as being "a fifty- minute in-class discussion assailing [his] conservative views and his postings on his website. In particular, [Pearlmutter] stated "that the Academic Bill of Rights is bad for the curriculum and that the SSW only 'teaches from the progressive perspective.'" (Am. Compl. ¶ 72.)

Pearlmutter did not inform Plaintiff prior to class that this in-class discussion would occur because she thought that doing so was unnecessary; she testified in a deposition that "[i]t was intended to be a session where people talked about their feelings about what was going on in class and outside of class." (Ex. 19 at 184:3-13.) Students expressed various concerns that Plaintiff's website postings would harm their professional reputations, were incorrect and belittling, and generally made students uncomfortable. *Id.* at 186:1-23; 187:12-19. Per Plaintiff, he did not have the opportunity to respond to these concerns. (Am. Compl. ¶ 72.) Plaintiff then posted details about the class discussion on his website. *Id.* Plaintiff also emailed Defendant Carol Bennett-Speight (Bennett-Speight) regarding the discussion, but he did not receive a reply. *Id.* ¶ 74.

Plaintiff received a letter from the Academic Standing Committee on March 14, 2005, stating that

the committee would conduct a hearing regarding ethics violations alleged against him by Pearlmutter for his emails to her, the recording of faculty, and the publication of in-class discussions to his website. (Am. Compl. ¶¶ 73, 75.) Professor Lenore Olsen supported the charges against Plaintiff, and Ryczek also filed ethics charges. *Id.* ¶¶ 77-78. However, the committee dismissed Ryczek's charges as redundant. *Id.* ¶ 79. On April 27, 2005, the committee found that Plaintiff had not violated ethical codes regarding respect towards others and confidentiality; however, the committee did find him guilty of "'deception' for recording independent conversations with Defendant Pearlmutter." *Id.* ¶ 80. The committee required Plaintiff to sign an agreement to refrain from recording faculty members, which Plaintiff signed and agreed to do. *Id.* ¶¶ 80-81.

Toward the end of his first year, Plaintiff met with his faculty advisor to declare a concentration and develop a study plan, which required completion of a field placement. (Am. Compl. ¶ 86.) Plaintiff secured an internship within the office of then-Governor Donald L. Carcieri to specifically work on "welfare reform legislation" that would be submitted to the General Assembly. *Id.* Plaintiff and his advisor met with Ryczek, who was then the School of Social Work's Director of Field Placements. *Id.* ¶ 88. Plaintiff and Ryczek disagreed over whether he would have to complete seven out of the eleven total objectives required by the field placement, which would have

required him to advocate for "progressive social change." *Id.* Ryczek refused to allow Plaintiff to forgo these objectives on the basis that "until there is a court case that says we need to do this, this is the law we are operating under." *Id.* ¶ 89.

After meeting with Bennett-Speight and receiving a new advisor, Defendant S. Scott Mueller (Mueller), Plaintiff eventually received his request for placement in October 2005, six months after his initial request. *Id.* ¶¶ 90-94. However, Mueller refused to allow Plaintiff to work on "welfare reform," which effectively gave Plaintiff the options of either abandoning his internship or conducting separate research outside of his field placement. *Id.* ¶¶ 94-95. Plaintiff consequently worked on a healthcare reform project because he was weeks behind his classmates when Mueller finally approved the field placement. *Id.* ¶ 96. Plaintiff claims that Mueller neglected his duties as advisor because Mueller missed meetings and failed to respond to emails. *Id.* ¶ 97. Plaintiff again requested to work on welfare reform on November 30, 2005, which Mueller similarly refused to approve. *Id.* ¶ 98.

Plaintiff finished his classes necessary to graduate in May 2006. *Id.* ¶ 99. However, Plaintiff had not yet completed his field placement project, which precluded him from graduating with his classmates. *Id.* ¶¶ 99-100. Plaintiff met with Bennett-Speight and Dr. Dan King over his concerns; Dr. King approved Plaintiff's request to work on welfare reform

and required Bennett- Speight to provide him an advisor. *Id.* ¶ 100. Plaintiff finally received permission to work on his field placement in January 2007, a year and a half after his classmates, and after his internship with Governor Carcieri's office had ended. *Id.* ¶ 101. Plaintiff requested additional time to complete his degree requirements but did not receive a response prior to this suit. *Id.* ¶ 102.

Plaintiff brought this action on December 14, 2007. *Id.* at 1. Plaintiff sued (1) Rhode Island College; (2) Nazarian, both individually and as President of Rhode Island College; (3) Scott Kane, both individually and as Dean of Students of Rhode Island College;[4] (4) Bennett-Speight, both individually and as Dean of the School of Social Work; (5) Ryczek, individually; (6) Pearlmutter, both individually and as a Professor of Social Work; and (7) Mueller, both individually and as an Assistant Professor of Social Work (collectively, excluding Kane, Defendants). (Compl. 1.) Plaintiff's Complaint alleged violations of his freedom of expression and right to equal protection under the First and Fourteenth Amendments to the United States Constitution; article I, sections 20 and 21 of the Rhode Island Constitution; 42 USC §§ 1983 and 1988; and the Rhode Island Civil Rights Act of 1990. (Compl. ¶¶ 26-31.)

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[4] Plaintiff and Defendant Kane settled; the Court (Hurst, J.) ordered a dismissal regarding Kane on November 7, 2008.

In July 2008, Defendants filed a motion for summary judgment, arguing, *inter alia*, that the Complaint had set forth no actionable claims; Plaintiff had failed to exhaust his administrative remedies; the Court should abstain from reviewing Plaintiff's Complaint based upon the theory of academic abstention as set forth in *Curators of the University of Missouri v. Horowitz*, 435 US. 78 (1978); Plaintiff had suffered no cognizable harm; and Defendants were protected by qualified immunity. (Defs.' Mem. Supp. Mot. Summ. J (July 2, 2008) (MSJ 1).) The motion for summary judgment was heard and denied. *See* Order (Nov. 7, 2008) (Hurst, J.). Discovery then commenced.

Plaintiff filed an Amended Complaint on December 3, 2013, which added claims of procedural due process and conspiracy to violate civil rights under the Fourteenth Amendment to the United States Constitution; article I, section 2 of the Rhode Island Constitution; and 42 USC §§ 1983 and 1985(3). (Am. Compl. 25-33.)

On March 8, 2015, Defendants filed a renewed motion for summary judgment on grounds of qualified immunity, claiming that: (1) Plaintiff's claims regarded purely academic issues, such as grades and internship placements; and (2) Defendants did not deprive Plaintiff of any of his rights. (Mar. 8, 2015 Renewed Mot. Summ. J. (MSJ 2) 34-54.) On October 2, 2015, the Court (Vogel, J.) granted Defendants' motion for summary judgment, thus granting

judgment in favor of Defendants on all counts of Plaintiff's Amended Complaint. *See* Decision 1; 46 (Oct. 2, 2015) (Vogel, J.). The Court (Vogel, J.) did not address whether Defendants were entitled to qualified immunity. *Id.* at 45 ("However, as Felkner failed to establish a genuine issue as to a material fact that a constitutional violation occurred, Defendants had no need to avail themselves of the protections of the qualified immunity doctrine[.]").

Thus, when Plaintiff appealed the grant of summary judgment to the Rhode Island Supreme Court on November 6, 2015, the Court in *Felkner* did not address whether Defendants would receive qualified immunity. *See Felkner*, 203 A.3d at 460. The Rhode Island Supreme Court remanded this action, in part, to determine "whether any of the defendants are entitled to qualified immunity, should defendants continue to press this argument[,]" which Defendants are doing in the present motion for summary judgment. *See id.*; *see also* Defs.' Post-Appeal Mem. Supp. Mot. Summ. J. (MSJ 3) (Oct. 31, 2019).

II

Standard of Review

Rule 56(c) of the Superior Court Rules of Civil Procedure provides that summary judgment shall issue if, after discovery, the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Rhode Island courts review the

evidence "in the light most favorable to the nonmoving party." *Felkner*, 203 A.3d at 446 (quotations omitted). "Furthermore, the nonmoving party bears the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." *Id.* (quotations omitted). "Summary judgment should enter against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 447 (brackets and quotations omitted). "It is a fundamental principle that summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Id.* (quotations omitted).

III

Parties' Arguments

Defendants argue that they are entitled to summary judgment based upon qualified immunity. (Defs.' Mem. 30.) Under qualified immunity analysis, Defendants argue (1) that the law at the time of the alleged constitutional violations by the Defendants against Plaintiff was not "clearly established"; and (2) even if the law was clearly established at the time, Defendants had no reasonable way of knowing that their actions violated Plaintiff's rights. *Id.* Therefore, Defendants request that the Court grant summary

judgment in their favor on all claims because they are immune from being brought to trial. *Id.*

Plaintiff argues that the Court should deny summary judgment, contending that these Defendants are not eligible to receive qualified immunity. (Pl.'s Mem. 4.) Plaintiff cites to a wide variety of Rhode Island and Federal cases in support of his argument that the law was clearly established when he alleges that the Defendants violated his rights. *Id.* Plaintiff also argues that Defendants knew that they violated his rights. *Id.* at 51. Plaintiff finally argues that, because the record is "replete with disputed facts," this issue is precluded from resolution by summary judgment. *Id.* at 4. Therefore, Plaintiff requests the Court to deny summary judgment. *Id.* at 58.

IV

Analysis

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Garza v. Lansing School District*, 972 F.3d 853, 877 (6th Cir. 2020) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Rhode Island law recognizes the defense of qualified immunity for state actors. *See Fabrizio v. City of Providence*, 104 A.3d 1289, 1294 (R.I. 2014). In a qualified immunity analysis, "'the first step in

evaluating a claim . . . is to determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.'" *Id.* (quoting *Monahan v. Girouard*, 911 A.2d 666, 674 (R.I. 2006)). The second step is to determine "'whether the right was clearly established at the time of the defendant's alleged violation.'" *See Baillargeon v. Drug Enforcement Administration*, 707 F. Supp. 2d 305, 307 (D.R.I. 2010) (quoting *Estrada v. Rhode Island*, 594 F.3d 56, 62-63 (1st Cir. 2010)). "'The second step has two aspects: (1) the clarity of the law at the time of the alleged civil rights violation and (2) whether, on the facts of the case, a reasonable defendant would have understood that his conduct violated the Plaintiffs' constitutional rights.'" *Id.* (quoting *Estrada*, 594 F.3d at 63). This two-step test for resolving government officials' qualified immunity claims was first set out by the Supreme Court of the United States in *Saucier v. Katz*, 533 U.S. 194 (2001). Courts deny qualified immunity when "[t]he contours of the right [. . . are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. Qualified immunity applies to government officials in

performing their duties, including the president, staff, and faculty of a university. *See Lallemand v. University of Rhode Island*, 9 F.3d 214, 217 (1st Cir. 1993) (finding that University of Rhode Island police lieutenant, president, and others received qualified immunity in a 42 USC § 1983 false arrest claim). *But see* Hoggard v. Rhodes, --- U.S. ---, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., in denying certiorari) ("But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question").

A

First Prong: Allegation of Deprivation of Actual Constitutional Right

"'[T]he first step in evaluating a claim to qualified immunity is to determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all….'" *Fabrizio*, 104 A.3d at 1294 (quoting *Monahan*, 911 A.2d at 674). In *Felkner*, the Rhode Island Supreme Court held that five issues presented material issues of fact and were precluded from resolution by summary judgment, including whether Defendants could receive qualified immunity. *Felkner*, 203 A.3d at 450, 462.

All parties agree that the holding of *Felkner* resolved the first prong of qualified immunity

analysis. *See* MSJ 3 at 35 ("In this case, the Supreme Court, using the summary judgment standard, has already essentially determined the first prong of qualified immunity analysis -- that there are some colorable claims of constitutional violation[.]") (footnote omitted) (citing *Felkner*, 203 A.3d at 460, 462); *see also* Pl.'s Obj. at 33 ("The Rhode Island Supreme Court found there was material evidence that Defendants violated Plaintiff's freedom of expression, based on the undisputed facts[.]"). Thus, there is no dispute that Plaintiff satisfied the first prong of qualified immunity analysis, which is whether "the plaintiff has alleged the deprivation of an actual constitutional right." *See Fabrizio*, 104 A.3d at 1294.

B

Second Prong: Clearly Established Rights

1

The clarity of the law at the time of the alleged civil rights violation

The second prong of qualified immunity analysis requires "consider[ing] whether existing case law was clearly established so as to give the defendants fair warning that their conduct violated the plaintiff's constitutional rights." *Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 527 (1st Cir. 2009) (quotations omitted). "The law is considered clearly established 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." *Id.* (quotations omitted). "The inquiry requires [a court] to consider the state of the law at the time of the challenged act, or in other words 'conduct the judicial equivalent of an archeological dig.'" *Lopera v. Town of Coventry*, 652 F. Supp. 2d 203, 213 (D.R.I. 2009) (quoting *Savard v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003) (en banc) (affirmed by *Lopera v. Town of Coventry*, 640 F.3d 388, 404 (1st Cir. 2011)).

"If 'controlling authority' on the issue does not exist, a plaintiff may point to a 'consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Id.* (quoting *Bergeron v. Cabral*, 560 F.3d 1, 11 (1st Cir. 2009)). "Careful attention also must be paid to the factual nuances of the case, so as to properly define the right at issue." *Id.* (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "At bottom, 'the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional.'" *Id.* (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)).

Modern jurisprudence regarding academic freedom of educators and students in the classroom began with the overturning of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), by *West*

Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).[5] Both cases involved schools' expulsion of students that belonged to the Jehovah's Witnesses faith. *Gobitis*, 310 U.S. at 591-92; *Barnette*, 319 U.S. at 630. In both cases, the expelled students refused to comply with mandated Pledges of Allegiance in school classrooms before the United States flag. *Gobitis*, 310 U.S. at 591; *Barnette*, 319 U.S. at 627. Prior to and during the Second World War, states enacted laws that compelled students to pledge allegiance to the United States flag to instill nationalistic sentiments of unity and citizenship. *See* Laura Prieston, *Parents, Students, and the Pledge of Allegiance: Why Courts Must Protect the Marketplace of Student Ideas*, 52 B.C. L. Rev. 375, 379 (2011). Those of the Jehovah's Witnesses faith opposed compulsory pledges on Biblical and political grounds:[6]

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[5] Defendants argue that the doctrines of academic freedom and abstention preclude this suit. (Answer Am. Compl. ¶ 26; p. 24.)

[6] Jehovah's Witnesses also opposed the Pledge of Allegiance because of Nazi Germany's comparable and contemporaneous requirement for school children in the Third Reich to salute and pledge to Nazi flags. *See* Jane G. Rainey, *Jehovah's Witnesses*, The First Amendment Encyclopedia https://www.mtsu.edu/first-amendment/article/1366/jehovah-s-witnesses (last visited Jul. 30, 2021). At the time, both the American Pledge of Allegiance, now known as the "Bellamy Pledge," and the "Nazi salute," involved raising the right hand to eye level towards the flag. *Id.* Jehovah's Witnesses in the Third Reich refused to comply with the Nazi requirement and were severely punished; American Witnesses responded by

> "Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them. They consider that the flag is an 'image' within this command. For this reason they refuse to salute it.'" *Barnette*, 319 U.S. at 629.

In overturning the holding of *Gobitis*, which affirmed a Pennsylvania statute that required the Pledge of Allegiance in schools on grounds of deference to state legislative authority, the court in *Barnette* reasoned that such statutes forced students to conform to a specific political and religious belief, contrary to those held by the Jehovah's Witnesses, against the intent and spirit of the First Amendment to the United States Constitution. *Gobitis*, 310 U.S. at 600; *Barnette*, 319 U.S. 641-42. "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. If there are any circumstances which permit an exception, they do not now occur to us." *Barnette*, 319 U.S. at 642. Thus, the Supreme Court in *Barnette* explicitly overruled the

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similarly refusing to comply as a demonstration of solidarity with their brethren under Nazi oppression. *Id.*

holding in *Gobitis* that schools could compel students to pledge allegiance to the American flag. *Id.*

Over time, the Supreme Court of the United States has defined the boundaries of First Amendment rights in academia for students, educators, and administrators. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969) (finding that school could not preclude students from wearing black armbands in class to demonstrate against the Vietnam War); *see also Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (finding that schools may restrict students' First Amendment rights by exercising editorial power "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns"); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986) (under Federal law, "the First Amendment gives a high school student the classroom right to wear *Tinker's* armband, but not *Cohen's* jacket"; i.e., students have free speech rights, provided such speech does not venture into the lewd, obscene, or disruptive) (quoting *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043, 1057 (2d Cir. 1979)); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 227-28 (1985) (reversing and remanding a precluded claim by an academically- dismissed medical school applicant who argued that he had a contractual, property, and liberty interest in being allowed to retake a critical exam); *Board of Curators of University of Missouri v.*

Horowitz, 435 U.S. 78, 89-90 (1978) (deferring to findings of professors and teachers on academic issues, such as what grade to award a student); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574-75 (1972) (finding that adjunct professor with annual contract did not have a property right in future employment and failed to show that his contract was not renewed because of his exercise of free speech); *Healy v. James*, 408 U.S. 169, 189-90 (1972) (finding that a college president was precluded on First Amendment grounds from denying a student group's approval without evidence that the group would be disruptive); *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 574-75 (1968) (finding that a school district was precluded from terminating a teacher based on teacher's exercise of free speech, absent showing that the teacher made knowingly or recklessly false statements); *Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589, 603-04 (1967) (abrogating a statutory scheme regarding what professors at state universities could express because of the statutes' "extraordinary ambiguity"). The most relevant of these are *Horowitz*, 435 U.S. at 89-91; *Ewing*, 474 U.S. at 227-28; and *Fraser*, 478 U.S. at 682-83.

The facts of both *Horowitz* and *Ewing* involved appeals by academically dismissed medical students at public institutions. In *Horowitz*, the plaintiff, a University of Missouri-Kansas City Medical School

student, had "'performance [in her program that] was below that of her peers in all clinical patient-oriented settings,' . . . she was erratic in her attendance at clinical sessions, and . . . she lacked a critical concern for personal hygiene." *Horowitz*, 435 U.S. at 81. After further unsatisfactory evaluations, the school's council on evaluations recommended dropping the plaintiff from the school. *Id.* at 82. Likewise, in *Ewing*, the plaintiff, a University of Michigan student, entered a six-year combined undergraduate and medical program, but immediately began experiencing academic difficulties, such as receiving marginally passing (C's and D's), incomplete, and failing grades. *Ewing*, 474 U.S. at 217 n.4. After the plaintiff appealed a failed entrance exam that would have allowed the transition from the undergraduate program into the medical program, the medical school's executive committee denied the student's request to retake the exam, precluding his continued studies. *Id.* at 216.

In both *Horowitz* and *Ewing*, the Court held that because the medical schools dismissed the students for academic, rather than disciplinary, reasons, courts should not intrude into academic matters by requiring a hearing before dismissal, and instead should defer to the expertise of educators. *See Horowitz*, 435 U.S. at 89-91; *Ewing*, 474 U.S. at 225-27. Both cases described that courts generally avoid intruding into academic disputes between educators and students, but are more proactive in resolving

disputes regarding student discipline, because "[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings [of disciplinary proceedings]." *Horowitz*, 435 U.S. at 89. "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." *Ewing*, 474 U.S. at 225 (citing *Horowitz*, 435 U.S. at 98 n.6 ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation[.]")). "Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Horowitz*, 435 U.S. at 90.

In contrast to *Horowitz* and *Ewing*, *Fraser* involved disciplining of a high school student over what he said during a speech at a school assembly. *See Fraser*, 478 U.S. at 676. "During the entire speech, [the student] referred to [a classmate] in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* "Some of the students at the assembly hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, and

others appeared to be bewildered and embarrassed." *Id.* "After [the student] admitted that he deliberately used sexual innuendo in the speech, he was informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises." *Id.* The court in *Fraser* held that, while students do have a First Amendment right to freely express themselves in school, their expressions must conform to avoid "offensively lewd and indecent" or otherwise disruptive forms. *Id.* at 682-85. The court in *Fraser* reasoned that the school had acted properly in disciplining the student because of the disruptive and lewd nature of the speech. *Id.* at 685-86.

Here, many of the incidents alleged in the Amended Complaint between Plaintiff and Defendants are academic in nature, including the issues of Plaintiff's assignments in his classes with Defendants Ryczek and Pearlmutter and whether Plaintiff could intern at Governor Carcieri's office to work on "welfare reform[.]" These issues, it is suggested, are comparable to those issues present in *Horowitz*, 435 U.S. at 89-91 and *Ewing*, 474 U.S. at 225-27. Indeed, the crux of the issue that Plaintiff experienced with Ryczek, Pearlmutter, and Mueller involved: (1) what Plaintiff's assignments would entail; and (2) Plaintiff's grades for those assignments. *See Horowitz*, 435 U.S. at 89-90 (courts are ill-equipped to resolve issues such as whether to dismiss a student for academic failure or how to grade

the student's work by means employed by academics: expert evaluation of cumulative information not presented in an adversarial manner).

The Court (Vogel, J.) noted this in the previous grant of summary judgment. *See* Decision at 34 ("[C]ourts should defer to decisions by school officials unless a plaintiff can show that the academic decision 'is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'" (citing *Horowitz*, 435 U.S. at 90). Rhode Island Supreme Court Associate Justice William P. Robinson, III similarly noted this sentiment in his concurrence and dissent on appeal. *See Felkner*, 203 A.3d at 462-63 (Robinson, J., concurring in part and dissenting in part).

In fact, the only disciplinary incident in the present case involved the ethics charges brought against Plaintiff during his second semester. (Am. Compl. ¶ 75.) The one charge out of the three brought that the ethics committee found Plaintiff guilty of violating regarded "deception" in his recordings of independent conversations with Pearlmutter. (Am. Compl. ¶ 80.) The "deception" charge involved Plaintiff's comment that Pearlmutter "take a refresher course" at Rhode Island College's psychology department, his attempts to work on the Academic Bill of Rights, his website postings, and his recording of a conversation between Pearlmutter and himself on February 17, 2005. (Am. Compl. ¶ 73.)

Plaintiff agreed to stop making these recordings of Pearlmutter. (Am. Compl. ¶ 81.) Plaintiff does not challenge the findings of that disciplinary hearing. (Am. Compl. ¶¶ 140-150.)

Further, Plaintiff's recording, posting, and editorializing of class discussions disrupted class. *Id.* ¶ 72. Two students voiced concerns to Pearlmutter regarding Plaintiff's recordings, stating that they found his postings belittling, uncomfortable, incorrect, and damaging to their future professional careers. Ex. 19 at 186:1-24; 187:12-19. These concerns resulted in, per Plaintiff, "a fifty-minute in-class discussion assailing [his] conservative views and his postings on his website." (Am. Compl. ¶ 72.) These facts demonstrate that, like the lewd speech in *Fraser* that resulted in class discussions to deal with the speech's fallout, not to mention the disruption caused by the speech itself, Plaintiff's recording, posting, and editorializing was disruptive to Pearlmutter's class. *See Fraser*, 478 U.S. at 675; 685-86.

The parties also cite a recent Eighth Circuit Court of Appeals decision, *Intervarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021) (*Intervarsity*) in support of their arguments. The court in *Intervarsity* held that the University of Iowa singled out and discriminated against a Christian student group by denying it registration as a student group because the university specifically targeted the group for not allowing all students to join, rather than allowing the group to

receive an exemption from the university as other non-inclusive student groups received. *See Intervarsity*, 5 F.4th at 866-67. Thus, the court in *Intervarsity* affirmed the denial of qualified immunity to the University of Iowa because the university violated extant Supreme Court of the United States and circuit court case law. *Id.* at 867.

However, the holding of *Intervarsity* is inapplicable here because, as stated *supra*, Plaintiff's activities interrupted classroom activities. (Am. Compl. ¶ 72.) Plaintiff had to be disciplined over his comments to Pearlmutter, which he did not challenge, and his website postings made his classmates uncomfortable to the point of requiring Pearlmutter to address the issue in class for fifty minutes. *Id.* ¶¶ 72-73; ¶¶ 80-81; Ex. 19 at 186:1-24; 187:12-19. As stated by the Court in *Fraser*, "Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences." *Fraser*, 478 U.S. at 681. Thus, the holding of *Intervarsity* does not apply because Plaintiff disrupted classroom activities and had to be disciplined over comments he made to Pearlmutter, in contrast to the student group in *Intervarsity* that was arbitrarily singled out for being a Christian group, in contrast to other non-inclusive groups that received exemptions.

Justice Robinson's concurrence and dissent in *Felkner*, 203 A.3d at 462 n.2 also touched on the legal maxim "*de minimis non curat lex*," translated as "The

law does not concern itself with trifles." *See* Black's Law Dictionary 544 (11th ed. 2019) (defining "*de minimus non curat lex*"). "The maxim . . . retains force even in constitutional cases, even in civil rights cases." *See Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993) (affirming placing a police officer on involuntary sick leave after the officer suffered "alleged psychological problems" because of the triviality and potential slippery slope of the suit). "Its particular function is to place outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a . . . case out of." *Id.*

As stated *supra*, the nexus of Plaintiff's claims surrounds his argument that two professors did not allow him to complete master's level assignments on topics he wanted, such as not being allowed to lobby against the cash assistance program or in favor of the Academic Bill of Rights, and that he could not intern for Governor Carcieri. These damages, comparable in their intangibility to being forced onto sick leave as in *Swick*, are not of the kind intended to be resolved by the Court. *See Swick*, 11 F.3d at 87; *see also Horowitz*, 435 U.S. at 92 ("Courts are particularly ill-equipped to evaluate academic performance"). To paraphrase the court in *Swick*, the consequences of allowing disputes over grades and internships to be resolved by courts are that the courts would become academic

overseers, a role for which courts are not designed or intended. *See id.*; *see also Horowitz*, 435 U.S. at 90.

Thus, it does not appear from the landscape of caselaw involving academic decisions by public institutions, including *Horowitz*, *Ewing*, and *Fraser*, in addition to *Swick*, that the actions undertaken by Defendants in this case had been clearly established as violations of a student's constitutional rights between the fall of 2004 and early 2007. Indeed, to the contrary, the law at the time of Plaintiff's claim, including *Horowitz*, *Ewing*, *Fraser*, and *Swick*, clearly established that his suit was precluded from being brought, considering that his lawsuit concerns intangible academic matters, such as grades and internship and project approvals. *See Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001) (affirming dismissal of a medical student for her inability to work with patients as an academic dismissal and thus, qualified immunity applied under the reasoning of *Horowitz*); *see also Perez v. Texas A & M University at Corpus Christi*, 589 F. App'x 244, 248-49 (5th Cir. 2014) (affirming dismissal of a medical student for failing an exam twice under *Horowitz* and qualified immunity). Therefore, the first part of the second prong of the test for qualified immunity has not been satisfied here, in that "existing case law" was not "clearly established to give the Defendants fair warning that their conduct violated the plaintiff's constitutional rights." *See Saucier*, 533 U.S. at 201.

Whether, on the facts of the case, a reasonable defendant would have understood that his conduct violated the Plaintiff's constitutional rights

The second prong of qualified immunity analysis also considers whether a reasonable defendant would have understood that his conduct violated a plaintiff's constitutional rights. *See Feminist Majority Foundation v. Hurley*, 911 F.3d 674, 704-05 (4th Cir. 2018) (holding that a university president would not have known that student-on-student sexual harassment constituted a violation of the victim's rights, in contrast to an employee sexually harassing a student). "Courts have described the second prong many ways, but 'a right is clearly established if the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 722 (brackets omitted) (quoting *Cox v. Quinn*, 828 F.3d 227, 238 (4th Cir. 2016)). "Put differently, for the law to be clearly established, officials must have 'fair notice' that their conduct violated the plaintiff's constitutional right." *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002)). If the Court determines, as suggested above, that the law at the time of the alleged violations did not clearly establish a violation of Plaintiff's rights, Defendants could not have reasonably known that their conduct was violating Plaintiff's constitutional rights; nevertheless, an analysis of that second part is provided here.

In *Hurley*, the court held that the plaintiffs sufficiently alleged that a university president failed to curb sexual harassment among the student body, satisfying the first prong of qualified immunity analysis, but that the president did not have "fair warning" based on existent case law at the time of the constitutional violations to satisfy the second prong. *Hurley*, 911 F.3d at 703-04. The plaintiffs in *Hurley* based their legal argument on *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 257-58 (2009) and *Jennings v. University of North Carolina*, 482 F.3d 686, 701-02 (4th Cir. 2007). *Id.* at 704-05. The court in *Hurley* differentiated the plaintiff's cited cases on two grounds: first, the court in *Fitzgerald* did not define the applicable standard for an equal protection claim based on deliberate indifference and thus was not clear enough case law for the president to know his actions to be constitutional violations; and second, the holding of *Jennings* applied to sexual harassment by university employees against students, not student-on-student harassment. *Id.* Using this reasoning, that the case law was not yet clear enough to directly deal with the constitutional violations at issue, the Fourth Circuit Court of Appeals in *Hurley* found that the plaintiff's argument failed on the second prong of qualified immunity analysis. *Id.*

Several factors indicate that Plaintiff intended to sue Rhode Island College, even prior to his enrollment in Rhode Island College's School of Social Work,

which would have suggested the probability of litigation to Defendants. First, Plaintiff stated that he had "similar testimony dating back to the 1980's" of a perceived left-wing bias at the School of Social Work. (Ex. 20, Part 6.) Second, Plaintiff generally preferred all conversations with professors to be conducted via email, as demonstrated by this example from his email chain to Pearlmutter:

> "I look forward to your reply; I prefer to do it via email as not to misinterpret you [*sic*] words. (not to mention we are 1 hour away and schedules as they are make personal visits inconvenient, that's why I offered for you to come here) *As long as we are all speaking the truth and being ethical there should not be problem with email communication*.
>
> "I have already been told by RIC SSW faculty member that he will not correspond to me via email. *There are some people interested in academic freedoms that are concerned by that practice, as am I*. Limiting my access in a disproportionate way (compared to other students) puts me at a disadvantage in regard to access to education. Perhaps this faculty does not correspond with any students via email (that is yet to be determined); if that's the case then fine, we are all on the same playing field. *If not then I am being discriminated upon and that will be dealt with according* [*sic*]. Is discrimination something you are concerned about, and would you be willing to advocate for non-discriminatory practices? *Please do not put yourself in that same predicament*. I have put my home email in

> the cc, so please 'reply to all.'" Ex. 8 at 5 (emphases added).

Plaintiff posted his email conversations, such as the one quoted *supra*, on his website. *See* Ex. 20, Part 5, 1-7. Plaintiff also demanded from a professor "that all [his work] [on Plaintiff's healthcare reform project] be conducted via email." (Ex. 30 ¶ 30.) Third, Plaintiff's website postings included significant editorializing of his conversations between himself and his professors. *See* Ex. 18; Ex. 20, Part 7, at 20-22. For example, Plaintiff editorialized one conversation with Pearlmutter in the following way:

> "P[earlmutter]- NO ITS NOT (loud & mad) we are talking about social justice for POOR people (very mad) (again confirmation that she believes any views taught besides the ones she promotes cannot help the poor & oppressed. This makes me think when my first policy professor said "Republicans are not mean, they just think they are right". Here she shows that liberals/progressives are not arrogant, they just think everyone else is wrong. This closed-minded view is why we have such division in our country. When one side refuses to acknowledge ANY good in the other side, we are doomed to conflict)[.]" (Ex. 20, Part 7, at 21.)

Plaintiff's editorializing of his conversations with his professors and his fellow students' class comments culminated in the in-class discussion regarding his website after his classmates expressed to Pearlmutter their lack of comfort with Plaintiff's posting on his website, which his classmates found belittling and

incorrect. (Ex. 19 at 186:1-24; 187:12-19; Am. Compl. ¶¶ 72-74.) Plaintiff likewise demonstrated a tendency to misconstrue communications in dealing with Ryczek, who stated that "[Plaintiff] has heard certain things that I have said differently than I have said them." (Ex. 13 at 175:13-21.) Fourth, Plaintiff mocked and/or parodied the social work profession during his presentation as part of his final assignment in Ryczek's class. (Ex. 11 at 2.) Ryczek's evaluation stated that "[Plaintiff . . .] did not appropriately participate in the debate presentation." *Id.* Plaintiff did make a presentation against his group's assignment, contrary to the rest of his group, which Ryczek summarized:

- Plaintiff appeared as a social worker "with a rumpled shirt, tousled hair, upturned collar sport jacket, and undone tie."
- Plaintiff had no research to support his client's (a group member's) perspective, but stated that he supported his client's right to self-determination.
- Plaintiff cited a Manpower Research Demonstration Corporation study that, when taken out of context, supported his argument against his group, and ended with "Oh, I'm

sorry[,] I guess that doesn't support our view."

- Plaintiff stated during his presentation, "Wouldn't you like your education paid for?", which Ryczek interpreted as having a "negative connotation." *Id.*

Ryczek informed Plaintiff that "[these] actions are unprofessional and inconsistent with . . . appropriate social work practice" and that Plaintiff's "work for [the] debate presentation assignment was not acceptable." *Id.* at 4. Plaintiff similarly displayed poor effort in completing his healthcare reform project, with little to no progress being made on it. (Ex. 30 ¶¶ 21-48.) Fifth, Plaintiff throughout his time at the School of Social Work emphasized that he was being oppressed, discriminated against, and threatened. (Ex. 20, Part 6, at 29.)[7] One email from Plaintiff to Professor Frederick Reamer contained only two sentences: "Are you threatening me? Another example of the oppression[.]" *Id.* The overall tone of Plaintiff's communications with his professors seemed to be fixated on concepts such as oppression, indoctrination, and chastisement. (Ex. 18 at 4; Ex. 20.) Professor Weisman described to *The Providence Journal* that "[i]n [his] experience, . . . [Plaintiff was] looking for fights and [Plaintiff was] finding them." (Ex. 20, Part 6, at 13.) Finally, Plaintiff's website

[7] This page is listed as number "5101" in the footer.

demonstrates that Plaintiff sought litigation, explicitly challenging Nazarian to "please sue." *See* Ex. 20, Part 6, at 1. These facts strongly suggest that Defendants would have known that Plaintiff sought to litigate against them over what Plaintiff perceived as a left-wing bias in the School of Social Work.[8]

The record suggests that Ryczek could not have known that his actions would constitute a deprivation of Plaintiff's rights. *See* Ex. 13; Ex. 15; Ex. 18. For example, Ryczek began taking notes regarding his interactions with Plaintiff. (Ex. 13 at 13:15-25.) Ryczek never took similar notes regarding other students at Rhode Island College. *Id.* at 14:1-5. Ryczek also redacted parts of his notes after consulting with the then-general counsel of Rhode Island College when Plaintiff refused to perform all the required objectives for field placement. *Id.* at 14:24-15:8; 17:6-12. In addition to Rhode Island College's general counsel, Ryczek spoke to a faculty member at another institution who possessed both a Master of Social Work and Juris Doctor degree. *Id.* at 15:9-18. Ryczek characterized the advice he sought as "looking for some direction and guidance on how to work with student who didn't want to do the objectives in field." *Id.* at 17:9-12. Ryczek testified

[8] The Court in *Felkner* noted that Plaintiff "was no doubt a challenging student with a political agenda as robust as the agenda he ascribes to defendants[,]" causing Ryczek, an adjunct professor, to refuse to teach Plaintiff for a second semester because "dealing with [Plaintiff] required too much of [Ryczek's] time." *See Felkner*, 203 A.3d at 442, 449.

that his colleagues, specifically Bennett-Speight and Professor Lenore Olsen, affirmed his actions and interactions with Plaintiff. *Id.* at 114:12-115:15. Ryczek contacted these two colleagues at the School of Social Work when Ryczek "felt that there was an issue that might become bigger than a student was expressing." *Id.* at 159:3-13. It seems that these facts, that Ryczek acted on the advice of two of his colleagues and potentially two legal advisors in an attempt to seek guidance as to how to manage a difficult student in an academic setting, indicate that Ryczek was taking care in properly discharging his duties as an adjunct professor, and tend to disprove any assertion that Ryczek could have known or had "fair warning" that he violated Plaintiff's rights.

At the time, as stated previously, case law such as *Horowitz*, 435 U.S. at 89-91; *Ewing*, 474 U.S. at 227-28; and *Fraser*, 478 U.S. at 675 held that professors did not violate the rights of students by making decisions regarding grading, absent some animus, and, as stated *supra*, Ryczek acted on the advice of his colleagues and two legal advisers. The record does not demonstrate a showing of an animus against Plaintiff; for example, Ryczek claims to have denied Plaintiff's request to change his first semester assignment topic out of concerns of fairness and to allow Plaintiff the opportunity to learn how to advocate for a position that he did not personally agree with. (Am. Compl. ¶¶ 40-41; Ex. 5 ¶¶ 38-40.) *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293

(10th Cir. 2004) (suggesting the existence of an animus by theater program professors towards the plaintiff's Mormon religion by suggesting that the plaintiff talk to "other 'good Mormon girls'" when the plaintiff expressed reservations about saying the word "fuck" as a student-actor because of her religiosity). If there is an indication of bias, the record indicates that Plaintiff had one against Rhode Island College, explicitly asking to be sued on his website. *See* Ex. 20, Part 7. The record indicates that Ryczek's handling of Plaintiff's assignment requests and grades, Plaintiff's conflict with Pearlmutter regarding the Academic Bill of Rights assignment, and Plaintiff's request to intern for Governor Carcieri, clearly come within the purview of academic decisions that courts defer to. *See Horowitz*, 435 U.S. at 89-91.

Therefore, Plaintiff failed to satisfy the second prong of qualified immunity analysis because "existing case law" was not "clearly established so as to give Defendants fair warning that their conduct violated the Plaintiff's constitutional rights" when Plaintiff was enrolled at Rhode Island College from the fall of 2004 through January 2007, and because a reasonable defendant would not have understood that his conduct violated Plaintiff's constitutional rights under the facts here and under relevant caselaw. *See Saucier*, 533 U.S. at 201. Plaintiff's claims fall within an academic area that courts are ill-equipped to delve into, such as the grading of students' work. Thus,

summary judgment must issue based upon qualified immunity.

V

Conclusion

The Court, therefore, grants Defendants' Motion for Summary Judgment because existing case law clearly established that academic disputes are within the realm of academic freedom and discretion. Thus, Defendants are entitled to qualified immunity under the facts of this case. Counsel shall prepare the appropriate order.

Appendix D

SUPREME COURT OF RHODE ISLAND

No. 2016-17-Appeal

WILLIAM FELKNER,

Plaintiff,

v.

RHODE ISLAND COLLEGE et al.,

Defendants.

Before

Suttell, Chief Justice,
Goldberg, Flaherty, Robinson, and Indeglia, Justices.

Opinion

March 18, 2019

Suttell, C.J. The principles of academic freedom often find uneasy passage in the halls of academia.[1] In this appeal, the plaintiff, William Felkner, describes himself as a "conservative libertarian." He chose, nevertheless, to matriculate in the Master of Social Work program at Rhode Island College's School of Social Work, which, he claims, has a distinct sociopolitical ideology. A clash of values was inevitable. In 2007, Felkner filed an action against Rhode Island College and various college officials (collectively defendants),[2] alleging they had violated his constitutional rights to freedom of expression and equal protection. In 2013, Felkner amended his complaint to include claims for conspiracy to violate his civil rights and a violation of his procedural due process rights. The matter now before us concerns his appeal from a grant of summary judgment in favor of the defendants on all counts and from the dismissal

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[1] "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself[.]" *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (internal citations omitted).

[2] In addition to Rhode Island College, the defendants are: John Nazarian, the President of RIC at the time Felkner was enrolled at the School of Social Work; Carol Bennett-Speight, Dean of the SSW at relevant times; James Ryczek, an adjunct professor at the SSW at relevant times; Roberta Pearlmutter, a professor of social work at the SSW at relevant times; and S. Scott Mueller, an assistant professor of social work at the SSW at relevant times.

of his claim for punitive damages. For the reasons set forth in this opinion, we vacate the judgment in part and affirm in part.[3]

I

Facts and Procedural History

Our summary of pertinent facts is garnered from Felkner's verified complaint and first amended complaint,[4] as well as from the parties' submissions on defendants' renewed motion for summary judgment. For purposes of our summary judgment review, we present the admissible evidence in the manner most propitious to plaintiff, as the nonmoving party. *Lehigh Cement Co. v. Quinn*, 173 A.3d 1272, 1275 (R.I. 2017).

In 2004, shortly after Felkner began his studies at Rhode Island College (RIC), he learned that the School of Social Work (SSW) would be sponsoring a showing of the movie Fahrenheit 9/11.[5] Felkner

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[3] We wish to thank the Foundation for Individual Rights in Education, the National Association of Scholars, and the Cato Institute for their amici curiae brief.

[4] The plaintiff's first amended complaint was the operative complaint at the time of defendants' renewed motion for summary judgment, but this pleading was not verified by Felkner. Our factual summary relies in part on his allegations in his complaints because the initial complaint was properly verified and the amended complaint presented nearly identical allegations.

[5] Fahrenheit 9/11 is a documentary film written and directed by filmmaker, author, and political commentator Michael Moore.

emailed defendant Professor James Ryczek, his instructor for a foundational course called "Policy and Organizing I," objecting to the showing of the film. Felkner asked if the SSW would consider showing the movie FahrenHYPE 9/11, a conservative rebuttal to Fahrenheit 9/11. According to Felkner, Professor Ryczek responded that the SSW has a mission dedicated to social and economic justice and suggested that "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." Felkner also wrote an email to Professor Daniel Weisman, who had sponsored the presentation of Fahrenheit 9/11. In response to Felkner's email, Professor Weisman expressed that the SSW was "not committed to balanced presentations" and that, "[f]or the most part, Republican ideology is oppositional to the [social work] profession's fundamental values." Ultimately, however, Professor Weisman presented FahrenHYPE 9/11 to the same classes that saw Fahrenheit 9/11.

As part of "Policy and Organizing I," students were assigned a group project in which they were to debate a social welfare issue and write a policy paper promoting the group's position. According to Felkner, the students could choose from a list of issues provided by Professor Ryczek, all of which involved, in Felkner's words, "a leftist position on social welfare issues." Professor Ryczek also informed the class that each student would participate in a class debate and

then lobby for their selected issue before the Rhode Island General Assembly in the next semester's "Policy and Organizing II" class. Felkner joined a class group advocating for passage of Senate Bill 525 (SB 525), which he described as an amendment to "a temporary cash assistance program for Rhode Islanders having a difficult time making ends meet."

Thereafter, however, Felkner asked Professor Ryczek for permission to argue against SB 525 in the class debate after he concluded that "SB 525 did not actually help people get off welfare with higher-paying jobs * * *." According to Felkner, Professor Ryczek denied this request, explaining that RIC "is a perspective school and we teach that perspective" and "if you are going to lobby on [SB 525], you're going to lobby in our perspective." Nevertheless, Felkner wrote his policy paper from a perspective opposing the passage of SB 525 and contrary to—in Felkner's words—Professor Ryzcek's "professed support of a comprehensive welfare state." At his deposition, Professor Ryczek testified that he typically gives a group grade for the group work. However, after members of Felkner's group told Professor Ryzcek that Felkner "was not participating in the group as expected[,]" Professor Ryczek agreed to "disaggregate" Felkner's grade from the group grade. Professor Ryczek further stated that he had never disaggregated a student's grade before, nor had he ever given a grade lower than an "A minus" or "B plus" for the group class debate. Felkner received a

failing grade on both his written assignment and classroom debate because he had not followed the directives of the assignment. Professor Ryczek then offered Felkner an opportunity to rewrite his paper. Ultimately, Professor Ryczek gave Felkner a C plus as his final course grade. Felkner appealed the failing grades for the paper and debate to the Academic Standing Committee (ASC) for the SSW.

On January 20, 2005, the ASC held a hearing on Felkner's appeal. According to Felkner, he was denied the opportunity to question Professor Ryczek at the hearing because Professor Ryczek left the room immediately following his testimony. Because Felkner believed that Professor Ryczek had given inaccurate testimony at the ASC hearing regarding conversations between them, Felkner announced that he would henceforth record all of his conversations with RIC professors. The next day, the ASC denied Felkner's appeal of his grades.

Felkner further appealed the matter to the chair of the Master of Social Work (MSW) program, Dr. Lenore Olsen, and then to the dean of the SSW, defendant Carol Bennett-Speight. In both appeals, the decision of the ASC was upheld. Felkner also contacted the Foundation for Individual Rights in Education (FIRE) about his alleged mistreatment. In a letter to RIC's then-President, defendant John Nazarian, dated January 28, 2005, FIRE noted that, in "[t]he case of Bill Felkner[,]" RIC should "reconsider and withdraw its unconstitutional

policies." On February 15, 2005, Nazarian replied that no RIC student had been punished for failing to espouse a certain political belief.

At the close of the Fall semester, Professor Ryczek wrote to Dr. Olsen, informing her that he would not teach the "Policy and Organizing II" class the next semester because, as an adjunct faculty member, dealing with Felkner required too much of his time. Consequently, Felkner was transferred to a section of the course taught by full-time Professor Roberta Pearlmutter. The plaintiff's relations with Professor Pearlmutter, however, were no more salubrious than they had been with Professor Ryczek.

One assignment in "Policy and Organizing II" required students to complete a group project approved by Professor Pearlmutter. Felkner proposed to Professor Pearlmutter that he be allowed to form a group with students from other colleges to lobby RIC for an Academic Bill of Rights. Professor Pearlmutter rejected Felkner's proposal, noting that it did not have a direct impact on the "poor and oppressed" and did not advance "social justice." Professor Pearlmutter also rejected Felkner's request to lobby in favor of the then-governor's welfare-reform proposal for the project.

Next, Felkner suggested that he be allowed to work on a project lobbying for the defeat of SB 525 in the General Assembly. Professor Pearlmutter told Felkner that she would penalize his grade on the

project if he did not work on it with classmates from his "Policy and Organizing II" class. Felkner had difficulty recruiting group members because his fellow students had already formed groups to promote policies that were contrary to his "conscience." Because of the "hostility towards his beliefs[,]" Felkner worked on his project with a group comprising himself and two individuals from outside of RIC.[6] Some of his conversations with Professor Pearlmutter took place through the exchange of emails. One conversation about Felkner's proposed projects was in person; Felkner audio-recorded the conversation without Professor Pearlmutter's knowledge and later posted a rough transcript of the conversation to a website he had created to expose what he characterized as the "liberal bias" at RIC.

During one of Professor Pearlmutter's classes, the students were permitted to discuss their concerns about Felkner's postings on his website related to the "Policy and Organizing II" class. According to Professor Pearlmutter, she was approached by several students who were concerned that the confidentiality of class discussions was being compromised by Felkner when he posted about those discussions on his website. She maintained that students in the class asked that Felkner discuss any issues he had with the class during classroom discussions rather than on his website. Felkner,

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[6] Felkner formed a group with a Brown University student and "a local radio personality[.]"

however, asserted that his conservative views were "assail[ed]" and that Professor Pearlmutter allowed other students to "assault" his views without allowing him the opportunity to respond. According to Felkner, "[t]he unmistakable message Defendant Pearlmutter communicated through the discussion was that only liberal/progressive ideas can help the poor and advance the cause of social justice."

Professor Pearlmutter eventually filed a complaint with the ASC, asserting that Felkner had committed unethical and unprofessional conduct in violation of the National Association of Social Workers (NASW) Code of Ethics. On April 27, 2005, the ASC held a hearing on Professor Pearlmutter's complaint. Thereafter, the ASC issued a written decision, through its chair Dr. Diane Martell, in which it found that Felkner's deceptive conduct in recording his conversation with Professor Pearlmutter violated one of the three sections of the Code of Ethics alleged by Professor Pearlmutter in her complaint. The ASC recommended to the chair of the MSW program that Felkner "declare immediately, in writing, that [he] will henceforth refrain from any deceptive audio or video copying of conversations with social work colleagues and refrain from any audio or video copying without express permission from them." The ASC further recommended that Felkner be dismissed from the MSW program if he was unwilling to execute such a declaration. In a letter to Dean Bennett-Speight, dated May 11, 2005, Felkner stated that he

would refrain from making audio or video recordings of his conversations with his SSW colleagues unless he first obtained their consent to record.

At the end of Felkner's first year in the MSW program, he met with his adviser and chose the Social Work Organizing and Policy (SWOP) concentration for completion of the degree. As a MSW student, Felkner was required to complete a field placement and an integrative project in order to fulfill the MSW program requirements. For Felkner's field placement and integrative project, he secured an internship in then-Governor Donald L. Carcieri's office, working on welfare-reform legislation. Felkner alleged that Professor Ryczek, as director of field placements, rejected Felkner's placement because it would not advance the concentration's objectives of promoting progressive social change. Felkner claimed that Professor Ryczek advised him that the SWOP-concentration objectives required him to advocate for liberal, progressive policies, and that he suggested Felkner's views might make him better suited to another academic discipline, such as political science. The MSW department chair, Dr. Olsen, supported Professor Ryczek's position by indicating that Felkner might consider pursuing other concentrations if he was not able to work on the academic objectives of the SWOP concentration.

On June 9, 2005, Felkner met with Dean Bennett-Speight about his challenges with Professor Ryczek and Dr. Olsen, claiming they were discriminating

against him because of his conservative views. Thereafter, Dean Bennett-Speight assigned Professor S. Scott Mueller, also a defendant in this case, as Felkner's field placement supervisor. Professor Mueller also initially rejected Felkner's proposed field placement and integrative project, but eventually RIC approved the field placement in the Governor's office. According to Felkner, Professor Mueller refused to approve Felkner's proposed integrative project on welfare reform because it was a "toxic" subject. Consequently, Felkner "reluctantly conceded to work on healthcare reform for his [integrative project]." Felkner further asserted that working on healthcare reform put him at a disadvantage relative to other SSW students because he was unable to use his field placement research for his integrative project.

Felkner proceeded to work on his integrative project in the fall of 2006 and most of 2007. On November 26, 2007, Felkner requested an extension of time to complete his integrative project. In January 2008, Dean Bennett-Speight granted Felkner an extension until May 11, 2009, to complete his degree requirements. The extension was conditioned upon Felkner submitting a portion of the project by April 15, 2008, a condition with which he did not comply. On March 17, 2008, Felkner requested an additional six-week extension; but both Dean Bennett-Speight and Professor Pearlmutter denied his request.

In December 2007, amid his integrative project extension requests, Felkner filed the instant action in

Providence County Superior Court alleging that defendants' conduct toward him during his enrollment in the MSW program violated his First and Fourteenth Amendment rights. Specifically, Felkner's initial verified complaint included claims for: deprivation of his right to freedom of expression "on issues of political concern" (count one) in part by placing "unconstitutional conditions on [his] continuance in the [MSW] program" (count four); violation of his right to freedom of expression by retaliating against him for "expressing his political beliefs and for publicly criticizing [RIC's] liberal biases" (count two) and by compelling him to "express ideas * * * contrary to his political beliefs" (count three); and violation of his right to equal protection (count five). The defendants answered and filed a motion for summary judgment, which a hearing justice denied after finding the case to be "extremely fact intensive and not susceptible to disposition by summary proceedings."

On December 3, 2013, Felkner filed an amended complaint, adding two counts. One new claim alleged that defendants had violated his procedural due process rights by the way in which they conducted the ASC hearings related to the complaints involving Felkner (count six). The other new claim alleged that defendants had engaged in a conspiracy to violate his civil rights, in violation of 42 U.S.C. § 1985(3) (count seven). For all of the alleged constitutional violations contained in the amended complaint, Felkner

asserted that he was entitled to damages pursuant to 42 U.S.C. §§ 1983 and 1988 as well as the Rhode Island Civil Rights Act (RICRA), including punitive damages. Felkner also sought an order expunging the ASC hearings from his academic file, an extension of time for him to complete his MSW degree, injunctive relief restraining enforcement of RIC's speech code,[7] and attorney's fees.

The defendants sought to strike plaintiff's claim for punitive damages after receiving a request for interrogatories seeking the individual defendants' personal financial details.[8] After conducting a hearing pursuant to *Palmisano v. Toth*, 624 A.2d 314 (R.I. 1993), the hearing justice struck plaintiff's claim for punitive damages, finding that defendants' conduct toward Felkner had not "rise[n] to the level of recklessness or callous indifference" to his constitutional rights and that, therefore, he had not established a prima facie case for punitive damages.

In March 2015, defendants filed a renewed motion for summary judgment on all of plaintiff's claims, arguing in part that defendants were protected from civil liability, if any, by the doctrine of qualified immunity. In Felkner's objection to the motion, he asserted that the law of the case doctrine barred the

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[7] Felkner later relinquished any claim with respect to RIC's speech code.

[8] Specifically, defendants filed a "Motion for Protective Order, or, in the Alternative, Motion to Strike Plaintiff's Claim for Punitive Damages and Assign Matter for Evidentiary Hearing."

renewed motion for summary judgment because the first motion for summary judgment had been denied and defendants had previously raised the issue of qualified immunity, although the hearing justice had not yet reached the issue or made any rulings thereon. He also argued that, if the renewed motion were to be considered, there were several issues of disputed facts that would preclude the entry of summary judgment against him.

The hearing justice disagreed with Felkner's objections, concluding in a written decision that the law of the case doctrine did not prevent her from deciding defendants' second motion for summary judgment because the record had significantly expanded during the several years of discovery that had taken place between the filing of the two dispositive motions. The hearing justice also concluded that there were no genuine issues of material fact and that defendants were entitled to judgment as a matter of law. The hearing justice did not substantively address the issue of qualified immunity, concluding this issue was moot based upon her conclusion that none of defendants' actions had violated Felkner's First and Fourteenth Amendment rights. Final judgment entered in favor of defendants in November 2015, and Felkner timely filed a notice of appeal.

II

Discussion

Felkner is raising four main issues before this Court. The first is whether the law of the case doctrine should have precluded the hearing justice from considering defendants' renewed motion for summary judgment. The second is whether genuine issues of material fact should have precluded the entry of summary judgment for each of Felkner's federal constitutional claims. The third issue is whether the doctrine of qualified immunity protects the individually named defendants from potential liability. The fourth issue is whether Felkner demonstrated a prima facie case for punitive damages. We take each issue in turn.

A

Law of the Case Doctrine

We first briefly address whether the law of the case doctrine should have precluded the hearing justice's consideration of defendants' renewed motion for summary judgment. Felkner argues that the hearing justice erred in considering the renewed motion because she relied upon the same affidavits as those relied on by the first hearing justice who presided over—and denied—defendants' first motion for summary judgment. Felkner also argues that the expanded record reinforced the factual issues, rather than eliminating them.

"The law of the case doctrine provides that, after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later

stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling." *Quillen v. Macera*, 160 A.3d 1006, 1012-13 (R.I. 2017) (alteration omitted) (quoting *Chavers v. Fleet Bank* (RI), N.A., 844 A.2d 666, 677 (R.I. 2004)). "The purpose of the doctrine is to ensure 'the stability of decisions and avoid unseemly contests between judges that could result in a loss of public confidence in the judiciary.' " *Id.* at 1013 (alteration omitted) (quoting *Commercial Union Insurance Co. v. Pelchat,* 727 A.2d 676, 683 (R.I. 1999)). Nevertheless, the doctrine is "a flexible rule" and "may be disregarded when a subsequent ruling can be based on an expanded record." *Id.* (quoting *Berman v. Sitrin*, 101 A.3d 1251, 1262 (R.I. 2014)). "When presented with an expanded record, it is within the trial justice's sound discretion whether to consider the issue." *Ferguson v. Marshall Contractors, Inc.*, 745 A.2d 147, 152 (R.I. 2000) (quoting *Goodman v. Turner*, 512 A.2d 861, 864 (R.I. 1986)).

Nearly seven years elapsed between the two motions for summary judgment filed by defendants in this case. The hearing justice acknowledged that defendants had submitted the same documents in support of their renewed motion, but that the parties had conducted significant discovery and the record had also been expanded by new exhibits. The hearing justice concluded that the law of the case doctrine did not preclude her consideration of the renewed motion for summary judgment because the record before her

had "expanded significantly" and included "exhibits that did not exist when the [c]ourt ruled on [d]efendants' first motion for summary judgment."

Our review of the record reveals that the renewed motion for summary judgment was submitted on a much broader record than the original motion for summary judgment. In the intervening seven years, the parties produced additional discovery—the hearing justice referred to "ten depositions and thousands of pages of documents" in her written decision on the renewed motion for summary judgment—and Felkner amended his complaint to add claims for conspiracy and violation of procedural due process. Because the record before the hearing justice had indeed been expanded since the denial of defendants' initial motion for summary judgment, we are of the opinion that she was acting well within her discretionary authority in entertaining and deciding the renewed motion for summary judgment. See *Quillen*, 160 A.3d at 1012-13; *Berman*, 101 A.3d at 1262.

B

Constitutional Claims

The hearing justice concluded that Felkner failed to show genuine issues of material fact on any of his claims brought pursuant to 42 U.S.C. §§ 1983 and 1988, alleging violations of his rights to freedom of expression, equal protection, and due process, as well as on his claim pursuant to 42 U.S.C. § 1985(3),

alleging a civil conspiracy to violate these constitutional rights.[9] On appeal, Felkner challenges her conclusions on each of these claims.[10]

1

Standard of Review

"This Court will review the grant of a motion for summary judgment de novo, employing the same standards and rules used by the hearing justice." *Newstone Development, LLC v. East Pacific, LLC*, 140 A.3d 100, 103 (R.I. 2016) (quoting *Daniels v. Fluette*, 64 A.3d 302, 304 (R.I. 2013)). "We will affirm a trial court's decision only if, after reviewing the admissible evidence in the light most favorable to the nonmoving party, we conclude that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Id.* (alteration omitted) (quoting *Daniels*, 64 A.3d at 304). "Furthermore, 'the nonmoving party bears the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.' " Id. (quoting *Daniels*, 64 A.3d at 304). "[S]ummary judgment

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[9] Felkner has not drawn this Court's attention to any distinction between the application of Rhode Island and federal law regarding his free speech and expression, equal protection, and due process claims. Therefore, we address only the application of federal law to these claims.

[10] On appeal, Felkner challenges her conclusions on each of these claims.

should enter against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Id. (deletion omitted) (quoting *Lavoie v. North East Knitting, Inc.*, 918 A.2d 225, 228 (R.I. 2007)). "It is a fundamental principle that summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Botelho v. City of Pawtucket School Department*, 130 A.3d 172, 176 (R.I. 2016) (alteration omitted) (quoting *Tarro v. Checrallah*, 60 A.3d 598, 601 (R.I. 2013)).

2

Freedom of Speech and Expression

Felkner's first claim alleges that defendants deprived him of his rights to freedom of speech and expression secured by the First Amendment to the United States Constitution and article 1, section 21 of the Rhode Island Constitution.[11] He seeks redress

[11] Article 1, section 21 of the Rhode Island Constitution provides: "The citizens have a right in a peaceable manner to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or for other purposes, by petition, address, or remonstrance. No law abridging the freedom of speech shall be enacted."

under 42 U.S.C. §§ 1983[12] and 1988,[13] as well as RICRA.

The freedom of speech and expression is perhaps our most cherished right as residents of the United States. "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." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). "At the heart of the First Amendment

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[12] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

[13] 42 U.S.C. § 1988(b) provides, in relevant part, that:

"In any action or proceeding to enforce a provision of section[ ] * * * 1983 * * * of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."

lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Moreover, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say * * *.' " *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (quoting *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion)).

Nor can it be gainsaid that freedom of speech and expression is alive and well in our public educational institutions. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. * * * The classroom is peculiarly the marketplace of ideas." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (internal citation omitted) (quoting *Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)). Rights guaranteed by the First Amendment, however, are not unlimited in the context of academia. See *Hazelwood School District v.*

Kuhlmeier, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

In the case under review, both parties seemingly acknowledge that the *Hazelwood* case is instructive. *Hazelwood* stands for the proposition 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." *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562.[14]

Our task in this appeal is not to determine the breadth of Felkner's constitutionally protected rights of speech and expression while a student in the MSW program at RIC, nor indeed to determine whether such rights are necessarily tempered by "legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562. Rather, it is to conduct a de novo review

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[14] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), concerned the First Amendment rights of former high school students who had been staff members of the high school newspaper when the high school principal instructed the supervising teacher to delete two articles from the proof of an edition just prior to publication. *Hazelwood*, 484 U.S. at 262-64, 108 S.Ct. 562. The Supreme Court specifically left open the question of whether "the same degree of deference" given to educators' decisions "is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 273, n.7, 108 S.Ct. 562. We recognize that *Hazelwood* is distinguishable from the case at hand in several significant respects.

of the record and determine whether genuine issues of material fact exist that would preclude the granting of summary judgment. See Newstone Development, LLC, 140 A.3d at 103. In that regard, we need go no further than the affidavit of Richard Gelles, Ph.D., submitted in support of Felkner's opposition to defendants' motion for summary judgment.

At the time of his affidavit, Dr. Gelles was the Dean of the School of Social Policy & Practice at the University of Pennsylvania and a former member of the faculty at the University of Rhode Island. After reviewing the allegations in Felkner's verified complaint, Dr. Gelles attested that, if Felkner's claims were true, the alleged conduct by defendants was "contrary to the concepts of academic freedom and constitute a substantial departure from the norms of academic debate and scholarship that should prevail at colleges and universities, as well as in programs and/or schools offering the Masters of Social Work degree[.]"

Specifically, in his affidavit, Dr. Gelles referenced Felkner's allegations that: (1) Professor Ryczek sent an email to Felkner stating that the social work profession has "a mission devoted to the value of social and economic justice" and anyone who holds antithetical views "might ask themselves whether social work is the profession for them" and indeed whether RIC is "a good fit for them"; (2) Professor Weisman sent an email which stated that social work is a "values-based profession" and that the SSW has a

"responsib[ility] to promote the values that underlie social work. For the most part, Republican ideology is oppositional to the profession's fundamental values"; (3) Felkner's statement that Professor Pearlmutter "led a fifty-minute in-class discussion assailing Mr. Felkner's conservative views" and allowed other students to "assault [his] views without allowing him to respond"; and (4) the fact that Felkner was prevented "from working on a welfare reform project with the Governor's office because" it was contrary to "the political perspective of the project."

In conducting our de novo review, we are mindful that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]" but that such rights must be "applied in light of the special characteristics of the school environment[.]" *Tinker*, 393 U.S. at 506, 89 S.Ct. 733. Accordingly, educational institutions are granted wide latitude to establish their curricula and "further [their] legitimate curricular objectives." *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (discussing *Hazelwood*). So, too, must teachers be given "broad discretion to give grades" and "in limiting speech when they are engaged in administering the curriculum." *Settle v. Dickson County School Board*, 53 F.3d 152, 156 (6th Cir. 1995) (citing *Tinker*, 393 U.S. at 512-14, 89 S.Ct. 733). Moreover, "[s]o long as the teacher limits speech or grades speech in the classroom in the name of 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." *Id.* at 155; see *Ward*, 667 F.3d at 734 ("[T]he First Amendment does not permit educators to invoke curriculum 'as a pretext for punishing a student * * *.' ") (alteration omitted) (quoting *Settle*, 53 F.3d at 155). Courts "should show great respect for the faculty's professional judgment. Plainly, they may not override it 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." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (footnote omitted).

In light of these principles, we are of the opinion that Felkner's freedom of speech claims deserve to go to a jury. The record in this case is voluminous and replete with disputed facts. Resolving all such facts in the light most favorable to Felkner, the issue is whether he has made tenable claims that defendants have violated his constitutional rights to free speech and expression. We believe that he has. Felkner describes himself as a "conservative libertarian" and was no doubt a challenging student with a political agenda as robust as the agenda he ascribes to defendants. Given the broad discretion afforded to educational institutions, he may have a difficult road ahead of him. Nevertheless, he has raised genuine issues of material fact concerning whether the actions

of defendants are "reasonably related to legitimate pedagogical concerns" or merely a pretext for punishing him for his conservative views. See *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562. "Although we do not second-guess the pedagogical wisdom or efficacy of an educator's goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was pretextual." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292-93 (10th Cir. 2004) (emphases and footnote omitted). The fact that a student may be required to debate a topic from a perspective that is contrary to his or her own views may well be reasonably related to legitimate pedagogical concerns. That relationship is far more tenuous, however, when the student is told that he or she must then lobby for that position in a public forum or that his or her viewpoint is not welcome in the classroom because it is contrary to the majority viewpoint of the students and faculty.

There is ample evidence in the record which, if found credible by a factfinder, suggests that the MSW program had a strong predisposition toward so-called "progressive" social values. Viewing, as we must, the evidence most generously to Felkner, we are of the opinion that, in light of his avowedly conservative bent, genuine issues of material fact exist as to whether defendants' justifications for their actions were truly pedagogical or whether they were pretextual. See *Axson-Flynn*, 356 F.3d at 1292-93. The subjective motivation of defendants is subject to

conflicting interpretations; the duty of a trial justice, and this Court, in considering a motion for summary judgment "is not to resolve disputed factual issues but only to find them." *Pound Hill Corporation, Inc. v. Perl*, 668 A.2d 1260, 1264 (R.I. 1996). We find several here. Accordingly, we vacate the judgment as to count one and remand to the Superior Court for trial or other disposition.

3

Retaliation

Felkner's second claim alleges that defendants "engaged in actions that are retaliatory and have therefore deprived [him] of his clearly established free speech rights * * *." Felkner specifically alleges that the following conduct was retaliatory: "penalizing his grades, filing ethics charges against him, delaying his graduation, and denying him the opportunity to work on welfare reform in the Governor's office, among other things[.]" In his objection to defendants' renewed motion for summary judgment, Felkner expands on his enumerated list to include "[r]equiring him to stop taping classes and conversations with instructors; * * * [c]omplaining about a website he had created about the political bias he was experiencing; * * * [o]rganizing or supporting verbal attacks on him against his views; * * * [t]hreatening to dismiss him from the program; * * * [a]ttempting to require him to lobby the General Assembly in support of political

positions he opposed;" and "[n]ot permitting him to complete his degree requirements."

To establish a First Amendment retaliation claim, a plaintiff must prove that (1) he "engaged in constitutionally protected conduct" and (2) "this conduct was a substantial or motivating factor for the adverse" action taken against him. *McCue v. Bradstreet*, 807 F.3d 334, 338 (1st Cir. 2015) (quoting *Padilla-García v. Rodríguez*, 212 F.3d 69, 74 (1st Cir. 2000)).

We begin by examining one of the alleged acts of retaliation. Felkner alleges that defendants impermissibly retaliated against him for exercising his constitutional right to record his classes and discussions with faculty. According to Felkner, he began recording conversations with faculty because "he believed that Ryczek had lied to the ASC about their conversations." Felkner also tape-recorded his classes. He would then post a rough transcript of some of these conversations on his personal website. Felkner further asserts that Professor Pearlmutter led a fifty-minute in-class discussion assailing his conservative views and the postings on his website. According to Felkner, Professor Ryzcek also allowed other students to criticize Felkner's views without allowing him to respond. In addition, Professor Pearlmutter filed a complaint with the ASC claiming that Felkner's recordings violated the NASW Code of Ethics. Felkner argues that these actions by

defendants were in retaliation against him because he had exercised his constitutional right to free speech.

It is well settled that citizens may record government officials in the exercise of their official duties. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). "The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). The right to make an audiovisual recording is not absolute, however; "[i]t may be subject to reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 84. Thus, acknowledging that the right to record is an activity protected by the First Amendment, we proceed to examine the activity in the context of an educational institution.

In this regard, we find *Tinker* to be instructive. *Tinker* involved the right of high school students to wear black armbands in protest of the war in Vietnam. *Tinker*, 393 U.S. at 504, 89 S.Ct. 733. Recognizing the First Amendment rights of the students, the Supreme Court held that speech could be restricted in an educational setting under two circumstances: if the speech "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," or if the speech "colli[des] with the rights

of other students to be secure and to be let alone." *Id.* at 508, 514, 89 S.Ct. 733.

As the hearing justice noted in her decision in the present case, "several students expressed their discomfort with Felkner's publication and editorializing of class discussions and activities, which they had previously believed were held in confidence." Clearly, the privacy rights "of other students to be secure and to be let alone" were implicated by Felkner's recordings. *Tinker*, 393 U.S. at 508, 89 S.Ct. 733. Felkner alleges that Professor Pearlmutter retaliated against his exercise of his First Amendment rights by filing a complaint against him with the ASC. The ASC found that Felkner had "failed to adhere to academic standards of the School when [he] deceptively audio-taped a conversation with Dr. Pearlmutter in violation of Section 4.04 of the NASW Code of Ethics." The recommendation of the ASC was that the SSW department chair, Dr. Olsen, request Felkner "to declare immediately, in writing, that [he] will henceforth refrain from any deceptive audio or video copying of conversations with social work colleagues and refrain from any audio or video copying without express permission from them."

Under the *Tinker* standard, it is apparent that Felkner's recordings "might reasonably have led school authorities to forecast substantial disruption" and "collid[e] with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508, 514, 89 S.Ct. 733. Moreover, as the hearing justice

noted, "Felkner was not disciplined for the actual act of recording; rather, he was prohibited from engaging in deceptive behavior by making surreptitious recordings of his colleagues." He was required to obtain permission before recording any conversations, a condition that is seemingly reasonable in the context of higher learning and academic freedom. We conclude, therefore, that Felkner has failed to provide evidence of a disputed issue of material fact demonstrating that any defendant interfered with or retaliated against him for exercising his First Amendment rights with respect to his recording activities.

With respect to Felkner's other claims of retaliatory conduct, as discussed above, genuine issues of material fact exist as to whether Felkner's activities were protected by the First Amendment. If Felkner is able to clear that first hurdle, clearly factual issues abound with respect to whether his conduct was a "substantial or motivating factor for the adverse" actions allegedly taken against him by defendants. *McCue*, 807 F.3d at 338 (quoting *Padilla-García*, 212 F.3d at 74). He may rely on circumstantial evidence to prove this second prong of his retaliation claim. *Lewis v. City of Boston*, 321 F.3d 207, 219 (1st Cir. 2003) (stating that, in cases where parties' motivations are at issue, the "so-called smoking gun[,]" or direct evidence, is not required). Examples of actions that can give rise to an inference of the required causal nexus include: temporal

proximity between the speech and the adverse action; ongoing actions of antagonism; inconsistent justifications for an adverse action; and any evidence of conduct between the time of the speech and the adverse action from which the totality of the circumstances can give rise to a reasonable inference that the adverse action was taken in response to the speech. *Id.*; *Farrell v. Planters Lifesavers Company*, 206 F.3d 271, 280-81 (3d Cir. 2000).

Accordingly, we affirm the judgment as to count two with respect to Felkner's claim that defendants retaliated against him for exercising his First Amendment right to record classroom discussions and his conversations with faculty members. We also hold, however, that defendants are not entitled to judgment as a matter of law on Felkner's remaining claims of retaliatory actions because there are genuine issues of material fact regarding whether defendants retaliated against Felkner for expressing his political beliefs.

4

Compelled Speech

Felkner also alleges that defendants violated his right to freedom of speech and expression by "compell[ing] [him] to express ideas that are contrary to his political beliefs." Before us, Felkner argues that he has made a prima facie claim for compelled speech in violation of his First Amendment rights, but he does not specify the speech he claims was compelled.

The hearing justice focused on Felkner's allegations that Professor Ryczek compelled him to espouse a political viewpoint contrary to his own when Felkner was not permitted to switch sides of a project topic.

We start off by noting that, on summary judgment, the issue is not whether a litigant has established a prima facie claim to his stated cause of action, but rather, whether he has demonstrated the presence of genuine issues of material fact to be resolved by a factfinder. We also note that, to the extent Felkner alleges that a requirement of the "Policy and Organizing" course curriculum was to lobby the General Assembly, the issue is moot. There is no dispute that, although Professor Ryczek initially told Felkner he would be required to lobby from a perspective contrary to his own views, Felkner never was compelled to lobby or testify at a public hearing. The question, therefore, is more appropriately whether the "speech" required by his class assignments, integrative project, and other educational activities were reasonably related to legitimate pedagogical concerns or, as Felkner contends, either an impermissible form of compelled speech or a "pre-text[ ] for political discrimination." See *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562. As we have previously indicated, based on our de novo review and in the context of this case, this inquiry is more amenable to resolution by a factfinder than to summary judgment. We therefore vacate the entry of

summary judgment on count three of Felkner's amended complaint.

5

Unconstitutional Conditions

In count four, Felkner invokes the unconstitutional conditions doctrine, under which the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Felkner argues that "[d]efendants' actions placed unconstitutional conditions upon [him] and attempted to compel him to change his political beliefs as a condition of obtaining his master's degree."

> "The doctrine of unconstitutional conditions bars government from arbitrarily conditioning the grant of a benefit on the surrender of a constitutional right, regardless of the fact that the government appropriately might have refused to grant the benefit at all. * * *
>
> "Not all conditions are prohibited, however; if a condition is germane—that is, if the condition is sufficiently related to the benefit—then it may validly be imposed. In the final analysis, the

> legitimacy of a governmental proposal depends on the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 747 (1st Cir. 1995) (internal citations omitted).

For the reasons we have stated above, including a record rife with disputed, material facts, we conclude that count four is not amenable to summary disposition, and we therefore vacate the entry of summary judgment on Felkner's unconstitutional conditions claim.

6

Equal Protection

In count five, Felkner alleges that defendants "treated [him] differently than similarly situated graduate students[,]" discriminated against him, and violated his right to equal protection under the law by "denigrating [his] beliefs, penalizing his grades, trumping up ethics charges against him, delaying his graduation, and denying him the opportunity to work on welfare reform in the Governor's Office[,]" actions that were allegedly taken in retaliation for exercising the right to express himself as he wished. The hearing justice focused her analysis on the grading process and result in the "Policy and Organizing I" course and concluded that Felkner, as a class of one, had not

demonstrated he was treated differently from similarly-situated students because the undisputed facts showed Professor Ryczek had not previously disaggregated a group grade or needed to ask for another faculty member's input during the grading process.

Before us, Felkner argues that the hearing justice ignored evidence that other students with conservative sociopolitical viewpoints similar to his were affected by defendants' intolerance of conservative ideologies. Felkner points to emails with classmates demonstrating that they either did not speak up in class or did speak up about their personal views and ideologies but not with the same resulting poor grades and consequences as Felkner.

"The Equal Protection Clause requires states to treat alike all persons similarly situated."[15] *Toledo v. Sánchez*, 454 F.3d 24, 33 (1st Cir. 2006) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). "Unless state action burdens a suspect class or impinges upon a fundamental right, we review equal protection claims for a rational relationship between the disparity of treatment and a legitimate government purpose." Id. (citing *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)). Because Felkner is not alleging

[15] The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

discrimination based on his membership in a suspect class and because education is not a fundamental right under the United States Constitution, see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), he must ultimately demonstrate that defendants' conduct was "irrational and not motivated by any conceivable legitimate reason." Toledo, 454 F.3d at 33. In our opinion, Felkner has failed to demonstrate any disputed fact regarding whether defendants' actions toward him were "irrational and not motivated by any conceivable legitimate reason." *Id.*

The hearing justice considered Felkner as a "class of one." The United States Supreme Court has recognized that a plaintiff can prevail on a claim that he "has been irrationally singled out as a so-called 'class of one' " rather than as a member of a larger "identifiable group" because the Equal Protection Clause is fundamentally concerned about arbitrary government classification. *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 601, 602, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). In *Engquist*, the Supreme Court discussed the case of *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam), in which a property owner had been properly considered a class of one when she pursued a claim for an equal protection violation after her municipality conditioned approval for a connection to reach a municipal water supply on the grant of a larger

easement than that required for other similarly situated property owners. *Id.* at 601-02, 128 S.Ct. 2146; see *Olech*, 528 U.S. at 563, 120 S.Ct. 1073. The Supreme Court cautioned in Engquist, however, against undermining the discretionary decisionmaking inherent in some contexts by mistaking an exercise of discretion for an act of discrimination simply because one person has been treated differently from others who are similarly situated. *Id.* at 603, 128 S.Ct. 2146. Indeed, the Supreme Court held in that case that the class-of-one theory was not cognizable in the public employment context, id. at 605, 128 S.Ct. 2146, and the First Circuit Court of Appeals has extended that reasoning limiting the application of the class-of-one theory to other arenas. See, e.g., *Caesars Massachusetts Management Company, LLC v. Crosby*, 778 F.3d 327, 336 (1st Cir. 2015) (recognizing *Engquist* and declining to apply the class-of-one theory to the context of licensure for operating a casino).

Similar to the context of employment, the educational realm is replete with discretionary decisions. Individual professors have the necessary authority to evaluate their students' work and to assign a grade for their students' performances on the assignments required for successful course and degree program completion. Administrators have the authority to set the academic requirements for completing specific degree programs. In our opinion, the class-of-one theory is not applicable to Felkner's equal protection

claim arising out of his educational experience for the same reasons discussed by the Supreme Court when it declared that the theory was not applicable to an equal protection claim arising out of an employment experience. See *Engquist*, 553 U.S. at 605, 128 S.Ct. 2146 ("To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship."). Moreover, Felkner himself has neither relied on the class-of-one theory nor suggested that we consider his equal protection claim pursuant to this framework.

Notably, the First Circuit's jurisprudence on equal protection claims in the context of postsecondary education clearly focuses on whether a defendant's actions have been different toward plaintiffs compared to other students and whether the disparate treatment has been rationally related to a legitimate purpose. For example, a student teacher's equal protection claim against his university and the city in which he had been engaged in a student-teaching practicum was summarily dismissed because the plaintiff had "failed to show that others, similarly situated, were treated differently." *Hennessy v. City of Melrose*, 194 F.3d 237, 244 (1st Cir. 1999). In *Toledo*, the First Circuit also affirmed the dismissal of an equal protection claim because a university student who had claimed a disability by virtue of a mental illness had failed to allege that the

university's refusal to acquiesce to his demands for class scheduling and course assignment changes to accommodate his disability was a result of irrational prejudice, and the university's decisions were obviously rationally related to its academic mission and budgetary constraints. *Toledo*, 454 F.3d at 29, 33-34.

Felkner asserts that some of his peers who held similar sociopolitical ideologies also did not speak up in class to share these views. The email exchanges with these students that Felkner provided as support for his argument do not show that defendants treated students with conservative ideologies differently than they treated students with liberal ideologies; instead, the emails simply provide evidence to support Felkner's claim that some other students felt that their sociological and political opinions should not be shared with the other students and faculty in the MSW program. This assertion is clearly more relevant to Felkner's claims based on freedom of expression than to claims based on equal protection violations.

Felkner also relies on a mosaic of allegations about the various professors and administrators whose actions against him—he claims—tend to show a pattern of disparate treatment due to his political affiliation. As litigants are apt to do, Felkner cherry-picks from the myriad written communications between him and fellow students, as well as between him and RIC professors and administrators, in his

attempt to demonstrate that defendants' actions were motivated by their disagreement with his political ideology. Our review of the record of this case, however, shows that the academic actions taken with respect to Felkner were, ultimately, to enforce the required components of the MSW degree at RIC. Felkner focuses on Professor Ryczek disaggregating his grade and giving him a failing grade when he refused to complete an assignment as instructed, various professors and administrators enforcing the requirement that Felkner complete both a field placement and an integrative project as a prerequisite to obtaining the MSW degree, and administrators denying Felkner a further extension of time in which to complete the integrative project after he failed to respond to the SSW's offer for completing the project long after the previous deadlines set for him. In our view, these are actions that involve "discretionary decisionmaking" that do not implicate equal protection concerns. *Engquist*, 553 U.S. at 603, 128 S.Ct. 2146.

Accordingly, we affirm summary judgment with respect to count five.

7

Procedural Due Process

In count six, Felkner alleges that defendants violated his procedural due process rights in several different ways related to the ASC hearings. The hearing justice concluded that Felkner had been

provided with sufficient opportunity to challenge the complaints against him as well as to address his own complaints before the ASC, and that the ASC carefully decided the outcome of each complaint filed with it related to Felkner. On appeal, Felkner argues that he was not provided with sufficient process. The defendants, for their part, argue that Felkner received the notice and opportunity to which he was entitled and that the ASC process was not deficient in any way.

The United States Supreme Court has recognized a "legitimate entitlement to a public education as a property interest * * * protected by the Due Process Clause[,] which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause," *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), namely, "notice and opportunity for hearing appropriate to the nature of the case," id. at 579, 95 S.Ct. 729 (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

> "The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. * * *

> "The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." Id. at 574, 95 S.Ct. 729 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971)).

"Due process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation." *Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). The span of procedural protections required to ensure fairness to students, aside from the right to notice and hearing, is uncertain, and must be determined on a case-by-case basis by balancing the competing interests in each case. *Id.* at 13. The First Circuit in *Gorman* explained that we must balance the "paramount" interest students hold "in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma" against

the promotion and protection of educational institutions. *Id.* at 14.

At a minimum, a student is entitled to know "what he is accused of doing and what the basis of the accusation is." *457 *Goss*, 419 U.S. at 582, 95 S.Ct. 729. In the context of a student disciplinary action, the Supreme Court has specifically "stop[ped] short of construing the Due Process Clause to require * * * that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Id.* at 583, 95 S.Ct. 729; see also *Gorman*, 837 F.2d at 12 (concluding that disciplinary actions taken against students implicate students' liberty and property interest in education and, therefore, require due process).

Although it is not entirely clear to us that Felkner's hearing before the ASC was disciplinary in nature, we shall assume that it was, thereby implicating his liberty and property interests. Before us, Felkner alleges six specific violations of his procedural due process rights:

> "(1) to adequate notice of Pearlmutter's complaint by not informing him of the critical 'assumption' upon which the ASC would base its decision, i.e., that he had been told that tape-recording faculty and students was 'unethical'; (2) to

> counsel for the hearings; (3) by engaging in ex parte communications; (4) by denying him the right to question his accusers at all the hearings; (5) by depriving him of a record for a meaningful appeal[;] and (6) by providing him with meaningless appeals that consisted only of 'rubber-stamping' the ASC's decision."

We discuss Felkner's contentions seriatim.

We start with the adequacy of Felkner's notice of Professor Pearlmutter's complaint to the ASC. Felkner received a letter advising him of Professor Pearlmutter's complaint and the date of the hearing. Professor Pearlmutter's complaint and other materials were enclosed with this notice. A review of these materials shows that Felkner was undisputably told the basis for the complaint against him, see *Goss*, 419 U.S. at 582, 95 S.Ct. 729, and Felkner has not provided any material to the contrary. The fact that the notice did not include an express statement of permitted and unpermitted behavior by SSW students does not lead to a violation of Felkner's due process rights regarding his entitlement to notice prior to the ASC hearing.

Second, Felkner claims he was deprived of his right to have counsel at the ASC hearing. He does not direct us, however, to any authority establishing a right to counsel in similar academic circumstances.

Indeed, "the weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question." *Gorman*, 837 F.2d at 16.

Third, Felkner's challenge regarding "*ex parte* communications"—referring to the deposition of Diane Martell, Ph.D., chair of the ASC, in which she testified that Dean Bennett-Speight asked Dr. Martell to assure her that Felkner would be treated fairly and that all the policies and practices would be followed—fares no better. It is difficult to see how this particular communication might compromise Dr. Martell's impartiality, and Felkner has not demonstrated a factual issue to be resolved by a jury.

Fourth, we address Felkner's claim that he was denied the opportunity to question his "accusers" at the ASC hearing. Although the MSW Academic and Field Manual expressly provides a student at an ASC hearing with "the right to question all participants on pertinent matters[,]" the failure to adhere to that policy is not necessarily of constitutional magnitude because Felkner did not have a constitutional right to confront and cross-examine Professor Ryczek as his accuser. *See Goss*, 419 U.S. at 583, 95 S.Ct. 729. Moreover, Felkner has not shown any material, disputed facts for a factfinder to resolve on this point.

Lastly, as to Felkner's assertion about a "meaningless appeal" resulting from the absence of a

formal record of the ASC hearings and alleged "rubberstamp" of the ASC's decisions, we note that courts have held that due process does not mandate that a student be afforded an opportunity to appeal from an adverse decision at a disciplinary proceeding. *See Flaim v. Medical College of Ohio*, 418 F.3d 629, 642 (6th Cir. 2005) (citing *Smith on Behalf of Smith v. Severn*, 129 F.3d 419, 428-29 (7th Cir. 1997); *Winnick v. Manning*, 460 F.2d 545, 549 n.5 (2d Cir. 1972)). While a record of an academic disciplinary proceeding is desirable and may be required by individual educational institutions as part of the process provided, *see Gorman*, 837 F.2d at 15, 16, Felkner has not demonstrated any disputed, material facts to resolve regarding whether the process here was constitutionally insufficient.

In summary, Felkner has failed to establish any factual disputes with respect to his procedural due process claims and has also failed to establish that defendants are not entitled to judgment as a matter of law on these claims. The undisputed facts and persuasive federal law lead us to hold that Felkner received adequate notice and opportunity to be heard before the ASC. We therefore affirm the judgment with respect to count six.

8

Conspiracy

Felkner alleges that defendants conspired to deny him his constitutional rights to freedom of speech and

due process "on account of his political beliefs" in violation of 42 U.S.C. § 1985(3). The hearing justice concluded Felkner had not alleged "a racial or class-based animus as motivation for the alleged conspiracy" as required by federal law and, as a result, defendants were entitled to judgment as a matter of law on Felkner's conspiracy claim. On appeal, Felkner argues that a conspiracy to "deprive [him] of his constitutional rights and drive him out of the MSW program" could reasonably be inferred by the evidence presented in Superior Court that: (1) members of the faculty discussed Felkner on several occasions[16]; (2) Professor Ryczek kept notes about Felkner and had other faculty members review a paper on which he was going to give Felkner a bad grade; and (3) Professor Mueller testified in his deposition that the ASC had not found that Felkner violated the NASW Code of Ethics but Dr. Martell stated that the ASC unanimously found Felkner had violated the code because the ASC tried to reach a consensus.

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[16] Specifically, Felkner alleges the following: Professor Ryczek discussed Felkner in a management committee and faculty meeting; Professor Pearlmutter spoke about Felkner at a faculty meeting; Professor Weisman discussed Felkner with almost every faculty member; Professor Mildred Bates informed Dean Bennett-Speight of Felkner's resistance to conforming with course requirements; and Dr. Martell admitted that the faculty discussed Felkner.

Felkner's argument, however, misses the mark entirely. To prove a claim under § 1985(3),[17] a plaintiff must demonstrate:

> "(1) a conspiracy, (2) a conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an overt act in furtherance of the conspiracy, and (4) either (a) an injury to person or property, or (b) a deprivation of a constitutionally protected right or privilege." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996) (citing *Griffin v. Breckenridge*,

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[17] 42 U.S.C. § 1985(3) provides, in relevant part:
"If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)).

We have previously acknowledged that a valid claim pursuant to § 1985(3) must include an allegation "that a conspiracy was not only established to deprive the claimant of the equal protection and privileges or immunities of the law but also was predicated upon a racial or suspect class-based, invidiously discriminatory animus." *Salisbury v. Stone*, 518 A.2d 1355, 1361 (R.I. 1986) (citing *United Brotherhood of Carpenters & Joiners of America v. Scott*, 463 U.S. 825, 828-29, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983)) (holding that the plaintiff failed to state a claim when he did not allege his dismissal from employment was "the act of a conspiracy motivated by racial or class-based animus"); *see also Hennessy*, 194 F.3d 237, 244 (1st Cir. 1999) (holding that a student teacher's conspiracy claim against his undergraduate school and field-placement teaching school "founder[ed]" because he had "made no showing that the defendants' conduct originated in an invidiously discriminatory class-based animus"). The First Circuit is clear "that a class is cognizable for purposes of § 1985(3)'s class-based animus requirement only when it is comprised of a distinctive and identifiable group." *Aulson*, 83 F.3d at 5. The First Circuit has declined an opportunity to extend the protection against conspiracy to classes based on political affiliation, holding "that § 1985(3) provides no remedy for animus on the basis of

political beliefs." *Pérez-Sánchez v. Public Building Authority*, 531 F.3d 104, 108, 109 (1st Cir. 2008) (acknowledging the Sixth Circuit's opinion in *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), that supporters of a political candidate are a clearly defined class entitled to protection under § 1985(3) but also collecting other federal circuit court cases holding that political affiliation is not a class entitled to protection).

Felkner's conspiracy claim is based entirely on the cause of action created by § 1985(3), yet he has not alleged that the deprivation of his constitutional rights stemmed from an "invidiously discriminatory animus" directed at a class entitled to protection under this statute. *See Aulson*, 83 F.3d at 3; *Salisbury*, 518 A.2d at 1361; *see also Diva's Inc. v. City of Bangor*, 411 F.3d 30, 39 (1st Cir. 2005) (holding appellants failed to state a claim for conspiracy pursuant to § 1985(3) and any presumed class inferred from the facts would be "at best, a vague and amorphous grouping of individuals" and therefore insufficient for stating class-based animus) (internal quotation marks omitted). Accordingly, defendants are entitled to judgment as a matter of law on Felkner's conspiracy claim and we therefore affirm the judgment as to count seven.

C

Qualified Immunity

In defendants' renewed motion for summary judgment, they argued that the doctrine of qualified immunity barred Felkner's claims against them. After the hearing justice determined that defendants were entitled to summary judgment on all of Felkner's claims, she declined to consider defendants' argument that they were qualifiedly immune from the claims. Instead, she found this issue to be moot. In a cursory manner before us, Felkner asserts that two of the individually named defendants are not entitled to qualified immunity. Felkner also acknowledges that the hearing justice did not address this issue. The defendants, for their part, have asked us—if we vacate the judgment the hearing justice entered in their favor—to conclude that qualified immunity bars Felkner's claims against them. The defendants argue that, even if their actions are deemed to have violated any of Felkner's constitutional rights, none of the violations were against clearly established constitutional rights, thereby entitling the individual defendants to qualified immunity.

While defendants have presented their qualified immunity arguments to the trial court on three separate occasions, there is no dispute that a hearing justice has yet to substantively consider these arguments. We have held that genuine issues of material fact preclude summary judgment in defendants' favor on several of Felkner's claims, but we decline defendants' invitation to consider or decide whether the potential violations of Felkner's

constitutional rights were violations of clearly established rights because we generally do not opine on legal issues that have not been explored and analyzed in the first instance by the trial court. *See Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education*, 151 A.3d 301, 307 n.5 (R.I. 2016); *State v. Gaylor*, 971 A.2d 611, 614-15 (R.I. 2009). Part of the Superior Court's task on remand will be, therefore, to consider whether any of the defendants are entitled to qualified immunity, should defendants continue to press this argument.

D

Punitive Damages

Felkner also asserts that the hearing justice erred when she granted defendants' motion to strike his demand for punitive damages. As previously recounted, Felkner sought punitive damages for defendants' alleged infringement of his right to exercise freedom of speech and for delaying his completion of the MSW degree program. In response to a request for interrogatories seeking the individual defendants' personal financial details, defendants moved to strike Felkner's claim for punitive damages. After conducting a *Palmisano* hearing, the hearing justice found that defendants' conduct toward Felkner had not "rise[n] to the level of recklessness or callous indifference" to his constitutional rights and therefore concluded that he had not established the required prima facie case for punitive damages.

Felkner argues that he did establish a prima facie case for punitive damages because the record demonstrates that defendants, by their actions, were either recklessly or callously indifferent to his constitutional rights. The defendants, not surprisingly, argue that the hearing justice did not err in her decision to grant their motion to strike Felkner's punitive damages claim.

We must first determine what standard applies to our review of this issue. Felkner seems to suggest we should review this issue *de novo*, applying the summary judgment framework in which we view the undisputed facts in the light most favorable to him. The defendants suggest we reverse the hearing justice's ruling only if we hold that her findings of fact and ultimate decision to strike the punitive damages claim were clearly erroneous. "*Palmisano* established a procedure whereby a plaintiff must make a prima facie showing at an evidentiary hearing that a viable claim exists for an award of punitive damages before discovery of defendant's financial worth may be undertaken." *Castellucci v. Battista*, 847 A.2d 243, 247 (R.I. 2004) (footnote omitted). Our caselaw is clear that the trial justice determines, as a matter of law, "[w]hether a party seeking punitive damages has met the high standard imposed on such an award[.]" *Palmisano*, 624 A.2d at 318; *see also Castellucci*, 847 A.2d at 248; *Simeone v. Charron*, 762 A.2d 442, 444 (R.I. 2000). "Such findings on questions of law are reviewed *de novo* by this

Court." *Simeone*, 762 A.2d at 444. Accordingly, we proceed with a *de novo* review of this issue.

Punitive damages are available in an action brought pursuant to 42 U.S.C. § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Kolstad v. American Dental Association*, 527 U.S. 526, 536, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (quoting *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)). In order to recover punitive damages under Rhode Island law, a plaintiff must present "evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounts to criminality, which for the good of society and warning to the individual, ought to be punished." *Palmisano*, 624 A.2d at 318 (alteration omitted) (quoting *Sherman v. McDermott*, 114 R.I. 107, 109, 329 A.2d 195, 196 (1974)). Also, "there must be a showing that the defendant acted with malice or in bad faith." *Id.* This standard "is rigorous and will be satisfied only in instances wherein a defendant's conduct requires deterrence and punishment over and above that provided in an award of compensatory damages." *Id.* (citing *Davet v. Maccarone*, 973 F.2d 22, 27 (1st Cir. 1992)). We have previously commented that "[a]n award of punitive damages is considered an extraordinary sanction and is disfavored in the law, but it will be permitted if

awarded with great caution and within narrow limits." *Id.*

In Felkner's objection to the defendants' motion to strike his claim for punitive damages, he provided dozens of pages of allegations against both individually named defendants and unnamed individuals he alleges acted as coconspirators. After reviewing these allegations, the hearing justice's decision on the motion, and Felkner's arguments before this Court, it is evident that, despite the sheer volume of allegations, the substance of his claims against each individual does not reveal either "evil motive or intent" on their part or their "reckless or callous indifference" to his federal constitutional rights. *Kolstad*, 527 U.S. at 536, 119 S.Ct. 2118 (quoting *Smith*, 461 U.S. at 56, 103 S.Ct. 1625). The hearing justice made an exhaustive and meticulous review of the abundant exhibits before she concluded that Felkner had not met his burden to demonstrate a prima facie case for punitive damages. Based upon our *de novo* review of the record, we agree with the hearing justice. Accordingly, we affirm the order granting the defendants' motion to strike Felkner's claim for punitive damages.

III

Conclusion

For the reasons stated herein, we vacate the judgment of the Superior Court with respect to counts one, three, and four. We affirm the judgment with

respect to counts five, six, and seven. As to count two, we affirm the judgment as it relates to Felkner's claim that the defendants retaliated against him for his audio recordings, and we vacate the judgment in all other respects. We also affirm the order striking Felkner's claim for punitive damages. We remand this case to the Superior Court for further proceedings consistent with this opinion.

Appendix E

SUPERIOR COURT OF RHODE ISLAND

No. PC 2007-6702

WILLIAM FELKNER,

Plaintiff,

v.

RHODE ISLAND COLLEGE et al.,

Defendants.

Before

Judge Vogel

Decision

October 2, 2015

VOGEL, J. This matter is before the Court on Defendants' Motion for Summary Judgment and on Plaintiff's objection thereto. Plaintiff William Felkner (Felkner or Plaintiff) has sued Rhode Island College (RIC); John Nazarian, individually and in his official capacity as President of RIC (President Nazarian); Carol Bennett-Speight, individually and in her official capacity as Dean of the School of Social Work (Dean Bennett-Speight); James Ryczek, individually (Ryczek); Roberta Pearlmutter, individually and in her official capacity as Professor of Social Work (Professor Pearlmutter); S. Scott Mueller, individually and in his official capacity as Assistant Professor of Social Work (Mueller); and Scott Kane, individually and in his official capacity as Dean of Students at RIC.[1] All of the Defendants argue that there exists no genuine issue as to a material fact and that they are entitled to judgment as a matter of law.

In his seven-count First Amended Complaint, Felkner alleges Defendants knowingly and intentionally violated, as well as engaged in a conspiracy to violate, his constitutional rights to free speech, equal protection, and due process through political viewpoint discrimination and suppressive academic conduct. Felkner seeks recovery "[p]ursuant to 42 U.S.C. §§ 1983 and 1988, as well as the Rhode Island Civil Rights Act of 1990 [RICRA] . . ." on all

[1] Pursuant to Super. R. Civ. P. 41(a)(2), the Court dismissed the claim against Scott Kane in his individual capacity. See Order, dated Nov. 7, 2008

counts other than the conspiracy charge, which he brings pursuant to 42 U.S.C. § 1985(3). (First Am. Compl. ¶¶ 115, 121, 127, 133, 139, 150, and 152.) He seeks monetary damages and equitable relief.[2] Id. at 34. Defendants deny violating Felkner's constitutional rights, but maintain that even if they had done so, their actions are protected from suit pursuant to the doctrine of qualified immunity.

In his objection to the Motion for Summary Judgment, Felkner maintains that the Court should not entertain Defendants' Motion because they previously sought summary judgment on the same grounds, and another justice of this Court denied that motion. He also contends that this justice had an opportunity in November 2014 to rule in favor of Defendants on the qualified immunity doctrine, but declined to do so. He argues that the Motion is barred by the doctrine of law of the case, to wit, that it is the law of this case that Defendants are not entitled to summary judgment on the doctrine of qualified immunity.

In the alternative, Felkner asserts that even if considered on its merits, the Court should deny Defendants' Motion for Summary Judgment. Felkner

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[2] With respect to his claims for equitable relief, Felkner seeks an order to expunge the Academics Standing Committee (ASC) hearing from his academic file and an order to extend the time in which to complete his master's program. (First Am. Compl. at 34.) At oral argument, Felkner, through counsel, conceded that he no longer is seeking the Court to invalidate RIC's speech code.

notes that he has brought federal claims against Defendants and that those claims cannot be resolved by summary judgment. Felkner further points to voluminous discovery responses in asserting that the case is fact driven and that there exists genuine issues as to material facts. Finally, Felkner contends that should the Court find for Defendants based upon their qualified immunity defense, his equitable claims nevertheless would survive the Motion.

For the reasons set forth herein, the Court finds that the doctrine of the law of the case does not bar the Court from considering Defendants' Motion. The Court further finds that there exist no genuine issues of material fact to demonstrate that Defendants violated Felkner's constitutional rights, state and federal; consequently, Defendants are entitled to judgment as a matter of law on his 42 U.S.C. § 1983 and RICRA claims. As Felkner has failed to demonstrate any constitutional violations, the Court also finds that he is not entitled to relief on his equitable claims. In addition, the Court finds that Felkner failed to state a claim with respect to the conspiracy charge.

I

Facts and Travel

Felkner was accepted into the graduate program in RIC's School of Social Work (SSW)[3] and began

[3] In support of, and in objection to, the instant Motion for

classes in October 2004. By May 2006, Felkner had completed all of his graduation requirements except one in his field of concentration, Social Work Organizing Policy (SWOP). He had not submitted his integrative project, a requirement for the second part of the two-part curriculum. Master's candidates must complete their studies in four years. As the four-year time limit approached, Felkner sought an extension to finish his degree requirements. Dean Bennett-Speight granted the request which would have given Felkner until May 11, 2009 to complete his studies. However, Dean Bennett-Speight expressly conditioned the extension on Felkner's compliance with set timelines.

For some unexplained reason, Felkner failed to comply with those conditions and timelines, even the one which merely required him to provide Dean Bennett-Speight with written acceptance of the terms of her offer by January 31, 2008. Felkner then sought a further extension to June 30, 2009. Noting his

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Summary Judgment, the parties have relied upon the exhibits that they previously filed with this Court. Defendants' exhibits are attached to the "Memorandum in Support of Defendants' Motion for Summary Judgment," filed July 2, 2008, and shall be referred to as "Defs.' Ex." Felkner's exhibits consist of "Plaintiff's Appendix of Exhibits in Support of his Objection to Defendants' Motion for Protective Order" and "Plaintiff's Supplemental Appendix of Exhibits in Support of his Objection to Defendants' Motion for Protective Order." Said exhibits shall be referred to as "Pl.'s Ex."

silence on the initial conditional offer, Dean Bennett-Speight rejected the second request and reminded Felkner of the conditions attached to the previous extension offer, one of which he already had breached by failing to accept the conditions by January 31, 2008. She gave him another opportunity to provide the acceptance if he did so by April 4, 2008. However, she did not extend the other timelines and further reminded him that he must submit his problem statement and methodology by April 15, 2008. She informed him that the school would view noncompliance with those conditions as a rejection of the extension offer to May 11, 2009. When Felkner failed to respond—either by accepting the extension offer or by submitting his problem statement and methodology—Professor Pearlmutter informed him that he was no longer considered enrolled in the graduate school.

Felkner's departure from the program was the culmination of an enrollment that was marked by conflict and disagreement with faculty and administration over a variety of issues, some of which triggered additional controversy.

Felkner protested his professor's selection of a movie to present to the class. (Defs.' Ex. E.) In response to that disagreement, Felkner created a website—http://www.collegebias.com—on which he regularly posted comments in order "to catalog his experiences of liberal bias at the College." (Verified Compl. ¶ 21.) Felkner "also criticized the College's

bias and discriminatory actions in other media including, radio talk shows, a TV news show, online magazines, and newspapers." Id. at ¶ 22.

On another occasion, his Policy and Organizing (part one) class professor, Ryczek, assigned a project for students to form groups to debate a social welfare issue and then to write a paper in support of the position advanced by the group. Id. at ¶¶ 34-35. After choosing his topic, Felkner requested permission to switch positions on the issue, and Ryczek rejected his request. Id. at ¶¶ 37-42. Felkner disregarded the professor's ruling and completed the position paper as though the request had been granted. Id. at ¶ 44. When Felkner received a failing grade on the paper, he rejected Ryczek's offer to resubmit the assignment for an improved mark. Id. at ¶¶ 47, 50. Instead, Felkner appealed the grade through the administrative channels at the school, which appeal was repeatedly denied. Id. at ¶¶ 52-57. Nonetheless, Ryczek gave Felkner a "C+" as his overall coursework grade. Id. at ¶ 51.

The hearing on the unsuccessful grade appeal led to further controversy. Felkner disputed Ryczek's version of events and informed the school that he would begin recording his conversations with college professors. Id. at ¶ 52.

Ryczek taught as an adjunct professor and had other commitments, including his enrollment in a Ph.D. program at Northeastern University. (Pl.'s Ex.

16.) Before part two of the Policy and Organizing class began, he advised RIC that he would be unable to teach the second session of the program because dealing with Felkner required too much additional time and conflicted with his other obligations. Id. Ryczek acquiesced and taught part two of the course when the school agreed to transfer Felkner into another class within the same program taught by Professor Pearlmutter, who was a full Professor of Social Work. (Verified Compl. ¶¶ 11, 60.)

Felkner's relationship with Professor Pearlmutter was not without its own set of problems. While a student in Ryczek's class, Felkner claimed to have found flaws in a study Professor Pearlmutter published, and he articulated his criticism to her by e-mail. Id. at ¶ 45. Professor Pearlmutter, who had never even met Felkner, was very disturbed by the rudeness and disrespectful nature of his e-mails and took particular offense to his inappropriate suggestion that she "walk down to the psychology department and take a refresher course[.]" (Pl.'s Exs. 12 and 25.) Professor Pearlmutter complained to the Chair of the Master of Social Work (MSW) program, Dr. Lenore Olsen, who responded by notifying Felkner that his comments were not consistent with the National Association of Social Workers Code of Ethics (NASW Code of Ethics). (Pl.'s Ex. 12.)

Things did not improve after Felkner began attending part two of the Policy and Organizing class. The class dealt with policies affecting low income and

other vulnerable populations, and the syllabus required students to complete specific assignments. (Pl.'s Ex. 23.) One of the assignments involved having students testify and/or lobby for the passage of pertinent legislation, regulations, policies, etc. Id. at 7.

Felkner sought to modify the assignment. Rather than working with his fellow students on a project that impacted the target population, he wanted to join with students from other schools to lobby RIC to adopt an Academic Bill of Rights (ABOR). (Verified Compl. ¶ 66.) When Professor Pearlmutter rejected this proposal, he asked to lobby in favor of the Governor's welfare reform plan. Id. at ¶¶ 67, 68. Professor Pearlmutter denied the request, voicing the opinion that the Governor's plan would "tear apart" the achievements of the federal Temporary Assistance for Needy Families welfare program. Id. at ¶ 68.

Another assignment required students to form groups to plan and implement a project approved by the professor. (Pl.'s Ex. 23 at 9.) Felkner encountered difficulty recruiting any fellow students to work on his chosen project. (Verified Compl. ¶ 70.) He wanted to advocate against legislation that would increase spending on education and training for families in need. (Verified Compl. ¶¶ 37, 69.) After initially requiring Felkner to work with his classmates, Professor Pearlmutter relented and permitted Felkner to form a group consisting of non-SSW members to advocate in class for the defeat of the bill

and to present the project to the class. Id. at ¶¶ 69, 70.

Throughout this period, Felkner continued to publicize his disagreements with RIC on his website. Id. at ¶¶ 59, 72, 82. It is significant to note that at the beginning of the course, RIC had provided students with a course description which stressed: "Maintenance of complete confidentiality regarding issues that may be raised in class. Discussions that occur here stay here and are not meant to be conveyed into public spaces." (Pl.'s Ex. 23 at 3.) However, much of Felkner's website commentary was based upon recordings that he had made during class which triggered confidentiality concerns among his classmates. (Pl.'s Ex. 64.) When Professor Pearlmutter allowed students to express these concerns during an in-class discussion, Felkner recorded the discussion and posted details about the incident on his website. (Verified Compl. ¶ 73.)

Professor Pearlmutter then filed an ethics charge with ASC against Felkner, asserting that he had violated the NASW Code of Ethics with respect to those sections governing respect and confidentiality between colleagues and the prohibition on deception. See Pl.'s Ex. 25. After notice, ASC conducted a hearing and found that Felkner had violated the ethics code when he "deceptively audio-taped a conversation with Dr. Pearlmutter . . . ." (Pl.'s Ex. 36 at 1.) The ASC made certain recommendations to Dr. Olsen, one of which was that as a condition of

remaining in the program Felkner agree in writing to "refrain from any deceptive audio or video copying of conversations with social work colleagues and refrain from any audio or video copying without express permission from them." Id. Felkner took no appeal from the recommendation in spite of receiving notice of his right to do so.

Felkner's final degree requirements involved both an integrative project and a field placement requirement as part of his SWOP concentration. (Defs.' Ex. DD.) Felkner sought to satisfy both aspects of this requirement by working as an intern in the Governor's office on his social welfare reform legislation. (Verified Compl. ¶¶ 87, 96.) Both Ryczek, who was the Director of Field Placements, and Dr. Olsen rejected the proposal as failing to implement all of the program's mandatory objectives, several of which involved working toward progressive social change. Id. at ¶¶ 89-90; Pl.'s Ex. 38. Felkner complained to Dean Bennett-Speight, and she transferred Felkner from Ryczek to Mueller, who took over as his field placement supervisor. (Verified Compl. ¶ 93.)

Although Mueller at first refused to give Felkner permission to work on welfare reform for either of his projects, in October 2005, the school relented as it related to his field placement proposal, but not his integrative project. Id. at ¶¶ 94-96. Having been denied permission to work on welfare reform for the integrative project, Felkner chose an alternative topic

of healthcare reform, and that topic was approved. Id. at ¶ 97. However, after Felkner accepted the alternative healthcare reform project, he expressed a concern that the topic did "not advanc[e] his professional goals . . . ." Id. at ¶ 99. On November 30, 2005, he renewed his effort to work on welfare reform, and ultimately, in September 2006, he was permitted to change topics from healthcare reform to welfare reform. Id. at ¶¶ 99 and 101.

In December 2007, before the regular four-year time limit for matriculation had run, and well before he asked for and received his extension offer from Dean Bennett-Speight, Felkner filed his Verified Complaint in this case. (Verified Compl.) On October 28, 2008, another justice of this Court denied Defendants' first motion for summary judgment which included a contention that the suit was barred by the doctrine of qualified immunity. On December 3, 2013, Felkner amended his complaint to include a claim of conspiracy. (First Am. Compl.)

The case was referred to this justice for handling after Defendants filed a motion to strike Felkner's claim for punitive damages. After conducting a so-called Palmisano hearing, the Court issued a bench decision in November 2014, granting the motion to strike. See Palmisano v. Toth, 624 A.2d 314 (R.I. 1993). In support of that motion, Defendants argued, in part, that the doctrine of qualified immunity precluded Felkner from obtaining punitive damages. However, the Court specifically declined to rule on

that issue, and this judge articulated that point in her bench decision in clear and unambiguous language. The Court based its bench decision on the absence of evidence of willfulness, recklessness, or wickedness, tantamount to criminality which for the good of society and warning to the Defendants ought to be punished. See Palmisano, 624 A.2d at 318.

After hearing on the present Motion for Summary Judgment and Felkner's objection thereto, and in consideration thereof, the Court grants Defendants' Motion for the reasons set forth in this Decision. The Court will provide additional facts, as necessary, in the Analysis portion of the Decision.

II

Standard of Review

The standard by which a motion justice considers a motion for summary judgment is clear. Briefly, summary judgment is appropriate only when, after reviewing the admissible evidence in the light most favorable to the nonmoving party, "no genuine issue of material fact is evident from 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Super. R. Civ. P. 56(c)). When considering such a motion, "the court may not pass on the weight or credibility of evidence, but must consider affidavits

and pleadings in the light most favorable to the party opposing the motion." Westinghouse Broad. Co., Inc. v. Dial Media, Inc., 122 R.I. 571, 579, 410 A.2d 986, 990 (1980) (internal citations omitted).

Mindful that summary judgment is an extreme remedy, the Court also is cognizant of the fact that the nonmoving party has the burden of "produc[ing] competent evidence that 'prove[s] the existence of a disputed issue of material fact[.]'" Sullo v. Greenberg, 68 A.3d 404, 407 (R.I. 2013) (quoting Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011)). This means that "the issue of fact must be 'genuine.'" Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (quoting Fed. R. Civ. P. 56(c), (e)). See Hennessy v. City of Melrose, 194 F.3d 237, 249 (1st Cir. 1999) (stating "factual disputes, in and of themselves, do not forestall summary judgment; to accomplish that end, the disputes must involve material facts") (emphasis in original). If a court concludes that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co., 475 U.S. at 587. In addition, "a '[c]omplete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Beauregard v. Gouin, 66 A.3d 489, 494 (R.I. 2013) (quoting Lavoie v. N.E. Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007)).

III

Analysis

Felkner argues that Defendants' Motion is barred by the previous ruling denying summary judgment which Felkner maintains is the law of the case. In the alternative, Felkner asserts that Defendants' Motion should be denied because there exist genuine issues as to material facts. Although he specifies the federal claims as providing sufficient grounds for denying the Motion, the Court has considered all of the claims set forth in Felkner's Complaint, both federal and state, in determining whether a genuine issue of material fact exists. Felkner contends that the case is fact driven and that the voluminous record contains genuine issues as to material facts that would preclude the granting of the Motion.

A

Law of the Case

Felkner argues that the doctrine of law of the case precludes the Court from considering the Defendants' Motion for Summary Judgment. He bases this assertion on two separate Court rulings: one made in 2008 and another issued in a bench decision by this justice in November 2014.

The Court first addresses Felkner's law of the case contention as it relates to the November 2014 bench decision on the punitive damages issue. This argument—that the Court's bench decision precludes

consideration of the instant Motion—is flawed and inconsistent with the clear and unambiguous language of the bench decision. In its 2014 Decision on the motion to strike punitive damages, this Court specifically stated that the Decision was not based on the doctrine of qualified immunity. Moreover, this Court did not opine on the merits of that defense or on whether it was barred by the 2008 ruling of the motion justice denying Defendants' motion for summary judgment.

The judicial task requires the Court to concentrate on those questions that must be determined in order to resolve a specific case. It is entirely appropriate for a judge to decline to pass on legal issues that are not pertinent to his or her decision. See Planned Env'ts Mgmt. Corp.v. Robert, 966 A.2d 117, 123 n.11 (R.I. 2009) ("'The judicial task, properly understood, should concentrate on those questions that must be decided in order to resolve a specific case.'") (quoting United States v. Gertner, 65 F.3d 963, 973 (1st Cir. 1995)). Having decided the punitive damages issue on other grounds, the Court had no reason to opine on whether the law of the case doctrine impacted Defendants' claim of qualified immunity. Accordingly, the Court categorically rejects Felkner's argument that the Court's 2014 bench decision precludes it from reviewing the instant Motion based upon the law of the case doctrine.

It is clear that if the doctrine of law of the case applies at all, it would be based upon the 2008 ruling

denying summary judgment on the issue of qualified immunity. It is well settled that "'[t]he purpose of the law of the case doctrine is to ensure the stability of decisions and avoid[ ] unseemly contests between judges that could result in a loss of public confidence in the judiciary.'" Lynch v. Spirit Rent-A Car, Inc., 965 A.2d 417, 424-25 (R.I. 2009) (quoting Chaversv. Fleet Bank (RI), N.A., 844 A.2d 666, 678 (R.I. 2004)) (internal quotations omitted). For the law of the case doctrine to apply, there must exist an interlocutory ruling that has binding effect. See McNulty v. Chip, 116 A.3d 173, 179 n.6 (R.I. 2015) (reiterating that "'after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling'") (emphasis added) (quoting Chavers, 844 A.2d at 677); see also Lynch, 965 A.2d at 424 (same); Ferguson v. Marshall Contractors, Inc., 745 A.2d 147, 151 (R.I. 2000) (same). This doctrine is "particularly applicable when the rulings under consideration pertain to successive motions for summary judgment . . . ." Ferguson, 745 A.2d at 151.

However, the law of the case doctrine "does not have the finality of the doctrine of res adjudicata . . . ." R.I. Hosp. Trust Nat'l Bank v. Nat'l Health Found., 119 R.I. 823, 829, 384 A.2d 301, 305 (1978). Rather, it "is more in the nature of a rule of policy and

convenience and 'does not apply when the second motion is based on an expanded record[.]'" Goldberg v. Whitehead,713 A.2d 204, 206 (R.I. 1998) (quoting Goodman v. Turner, 512 A.2d 861, 864 (R.I. 1986)); see also Ferguson, 745 A.2d at 152 ("The law-of-the-case doctrine is not applicable when a second motion is based upon an expanded record.") As a result, said doctrine should be treated as "'a flexible rule that may be disregarded when a subsequent ruling can be based on an expanded record.'" Berman v. Sitrin, 101 A.3d 1251, 1262 (R.I. 2014) (quoting Lynch, 965 A.2d at 424). This is true even in cases where there are successive motions for summary judgment. See Lynch,965 A.2d at 425 (affirming grant of summary judgment "on an expanded record, replete with new evidence"); see also Kirby v. P. R. Mallory & Co., 489 F.2d 904, 913 (7th Cir. 1973) ("If good reason is shown why a prior denial of a motion for summary judgment is no longer applicable or should be departed from, the trial court may, in the exercise of sound discretionary power, consider a renewed motion for summary judgment, particularly when the renewed motion is based on an expanded record."). Where there is evidence of an expanded record, it always "'is within the trial justice's sound discretion whether to consider the issue.'" Ferguson, 745 A.2d at 152 (quoting Goodman, 512 A.2d at 864). Thus, under both state and federal law, a court may consider a subsequent

summary judgment motion based upon an expanded record.

This Court observes that nearly six years have elapsed since Defendants first moved for summary judgment based upon qualified immunity. During the intervening period, the parties have conducted significant discovery, including ten depositions and thousands of pages of documents—some of which Felkner included in his previous pleadings.[4] In addition, Felkner has amended his Complaint to add a new claim for conspiracy. See State v. Presler, 731 A.2d 699, 703 (R.I. 1999) (reasoning, in dicta, "the defendant's additional and new allegation contained in his second motion to suppress might well have actually served to rescue his motion from the non-final aspect of the law-of-the-case doctrine and permitted its reconsideration"). Thus, although Defendants have included the same materials that they submitted in support of their original motion, they also have incorporated Felkner's newer exhibits by reference—exhibits that did not exist when the Court ruled on Defendants' first motion for summary judgment.

As the record has been expanded significantly over the past seven years since the Court's previous

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[4] Plaintiff acknowledges this fact in his objection to the instant Motion. See Pl.'s Obj. to Defs.' Third Mot. for Summ. J. Based on Qualified Immunity, at 40 (stating, "On June 5, 2014, Plaintiff submitted an additional memorandum and exhibits to demonstrate material issues of disputed fact").

decision on summary judgment, the Court concludes that it has been expanded sufficiently to consider the motion for a second time. See Pari v. Corwin, 620 A.2d 86, 87 (R.I. 1993) ("With the now expanded record, the trial justice was fully justified in considering the motions."). Accordingly, the law of the case doctrine does not preclude consideration of the Motion, and the Court will exercise its discretion to do so.

B

The Constitutional Claims

Felkner asserts that his 42 U.S.C. § 1983 claims against Defendants establish genuine issues of material facts. He contends that those facts, when considered in a light most favorable to him, demonstrate that Defendants knowingly and intentionally violated his constitutional rights to free speech, equal protection, and procedural due process.

It is well settled that "[t]he very purpose of § 1983 was to interpose the * * * courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 749 (R.I. 1995) (quoting Patsy v. Bd. of Regents of Florida, 457 U.S. 496, 503 (1982)) (internal quotations omitted); see also Laurence v. Sollitto, 788 A.2d 455, 457 (R.I. 2002) ("It is well settled that 42 U.S.C. § 1983 claims are cognizable only for constitutional violations

committed by persons acting under color of state law.") (citing Brunelle v. Town of S. Kingstown, 700 A.2d 1075, 1081 (R.I. 1997)).

Thus, "the first inquiry in any § 1983 suit is * * * whether the plaintiff has been deprived of a right secured by the Constitution and laws of the United States." Jolicoeur Furniture Co., 653 A.2d at 749-50 (quoting Baker v. McCollan, 443 U.S. 137, 140 (1979)) (internal quotations omitted). "All other issues [including that of immunity] are secondary to this determination." Jolicoeur Furniture Co., 653 A.2d at 750 (declining to address claim of immunity after holding invalid plaintiff's 42 U.S.C. § 1983 claim). Accordingly, the very first issue for the Court to determine is whether Defendants deprived Felkner of any constitutional rights.

1

Free Speech

In some of his 42 U.S.C. § 1983 claims, Felkner asserts that Defendants violated his free speech rights and then retaliated against him in a number of ways when he then exercised those free speech rights. With respect to such free speech claims, Felkner specifically contends that Defendants compelled him to write papers on, and advocate in favor of, ideas that conformed to the school's alleged political perspective, but that were contrary to his own political beliefs. He further asserts that by denying him the opportunity to work on welfare reform because the subject did not

conform to the school's social perspective, Defendants placed unconstitutional conditions on his continuing in the Master's program in violation of his free speech.

With respect to the alleged violations of free speech, the Court first must determine whether the speech in question was protected under the First Amendment as a matter of law. See Adler v. Lincoln Hous. Auth., 544 A.2d 576, 581 (R.I. 1988) (stating "'[t]he inquiry into the protected status of speech is one of law, not fact'") (quoting Connick v. Myers, 461 U.S. 138, 148 n.7 (1983)). It is well settled that "[t]he freedom of speech protected by the First Amendment, though not absolute, 'includes both the right to speak freely and the right to refrain from speaking at all.'" Steirer by Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 993 (3rd Cir. 1993) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)). The reason is that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994); see also Hurley v. Irish–American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995) (stating "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'") (quoting Pac.

Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion)). Thus, "[i]f 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." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Applying these principles to the public school context means that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." Tinker v.Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). However, while "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," those rights are not unlimited. Id. at 506. Indeed, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Id. at 507.

As a result, "courts have traditionally given public colleges and graduate schools wide latitude 'to create curricula that fit schools' understandings of their educational missions.'" Ward v. Members of Bd. of

Control of E. Mich. Univ., 700 F. Supp. 2d 803, 814 (E.D. Mich. 2010) (quoting Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 181 (6th Cir. 1993)). This principle has been extended to clinical education. See Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 95 (1978) ("Evaluation of [a medical student's] performance in the [clinical and experiential courses] is no less an "academic" judgment because it involves observation of [his or] her skills and techniques in actual conditions of practice, rather than assigning a grade to [his or] her written answers on an essay question.").

It is well settled that "educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). It is only when an educator's action "has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' as to require judicial intervention to protect students' constitutional rights." Id. (internal citation omitted). More specifically, the standard for evaluating a graduate student's First Amendment claim stemming from curricular speech "balances a university's interest in academic freedom and a student's First Amendment rights. It does not immunize the university altogether from First Amendment challenges but, at the same time,

appropriately defers to the university's expertise in defining academic standards and teaching students to meet them." Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002).

In summary,

> "First Amendment jurisprudence recognizes that the educational process itself may sometimes require a state actor to force a student to speak when the student would rather refrain. A student may also be forced to speak or write on a particular topic even though the student might prefer a different topic. And while a public educational institution may not demand that a student profess beliefs or views with which the student does not agree, a school may in some circumstances require a student to state the arguments that could be made in support of such beliefs or views. See Brown v. Li, 308 F.3d 939, 953 (9th Cir. 2002) (explaining in the context of First Amendment challenge to a university's refusal to approve a student thesis that a college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write opinions showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question . . . . Such requirements are part of the teachers' curricular mission to encourage critical thinking . . . and to conform to professional norms); see also Board of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 242–43, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (Souter, J.,

> concurring) (noting that university students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach.); Marinello v. Bushby, 1996 WL 671410 *14 (N.D. Miss. 1996) (unpublished) (it is part of the function of schools to compel speech from students to some degree so that officials can ensure that the students are in fact learning what is taught), aff'd 163 F.3d 1356 (5th Cir. 1998) (table); Smolla & Nimmer, Freedom of Speech § 17:1.50 (2005) (compelling speech may be part of a school's curricular mission.)." C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 187 (3rd Cir. 2005) (internal quotations omitted).

With respect to "compelled speech," the United States Supreme Court jurisprudence "has only ever found a violation of the First Amendment right . . . in the context of forced speech that requires the private speaker to embrace a particular government-favored message." Id. at 188. However, "[i]n order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is 'regulatory, proscriptive, or compulsory in nature.'" Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1247 (10th Cir. 2000) (quoting Laird v. Tatum, 408 U.S. 1, 11 (1972)). Similarly, the government may not place constitutional conditions

such as withholding a benefit for failure to surrender a constitutionally protected interest. See Perry v. Sindermann, 408 U.S. 593, 597 (1972) (stating government "may not deny a benefit to a person on a basis that infringes his [or her] constitutionally protected interests—especially, his [or her] interest in freedom of speech").

Felkner alleges that in part one of the Policy and Organizing class, Ryczek violated his free speech when he "provided the students with an approved list of issues to lobby[]" that "involved a leftist position on social welfare issues[]" with which he disagreed, but was compelled to follow. (Verified Compl. ¶ 34.) He contends that Ryczek further violated his free speech rights when he would not allow Felkner to switch sides on his chosen topic—support of SB 525—after Felkner argued that Professor Pearlmutter's study of the issue was flawed and that he had discovered a contradictory study. Felkner further alleges that Ryczek then gave him a failing grade after he exercised his right to free speech by writing his paper and debating the topic from the opposite perspective.

Felkner's version of events simply is not supported by the record. On the contrary, the record demonstrates that Ryczek "provided students with a list of 'suggested' issues[,]" and he also "encouraged students to come up with other ideas/choices." (Defs.' Ex. H, Affidavit of Ryczek, ¶¶ 20-21.) The record fails

to establish any evidence that Felkner ever approached Ryczek about an alternative idea or choice. Id. at ¶ 22. Ryczek further testified that "[n]o students were assigned to lobby for or against any issue in the class [Felkner] took with me, which ended before the General Assembly was in session." Id. at ¶ 19. Felkner has offered no evidence to refute this contention.

Referring to Felkner's request to switch sides for his chosen topic, Ryczek testified that "the reason why I refused to allow him to change sides at the last minute was because it would have been unfair to the other group members and because it was a useful academic exercise, as with any academic debate, to argue from different perspectives regardless of one's personal beliefs." Id. at ¶ 38. In his Debate and Policy Paper Feedback, Ryczek noted that he had explained to Felkner at the time that "[a]t least half the class was also arguing from a perspective that they did not necessarily agree with. Hence, you were not being asked to do an assignment that was any different than that being required of other students[.]" (Pl.'s Ex. 17 at 3.) In addition, Ryczek told Felkner:

> "I was clear that you would be required to write the paper and present the debate from the *pro* side of the policy issue . . . the policy issue that you personally picked in October and the perspective (pro) that you personally chose in

> consultation with your group classmates." Id. (Emphasis in original, ellipses in original.)

When Felkner nevertheless wrote his paper from the opposite perspective, Ryczek gave him a failing grade, explaining,

> "As you know, your paper is not written from the position you chose in your group (pro). Regardless of the content, application of theory and critical analysis, you did not write from the perspective you were required to use in this academic exercise. Therefore, the paper is [sic] must receive a failing grade." Id. at 4.

Commenting on Felkner's participation in the group debate, Ryczek stated that Felkner's "participation was anemic and [he] graded him on that portion of the assignment accordingly." (Defs.' Ex. H ¶ 36.) In his notes about the debate, Ryczek observed that Felkner "said that he had no research to support his client's perspective, but as a social worker he supports her right to self- determination." (Pl.'s Ex. 17 at 2.) In feedback, Ryczek informed Felkner that it was "unfortunate that you decided not to properly participate on the pro side of the policy issue in your group's presentation in class." Id. at 3. He also noted that Felkner "made an unsupportive remark about your client to your colleagues. You stated, 'Wouldn't you like your education paid for?' regarding your client's expressed need for education and training services." Id. at 3-4. Although Ryczek opined that

"both of those actions [were] unprofessional and inconsistent with the Code of Ethics and appropriate social work practice[,]" he stated that he was

> "most concerned about your decision not to fully participate in the debate exercise. It is very distressing that you placed the entire burden for the presentation on the shoulders of your three classmates. Most important, you left one classmate to carry the entire pro side of the debate on her own." Id. at 4.

Thus, after concluding that Felkner's "work for this debate presentation assignment was not acceptable[,]" Ryczek awarded Felkner with an "F" grade for the assignment. Id.

Although Felkner maintains that Ryczek violated his free speech rights in part one of the Policy and Organizing class when he compelled Felkner to write about, and argue in favor of, a topic with which he disagreed politically, he has not provided genuine issues of material fact to support this assertion. The undisputed facts demonstrate that Felkner was given an assignment to write a paper and debate a topic in class as part of a group. Felkner chose his topic, but then changed his mind and wanted to switch sides late in the course. After Ryczek explained his reasons for refusing to give Felkner permission to switch sides—that it was a useful academic exercise to argue from a non-preferred perspective and that it would

unfairly impact other group members—Felkner ignored that refusal by writing his paper and participating in his group debate from the opposite perspective to that which he had chosen earlier in the year. Ryczek then reasonably awarded Felkner an "F" grade on both assignments for failure to follow directions. See Hazelwood Sch. Dist., 484 U.S. at 273 (stating "educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns"). Ryczek went so far as to offer Felkner an opportunity to improve his grade on the assignment by resubmitting it, an offer that Felkner failed to accept. (Defs.' Ex. H ¶ 43.) Ryczek still gave him a passing grade for his overall work in the course. (Verified Compl. ¶ 51.)

There is nothing in the record to suggest that Felkner was forced to embrace any subject; rather, the assignments simply were part of SSW's curricular mission to encourage critical thinking. See Brown, 308 F.3d at 953 (recognizing that "a teacher may require a student to write a paper from a particular viewpoint, even if it is a view-point with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose"). Consequently, the Court finds that Felkner has not provided any genuine issues of material fact demonstrating that Defendants compelled him to speak in violation of his

free speech rights when Ryczek refused him permission to switch sides in part one of the Policy and Organizing class. The Court further finds that there exist no genuine issues of material fact to show that Felkner was engaged in protected speech when he chose to switch sides from his chosen topic and to write about and present the topic from the opposite perspective. Thus, the ASC and Dr. Olsen did not violate Felkner's constitutional rights when they later denied Felkner's grade appeal.

With respect to part two of the Policy and Organizing class, Felkner asserts that Defendants violated his right to free speech by requiring him to lobby from a political perspective that would directly impact the "poor and oppressed" or advance "social justice"—a perspective with which he disagreed—rather than allowing him to lobby for the adoption of ABOR or to lobby in favor of the Governor's welfare reform proposal. (Verified Compl. at ¶¶ 66-68.) Felkner also maintains that even though Professor Pearlmutter later granted him permission to lobby for the defeat of SB 525, she threatened to reduce his grade if he formed his own group. According to Felkner, this left him with the untenable choice of "either form[ing] his own group and face certain grade reduction, or join[ing] a group that would publicly promote social policies that go against his conscience." Id. at ¶ 69.

Part two of the Policy and Organizing class focused "on matters of policy that affect low- income and other vulnerable populations[,]" and employed "a highly interactive format using small and large group discussion and other experiential activities." (Pl.'s Ex. 23 at 1, 3.) However, although the course description required students to "testify and/or lobby for passage of specific legislation, regulations, state plans or other public policy at public hearings, legislative and administrative offices in Rhode Island, Massachusetts, or Connecticut," id. at 7, the record reveals that Felkner never was compelled to lobby or testify at a public hearing, and his only outstanding degree requirement when his enrollment ended involved his integrative project.

Furthermore, despite Felkner's characterization of the class as one which required him to adopt political beliefs with which he disagreed, the record fails to support this description. The record reveals that although Professor Pearlmutter initially refused his request to argue in favor of defeating SB 525, she later granted him permission to do so and to form his own group with the help of outside students. The Court further notes that the course had a valid educational purpose of encouraging critical thinking by using "a highly interactive format" for purposes of "group discussion and other experiential activities." (Pl.'s Ex. 23 at 3.) Consequently, regardless of

Felkner's characterization of events, the Court concludes that Felkner has presented no genuine issues of material fact to support his contention that he was required to lobby from a political perspective in violation of his constitutional right to free speech in part two of the Policy and Organizing class.

Felkner next maintains that his being refused permission to choose welfare reform as his topic for both SWOP option projects violated his right to free speech. Specifically, he contends that because students typically choose the same subject matter for both their integrative and field placement projects, when Ryczek and Mueller initially refused him permission to work on welfare reform for his field placement project, Defendants violated his First Amendment Rights. He further contends that when Mueller later denied him permission to work on welfare reform for the integrative project because the subject matter allegedly was "toxic," he forced Felkner to either abandon his field placement internship or to choose another topic in violation of Felkner's constitutional right to free speech. (Verified Compl. at ¶¶ 94-97.) Moreover, Felkner avers that Defendants placed unconstitutional conditions upon his graduating from the program when they required him to fulfill certain mandatory objectives—such as working toward advancing progressive social change—that were against his own political beliefs.

The record reveals that when Felkner proposed fulfilling his field placement requirement by working on social welfare reform legislation as an intern in the Governor's office, Ryczek would not approve his proposed field placement because it did not implement some of the course's mandatory academic objectives. (Pl.'s Ex. 32.) In doing so, Ryczek noted Felkner's "stated refusal to do the majority of the social work organizing and policy practice (SWOP) curriculum objectives . . . ." Id. Dr. Olsen supported Ryczek's decision in a letter to Felkner in which she stated that she "cannot approve the Plan of Study you have developed, given your statement that you would not work on a number of the academic objectives of the concentration." (Pl.'s Ex. 38.) Recognizing that these objectives were mandatory, she also reiterated Ryczek's suggestion to Felkner that "there are other concentrations in the MSW program that you may choose as alternatives to the SWOP concentration." Id. After Felkner complained to Dean Bennett-Speight about Ryczek and Dr. Olsen's refusal, Dean Bennett-Speight assigned Mueller as Felkner's field placement supervisor. (Verified Compl. ¶ 93.)

Although Mueller initially refused to allow Felkner to conduct his internship at the Governor's office, the school later granted his request in October 2005. Id. at ¶¶ 94-95. The fact that Felkner received permission to intern at his chosen location renders

any argument on this point moot. The Court concludes that Felkner has not satisfied his burden of providing genuine issues of material fact to demonstrate that his constitutional right to free speech was violated with respect to his field placement assignment.

Regarding Felkner's choice of topic for the integrative project, whereas Ryczek and Mueller rejected his request to focus of welfare reform, he later met with Dean Bennett-Speight and Vice President of Academic Affairs Dan King in September 2006 and received permission to do so. (Pl.'s Ex. 46.) Dean Bennett-Speight also gave Felkner permission to take an extended period during which he could complete his integrative project and asked him to provide, in writing, his projected date of completion. Id.

Over one year later, on January 4, 2008, Dean Bennett-Speight acknowledged Felkner's request to extend the school's four-year time limit for completion of his MSW degree. (Pl.'s Ex. 47) She also acknowledged that his proffered reasons for the request were professional and personal interferences, as well as the lack of supports that normally would come from still being in the internship program. Id. Dean Bennett-Speight noted that SSW policy permits extensions in extraordinary circumstances, and that she was willing to grant his extension request, provided that (1) he submitted his problem statement

and methodology to his advisor before April 15, 2008, and that they be completed and accepted by May 12, 2008; and (2) he submitted "a detailed plan, no later than, May 2008, outlining how [he] will finish the research project by May 11, 2009, notwithstanding [his] work and family obligations." Id. Dean Bennett-Speight required Felkner to acknowledge his understanding and acceptance of these conditions in writing by January 31, 2008. Id.

On March 25, 2008, Dean Bennett-Speight responded to Felkner's additional request for an extension until June 30, 2009, by refusing the request. (Pl.'s Ex. 48.) In her letter, she observed that Felkner had yet to respond to her earlier request to acknowledge and accept the conditions of his previous extension. Id. She again directed Felkner to provide said acknowledgement, this time by April 4, 2008, and that failure to do so would be considered a rejection of the previous extension offer. Id. Dean Bennett-Speight also told him that even if he accepted the extension by April 4, 2008, the April 15, 2008 deadline for submitting his problem statement and methodology to his advisor was mandatory and that failure to meet that deadline would result in termination of the extension. Id. Felkner failed to meet either deadline, April 4 or 15, 2008; therefore, on April 25, 2008, Professor Pearlmutter informed

Felkner that, as a result, he no longer was considered to be enrolled as a student in SSW. (Pl.'s Ex. 49).

From the foregoing, it is clear to the Court that Felkner has not demonstrated that his free speech rights were violated with respect to the integrative project. While Felkner has provided the Court with evidence of disputes that he had with various Defendants, he has not submitted any genuine issues of material fact to demonstrate that Defendants placed unconstitutional conditions on his graduating from the program. Rather, Defendants gave Felkner permission to work on the subject of his choice for the integrative project and allowed him to extend the time for graduation provided that he submit his problem statement and methodology by a certain date. Felkner failed to meet that deadline, and Defendants reasonably considered his behavior to have constituted a rejection of the extension offer resulting in his termination from the program. See John Hancock Mut. Life Ins. Co. v. Dietlin, 97 R.I. 515, 518, 199 A.2d 311, 313 (1964) (stating "before a contractual relationship can come into being the offer must be unconditionally accepted") (citing Thurber v. Smith, 25 R.I. 60, 54 A. 790 (1903)).

Felkner also asserts that Defendants retaliated against him in various ways for exercising his free speech rights. Despite such assertions, Felkner has not met his burden of proving such retaliation.

To establish a First Amendment retaliation claim, "a plaintiff must prove '(1) that the activity in question is protected by the First Amendment, and (2) that the protected activity was a substantial factor in the alleged retaliatory action.'" Serodio v. Rutgers, 27 F. Supp. 3d 546, 551 (D.N.J. 2014) (quoting Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006)). To demonstrate the second prong of the retaliation claim, "a plaintiff may rely on 'a range of circumstantial evidence' including temporal proximity between the speech and adverse action, evidence of retaliatory animus in the intervening period, proof of ongoing antagonism and inconsistent explanations for the alleged retaliation." Serodio, 27 F. Supp. 3d at 551 (citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280–81 (3d Cir. 2000); Ivan v. Cnty. of Middlesex, 595 F. Supp. 2d 425, 472 (D.N.J. 2009)).

Felkner asserts that Defendants retaliated against him by transferring him into Professor Pearlmutter's class for part two of the Policy and Organizing class because he had attempted to exercise his free speech rights in part one of the class taught by Ryczek. However, as this Court has rejected Felkner's claim that he was engaged in protected speech during part one of the Policy and Organizing class, he cannot satisfy the first prong of a retaliation analysis. See Serodio, 27 F. Supp. 3d at 551 (requiring

a plaintiff to first prove "that the activity in question is protected by the First Amendment"). Consequently, this specific claim must fail.

Felkner further alleges that Professor Pearlmutter retaliated against him during his group presentation to the class when she allowed his classmates "to ridicule [his] associates and attack the group's position on SB 525[,]" and when she "prevented [him] from answering questions or defending his associates." (Verified Compl. at ¶ 83.) Felkner also claims that Professor Pearlmutter lowered his grade because he did not work with other students from RIC—all of whom had chosen progressive social change projects with which he disagreed. Id. at ¶ 84. According to Professor Pearlmutter, however, the questions in class "were directed to other members of the group[,]" and not to Felkner. (Pl.'s Ex. 52, Dep. of Professor Pearlmutter, Vol. II, 86.)

Even assuming that Felkner's classmates, in fact, did ridicule Felkner and his associates during his group presentation, and that Professor Pearlmutter did penalize him with a reduced grade for working with other students, Felkner has failed to establish that such action amounted to retaliation for engaging in protected behavior. As stated previously, Felkner has failed to establish the existence of genuine issues of material fact to show that his First Amendment

rights were violated in either part one or part two of the Policy and Organizing class. Consequently, he has failed to establish the first prong of his retaliation claim with respect to these allegations. See Serodio, 27 F. Supp. 3d at 551 (requiring a plaintiff to first prove "that the activity in question is protected by the First Amendment"). Furthermore, with respect to his allegation that Professor Pearlmutter penalized his grades for working with outside students, the Court will not second guess her decisions regarding her grading of Felkner's work. See Horowitz, 435 U.S. at 90 (stating "the decision of an individual professor as to the proper grade for a student in his [or her] course" is a judgment that "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial . . . decisionmaking").

Felkner next asserts that Professor Pearlmutter retaliated against him by organizing and/or facilitating an in-class attack against him because he had exercised his constitutional right to free speech when he tape recorded his classes and disseminated them on his website. It is well settled that "[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012) (emphasis in original).

Furthermore "[t]he right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected . . . ." Id. (emphasis in original). Thus, "banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording." Id. at 595-96.

It appears that Felkner has satisfied the first prong of his retaliation claim—engaging in a protected activity—when he tape recorded his classes and posted the recordings to his website. However, the next inquiry in a First Amendment retaliation claim is whether "the protected activity was a substantial factor in the alleged retaliatory action." Serodio, 27 F. Supp. 3d at 551.

It is undisputed that students had raised concerns to Professor Pearlmutter about Felkner's publication of what they had believed to be confidential information on his website. See Pl.'s Ex. 23 at 3 (requiring students to maintain "complete confidentiality regarding issues that may be raised in class. Discussions that occur here stay here and are not meant to be conveyed into public spaces."). Felkner's own partial transcript of the class

discussion reveals that Professor Pearlmutter informed Felkner that "some students have approached me about their safety saying things in class . . . some students have approached to talk about just an underlying discomfort so I wanted to offer an opportunity everyone to talk about it." (Pl.'s Ex. 64 at 4495.) In a subsequent discussion, several students expressed their discomfort with Felkner's publication and editorializing of class discussions and activities, which they had previously believed were held in confidence. Id. 4499-4509.[5] Some students expressed

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[5] One student, who said he initially sympathized with Felkner's position, accused Felkner of having an agenda and feared that the class discussions possibly could be brought up in a future lawsuit. (Pl.'s Ex. 64 at 4503-04.) Thereafter, the following colloquy took place:

> "[STUDENT:] . . . And I understand what your [sic] doing and this is a calculated move and I wish you would just be open and honest about that thing instead of, for instance using you know this project, that's not fair, your [sic] inviting them into something that your [sic] not providing the knowledge to understand, that's not fair.
>
> "[FELKNER:] Well I would have to say that's your opinion because there are others like the lawyers involved who didn't find it not to be appropriate. They found it to be an interesting point. "[STUDENT:] Interesting but not fair.
>
> "[FELKNER:] Maybe not fair but its [sic] instrumental to our purpose." Id.

Another student asked Felkner: "[D]o you think its [sic] appropriate for you to promote your personal agenda at the cost

anger at Felkner, and others commiserated with him about his minority political views; however, it is undisputed that every student recorded in the transcript expressed a loss of respect, safety, or confidentiality. Id.

While this discussion may have been uncomfortable for Felkner, he has not provided any genuine issues of material fact to suggest that it constituted an adverse action for purposes of a retaliation claim. See Russo v. Dep't of Mental Health, Retardation and Hosps., 87 A.3d 399, 408 (R.I. 2014) (stating, in the context of an employment retaliation claim, for the claim to be actionable, the adverse action "must have been materially adverse in order to 'prevent lawsuits based upon trivial workplace dissatisfactions' or 'bruised ego[s]'") (quoting White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795, 797 (6th Cir. 2004)). Furthermore, "in analyzing a given act of retaliation, '[c]ontext matters.'" Russo, 87 A.3d at 408 (quoting Burlington

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of our right to privacy which is a fundamental right[?]" Id. at 4506. The student also stated: "My right to having a classroom become a confidential setting where I can share my ideas and hear back from other people in the classroom is being violated by your agenda . . . the basic bottom line to me here is your [sic] violating my right to privacy, my right to expression." Id. Later in the class, another student asked Felkner: "And does this mean that someday I am going to be asked by a lawyer about my group organizing project[?]," to which Felkner replied, "I don't know, I don't make those decisions." Id. at 4509.

N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006)). In the present context, although Felkner may have been upset about the class discussion concerning his recording activities, he has failed to provide any genuine issues of material fact to show that said discussion constituted a materially adverse or disciplinary action. The Court notes that when claiming to be violated by comments voiced by his fellow students, Felkner seems to consider free speech a one-way street.

Felkner additionally contends that Professor Pearlmutter retaliated against him by filing baseless ethics complaints against him with the ASC, and that the ASC then violated his right to record when it ordered him to stop taping classes and conversations with instructors and threatened him with suspension if he failed to do so.

With respect to Felkner's claim that he was denied his constitutional right to record, there is no evidence of any such violation in the record. In its decision, the ASC found that Felkner had "failed to adhere to academic standards of the School when [he] deceptively audio-taped a conversation with Dr. Pearlmutter in violation of Section 4.04 of the NASW Code of Ethics." (Pl.'s Ex. 36 at 1) (emphasis added). See also Defs.' Ex. C, School of Social Work, Academic & Field Manual, at 71 (setting forth Section 4.04 of the NASW Code of Ethics: "Social workers should not

participate in, condone, or be associated with dishonesty, fraud, or deception."). After expressing its "concern[] that [Felkner's] testimony reveal[ed] an unwillingness or inability to understand the academic necessity to comply with the School's standards[,]" the ASC "recommend[ed] to the Chair of the MSW department, Dr. Lenore Olsen, that [Felkner] be requested to declare immediately, in writing, that [he] will henceforth refrain from any deceptive audio or video copying of conversations with social work colleagues and refrain from any audio or video copying . . . without express permission from them." (Pl.'s Ex. 36 at 1.) The ASC warned Felkner that if he was "unwilling to do so, the Committee [would] recommend[] that [he] be dismissed from the School of Social Work." Id.

It is clear from the foregoing that Felkner was not disciplined for the actual act of recording; rather, he was prohibited from engaging in deceptive behavior by making surreptitious recordings of his colleagues. The ASC found these actions to be in violation of Section 4.04 of the NASW Code of Ethics and sought to prevent such deceptive behavior in the future by requiring Felkner to obtain express permission from his colleagues before making any further recordings. At oral argument, through counsel, Felkner conceded that he was not disciplined for creating his website and that he never was ordered to take down said

website. Consequently, the Court concludes that Felkner has not provided any genuine issues of material fact to show that Defendants interfered with his right to record public officials in violation of the First Amendment or that their actions constituted retaliation for same.

For all of the reasons set forth above, there exists no genuine issue as to a material fact concerning Felkner's free speech claim. For this reason, Felkner's retaliation claims also must fail. The Court concludes, as a matter of law, that Defendants did not violate Felkner's constitutional right to free speech with respect to Count I (free speech), Count II (compelled speech), Count III (retaliation), and Count IV (unconstitutional conditions).

2

Equal Protection

Felkner maintains that he was singled out and treated differently due to his political viewpoint at the expense of his academic progress and that this prejudicial treatment constituted a violation of his right to equal protection (Count V). To support this allegation, Felkner asserts that by denigrating his beliefs, penalizing his grades, trumping up ethics charges against him, and by denying him the opportunity to work on welfare reform, Defendants violated his right to equal protection. Specifically, he

contends that Ryczek violated his equal protection rights by disaggregating his grade from the group debate to give him a failing grade and for consulting with other professors before failing him on his written assignment.

Although "'the First Amendment protects speech in the public square, [it] does not mean it gives students the right to express themselves however, whenever and about whatever they wish on school assignments or exams. A school need not tolerate student speech that is inconsistent with its basic educational mission.'" Corlett v. Oakland Univ. Bd. of Trs., 958 F. Supp. 2d 795, 806 (E.D. Mich. 2013) (quoting Ward v. Polite, 667 F.3d 727, 733 (6th Cir. 2012)) (internal quotations omitted). In Corlett, the court observed:

> "'A research paper is not an expression of opinion, and the restriction of choice of topic is not readily analogous to the kind of pure expression of student opinion, that happened to take place in the classroom . . .
>
> * * *
>
> "The bottom line is that when a teacher makes an assignment even if [he or] she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it. It is not necessary to try to cram this situation into the framework of constitutional precedent, because there is no

> constitutional question.'" Corlett, 958 F. Supp. 2d at 809 (quoting Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 158 (6th Cir. 1995) (Batchelder, J., concurring)).

Furthermore, "the decision of an individual professor as to the proper grade for a student in his [or her] course" is a judgment that "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial . . . decisionmaking." Horowitz, 435 U.S. at 90; see also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."). Thus, courts should defer to decisions by school officials unless a plaintiff can show that the academic decision "is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Id.

With respect to a class of one, "when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a 'rational basis for the difference in treatment.'" Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602 (2008) (quoting Vill. of Willowbrook v. Olech,

528 U.S. 562, 564 (2000)). Thus, prior to conducting a rational basis analysis, a court must look to the record to determine whether evidence exists to make an initial showing that an individual indeed "is being singled out by the government[.]" Engquist, 553 U.S. at 602.

As previously stated, the evidence reveals that midway through part one of the Policy and Organization class, Felkner disagreed with the topic that he chose for the written assignment and group debate and wanted to switch sides. Ryczek refused Felkner's request. When Felkner nevertheless presented his group project from the opposite perspective to the one he initially had chosen, Ryczek disaggregated his grade from the group and gave him an "F" grade. Ryczek also gave Felkner an "F" grade on the written assignment for the same reason; namely, presenting the topic from the opposite perspective to that which he had chosen previously. While this Court already has found that Ryczek violated none of Felkner's free speech rights when he gave Felkner an "F" on both his group debate and written assignment, Count V raises the additional claim that Ryczek's grading violated Felkner's equal protection rights.

In his deposition, Ryczek admitted to disaggregating Felkner's grade and that he had never done that before, but he testified that he did so

because "this is a group grade that I agreed to disaggregate from his group because his group members approached me and said he was not participating in the group as expected." (Pl.'s Ex. 51 at 207, 210). Ryczek also stated that in his past experience, no other student had ever switched sides. Id. at 212.

With respect to the written paper, Ryczek testified that he didn't grade the paper on the criteria set forth for grading as, "I stopped after the first readthrough [sic] because I had determined it wasn't the paper that he was supposed to write." Id. at 212. He said that he "was very clear about the assignment" and that he previously had told Felkner "that if he chose not to do the assignment as assigned, he would receive an F on the paper." Id. Before he graded the paper, Ryczek gave it to Professor Pearlmutter and two other instructors to read "[b]ecause I just wanted to have a check-and-balance to make sure that I was reading it correctly." Id. at 220. They all agreed that Felkner failed to write the paper from a "prosocial work perspective" which "was the perspective that [Felkner] chose in his debate group and the perspective he was supposed to write the paper from." Id. at 221. Ryczek admitted that he had never before marked down a student's grade for not writing it from the assigned perspective, but that was because "[n]o other student has ever done that." Id. at 212. He also

agreed that he previously had never asked any other instructor to perform a similar review of a student's written paper, but that was because he "never had need to . . . ." Id. at 221. However, despite giving Felkner an "F" grade on his class paper and debate performance, and although he disaggregated Felkner's grade from the group, he also gave him the opportunity to resubmit the paper on the chosen topic for an improved grade, but Felkner failed to do so. Ryczek ultimately gave Felkner a "C+" as an overall grade for part one of the two-part program.

Assuming, arguendo, that students have a protected interest in obtaining a degree and that the grade Felkner received somehow implicated that interest, Felkner's attempt to switch sides in the middle of the course and his presentment of the opposite perspective when this attempt was thwarted did not bring him within a protected class because he failed to show that other similarly situated individuals were treated differently. See Hennessy, 194 F.3d at 244 (finding college student who failed his student teaching class and was terminated from teacher certification program "ha[d] no equal protection claim against anyone[] [because] he ha[d] not brought himself within any protected class and he ha[d] failed to show that others, similarly situated, were treated differently") (citing Alexis v. McDonald's Rests. of Mass., Inc., 67 F.3d 341, 354 & n.13 (1st Cir.

1995)). As no other student attempted to switch sides in the past, Felkner has been unable to show evidence that Ryczek failed to disaggregate another student's grade when that student, like Felkner, presented a side opposite that to which he or she was assigned. In other words, there were no other students who were similarly situated to Felkner but who were treated differently.

Furthermore, considering that due process is not implicated when a student at a public school receives a failing grade, see Hennessy, 194 F.3d at 250 n.3, it is not implicated in this case, where Felkner ultimately received a "C+," rather than a failing grade. Thus, Felkner has failed to demonstrate that his substantive due process rights were violated under the facts of this case, and he has not provided any genuine issues of material fact to show that Ryczek's decision regarding his grade constituted "such a substantial departure from accepted academic norms" so as to show that he "did not actually exercise professional judgment." Ewing, 474 U.S. at 225.

For all of the reasons set forth above, there exists no genuine issue of material fact as to Felkner's equal protection claim (Count V). Consequently, the Court concludes as a matter of law that Defendants did not violate his constitutional right to equal protection under the law.

3

Procedural Due Process

Felkner contends his procedural due process rights were violated when Defendants did not permit him to cross-examine witnesses at the disciplinary proceedings in violation of RIC's own internal policies and procedures (Count VI). See Pl.'s Ex. 71 at 18 ("Hearings will be conducted in an informal manner, with both the student and members of the committee having the right to question all participants on pertinent matters.").

To the extent that university students have a liberty interest in procedural due process, this interest is intrinsically limited. See Thomas v. Gee, 850 F. Supp. 665 (S.D. Ohio 1994). Thus, while "[t]he Fourteenth Amendment guarantees that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,'" Barnes v. Zaccari, 669 F.3d 1295, 1303 (11th Cir. 2012) (quoting U.S. Const. amend. XIV), "[t]he standards of procedural due process are not absolutes." Jenkins v. La. State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975). In the context of proper school administration, due process rights are "not to be equated with that essential to a criminal trial and the notice of charges need not be drawn with the precision of a criminal indictment." Id. (finding sufficient notice where

student plaintiffs were prepared to rebut the charges against them despite not being explicitly notified of the charge of conspiracy).

In Horowitz, the United States Supreme Court held process sufficient when "[t]he school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment . . ." and "[t]he ultimate decision to dismiss respondent was careful and deliberate." Horowitz, 435 U.S. 78, 85 (1978).[6] Furthermore,

> "[l]ike the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." Horowitz, 435 U.S. at 90.

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[6] The record demonstrates that the ASC informed Felkner of Professor Pearlmutter's ethics complaint in a letter dated March 14, 2005. (Pl.'s Ex. 27). Plaintiff responded to this letter on March 28, 2005. (Pl.'s Ex. 28). Following a hearing on the matter, on May 2, 2005, the ASC notified Felkner that "[a]fter consideration of all of the evidence, including [Felkner's] testimony, the Committee determined that you failed to adhere to academic standards of the School when you deceptively audio-taped a conversation with Dr. Pearlmutter in violation of Section 4.04 of the NASW Code of Ethics." (Pl.'s Ex. 36.)

In this case, each time a complaint was filed against Felkner, he was informed of the charge and offered an opportunity to rebut those charges prior to the imposition of a penalty pursuant to local procedural rules.[7] Although he contends that he was not permitted to conduct cross-examination of Defendants at any proceeding, this procedural shortcoming does not rise to the level of constitutional violation. Horowitz, 435 U.S. at 85; Goss v. Lopez, 419 U.S. 565, 584 (1975) (finding notice and informal hearing satisfied due process in the school context and requiring just an "informal give-and-take between student and disciplinarian" prior to serious disciplinary action); Whiteside v. Kay, 446 F. Supp. 716, 721 (W.D. La. 1978) (finding limited suspension proceedings fundamentally fair).

The evidence reveals that Felkner was afforded "the opportunity to voice his dissatisfaction about his grade [and the accusations concerning his recording of professors and fellow students] before a duly authorized faculty panel that considered his concerns, and the panel's decision was made with careful deliberation." Negrete v. Trs. of Cal. State Univ., 260

[7] Felkner may argue that he was not given notice of Professor Pearlmutter's initial ethics complaint prior to Dr. Olsen's December 14, 2004 letter informing Felkner of her complaint (Pl.'s Ex. 12); however, there is no evidence in the record to imply that he sustained any adverse consequence as a result of this letter.

F. App'x 9 at 1 (9th Cir. 2007) (per curiam) (citing Horowitz, 435 U.S. at 84–91). However, assuming that Defendants did not follow RIC's procedural policies regarding a student's right to question participants, such a violation would not give rise to a constitutionally cognizable violation of due process. See James v. Rowlands, 606 F.3d 646, 656–57 (9th Cir. 2010) ("'[A]n expectation of receiving process is not,without more, a liberty interest protected by the Due Process Clause.'") (quoting Olim v. Wakinekona, 461 U.S. 238, 250 n.12 (1983)); Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1471 (9th Cir. 1984) ("[A] state agency's violations of its own internal rules not otherwise constitutionally required would not give rise to a due process violation.") (citing Horowitz, 435 U.S. at 92 n.8). Indeed, a regulation that simply sets forth procedural requirements, even if mandatory, does not create a constitutionally protected liberty interest. See Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993) (holding that administrative code "d[id] not create a liberty interest that requires that [prisoner] remain in the general prison population").

For all of the reasons set forth above, the Court finds that there exists no genuine issue as to a material fact to support Felkner's due process claim (Count VI). Accordingly, the Court concludes as a matter of law that Defendants did not violate

Felkner's constitutional right to due process under the facts of this case.

C

The State Claims

In addition to contending that Defendants violated his constitutional rights under 42 U.S.C. § 1983, Felkner also asserts that Defendants violated his civil rights under RICRA with respect to the identical counts in his Amended Complaint. The Court observes that neither party addressed these claims either in their submissions to, or legal arguments before, the Court. However, on September 5, 2015, after oral arguments were presented, counsel for all parties confirmed by e- mail to the Court that a resolution of Defendants' Motion in favor of Defendants would resolve all legal issues contained in Plaintiff's First Amended Complaint.[8]

Considering that Felkner has failed to provide any genuine issue as to a material fact to show that his constitutional rights were violated, he necessarily has failed to demonstrate an injury under RICRA. See Horn v. S. Union Co., 927 A.2d 292, 300 (R.I. 2007)

[8] Plaintiff's counsel does not concede that resolution of the legal claims in Defendants' favor would resolve Plaintiff's equitable claims. Defense counsel, however, maintains that resolution of their Motion in favor of Defendants would resolve all claims set forth in Plaintiff's First Amended Complaint.

(Suttell, C.J., dissenting) (observing that "a violation of rights protected under the RICRA . . . would constitute an injury to the person") (emphasis added). Furthermore, this Court's finding that Felkner failed to show that he is a member of a suspect class requiring equal protection likewise would preclude his RICRA claims—particularly where the statute delineates the protected classes covered by the Act and Felkner did not allege that he was a member of any such class. See G.L. 1956 § 42-112-1 (protecting from discrimination "[a]ll persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin"). For the same reason, assuming his RICRA claims are ones for retaliation—see Conetta v. Nat'l Hair Care Ctrs., Inc., 236 F.3d 67, 76 (1st Cir. 2001) (citing RICRA in discussing an employment retaliation claim)—as the Court already has rejected Felkner's retaliation claims under 42 U.S.C. § 1983 for failure to provide genuine issues of material fact to show that he was engaged in protected conduct, Felkner's RICRA claims for retaliation would likewise fail.

As Felkner has failed to establish a genuine issue as to a material fact that his constitutional rights were violated, the Court finds that he also failed to demonstrate any injury under RICRA. Furthermore, Felkner's failure to allege, or even to show, that he was a member of any class protected under RICRA

also precludes relief under that statute. Consequently, the Court concludes as a matter of law that Felkner is not entitled to relief on his RICRA claims.

D

Qualified Immunity

Defendants have asserted that they are protected from suit under the doctrine of qualified immunity. However, because Felkner failed to establish a genuine issue as to a material fact that he has an actionable claim on any of his federal and state claims, this issue is rendered moot.

Our Supreme Court has declared that "in an appropriate case, the doctrine of qualified immunity might well be applied by this Court." Ensey v. Culhane, 727 A.2d 687, 690 (R.I. 1999). Considering it "is an immunity from suit rather than a mere defense to liability," the court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Id. at 691 (emphasis in original) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)). With that in mind, "[w]hen a defendant pleads qualified immunity as a defense, the court must determine whether the facts alleged by the plaintiff set forth a violation of a constitutional right and whether the constitutional right was clearly established at the time of the alleged

misconduct." Walker v. Howard, 517 F. App'x 236, 237 (5th Cir. 2013) (citing Ontiveros v. City of Rosenberg, 564 F.3d 379, 382 (5th Cir. 2009)).

Thus, just like a 42 U.S.C. § 1983 claim, "the first step in evaluating a claim to qualified immunity is to determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all * * *." Fabrizio v. City of Providence, 104 A.3d 1289, 1294 (R.I. 2014) (quoting Monahan v. Girouard, 911 A.2d 666, 674 (R.I. 2006)). If there is no evidence of a constitutional violation, the inquiry ends at step one because "'[g]overnment officials need not avail themselves of the protections of qualified immunity when no constitutional violation is present.'" Fabrizio, 104 A.3d at 1293 (quoting Monahan, 911 A.2d at 673–74).

The Court already has addressed the factual allegations upon which Felkner alleges a deprivation of his constitutional rights and determined that there is no genuine issue as to a material fact to support his claims. Even considering the evidence in a light most favorable to Felkner, he has not established evidence of any constitutional violations. That being the case, the inquiry ends at step one, and consequently, the issue of qualified immunity is rendered moot.

E

The Conspiracy Claim

In his First Amended Complaint, Felkner asserts that Defendants conspired to violate his freedom of speech and due process rights pursuant to 42 U.S.C. § 1985(3). However, Felkner's conspiracy claim fails because this Court has found that Felkner did not suffer a violation of his civil rights.

A civil conspiracy claim requires an actionable underlying wrong, and none exists in this case. See Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004) (recognizing that a civil conspiracy claim "is a means for establishing joint liability for other tortious conduct; therefore, it 'requires a valid underlying intentional tort theory'") (quoting Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268 (D.R.I. 2000)). Here, although Felkner alleges that Defendants conspired to violate his constitutional rights, he has failed to provide genuine issues as to a material fact to demonstrate that Defendants actually violated his rights in the first instance, much less conspired to violate same.

Furthermore, our Supreme Court has declared that "[u]nlike § 1983, which provides a remedy for deprivations of any constitutional right, § 1985(3) provides a remedy exclusively for deprivations of the equal protection of the law or of the privileges and immunities guaranteed under the law." Salisbury v. Stone, 518 A.2d 1355, 1361 (R.I. 1986) (citing

Jennings v. Shuman, 567 F.2d 1213, 1221 (3d Cir. 1977)). In setting forth a 42 U.S.C. § 1985(3) claim, "a claimant must allege that a conspiracy was not only established to deprive the claimant of the equal protection and privileges or immunities of the law but also was predicated upon a racial or suspect class-based, invidiously discriminatory animus." Salisbury, 518 A.2d at 1361 (citing United Bhd. of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 828-29 (1983); Griffin v. Breckenridge, 403 U.S. 88, 101-03 (1971)).

Failure to allege a racial or class-based animus as motivation for the conspiracy is fatal to any such claim. See Salisbury, 518 A.2d at 1361 ("In failing to allege that his dismissal was the act of a conspiracy motivated by a racial or class-based animus, [plaintiff] failed to state a claim under § 1985(3)."); see also Cruz Velazquez v. Rodriguez Quinones, 550 F. Supp. 2d 243, 251 (D.P.R. 2007) (reiterating "in order for plaintiffs to have a viable claim, they must belong to a constitutionally protected class under section 1985(3)").

The United States Supreme Court has questioned whether 42 U.S.C. § 1985 prohibits "wholly non-racial, but politically motivated conspiracies," stating that if it accepted such a theory, "the proscription of § 1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the

heckling of its rival's speakers and the disruption of the rival's meetings." United Bhd. of Carpenters and Joiners of Am., 463 U.S. at 836. Lower courts since have rejected the proposition. See Cruz Velazquez, 550 F. Supp. 2d at 251 (stating "[b]eing a member of a political party does not constitute a protected class envisioned by Congress when it created § 1985(3)"); Rodriguez v. Nazario, 719 F. Supp. 52, 57 (D.P.R. 1989) (declaring "there can be no Section 1985(3) protection for purely political conspiracies").

In Count VII of his First Amended Complaint, Felkner alleges that Defendants conspired to deny him "his freedom of speech and due process rights on account of his political beliefs" (First Am. Compl. ¶ 152.) In doing so, however, he failed to allege that this alleged conspiracy was "motivated by a racial or class-based animus . . . ."Salisbury, 518 A.2d at 1361. Furthermore, considering that actual political party membership "does not constitute a protected class" under 42 U.S.C. § 1985(3)—Cruz Velazquez, 550 F. Supp. 2d at 251—it follows that the mere holding of political beliefs would not bring Felkner within a protected class for purposes of 42 U.S.C. § 1985(3).

In view of the foregoing, the Court determines that Felkner has failed to establish evidence of any underlying constitutional violation that would support his conspiracy claim. Furthermore, even if he had, the fact that he failed to allege a racial or class-

based animus as motivation for the alleged conspiracy is fatal to the viability of his civil rights claim under 42 U.S.C. § 1985(3). Accordingly, the Court dismisses Count VII of the First Amended Complaint.

F

The Equitable Claims

In addition to seeking compensatory relief, Felkner seeks equitable relief in the nature of an order to expunge the ASC hearing from his academic file and an order to extend the time in which to complete his master's program. (First Am. Compl. at 34.) Citing to Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), Felkner asserts that in the event that the Court finds in favor of Defendants based on their qualified immunity defense, then the equitable claims would survive the instant Motion. (Pl.'s Obj. to Defs.' Third Mot. for Summ. J. at 1, n.1.)

The United States Supreme Court has declared that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1946). Thus, had this Court ruled in favor of Defendants based upon qualified immunity, Felkner's equitable claims would have survived the motion. See Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975) (stating "immunity from damages does not ordinarily

bar equitable relief as well"); Denius v. Dunlap, 209 F.3d 944, 959 (7th Cir. 2000) ("The doctrine of qualified immunity does not apply to claims for equitable relief.").

However, as Felkner failed to establish a genuine issue as to a material fact that a constitutional violation occurred, Defendants had no need to avail themselves of the protections of the qualified immunity doctrine. See Fabrizio, 104 A.3d at 1293 (stating "[g]overnment officials need not avail themselves of the protections of qualified immunity when no constitutional violation is present"). It necessarily follows that because Felkner did not provide evidence of any constitutional violations, he is not entitled to equitable relief. See Granger v. Johnson, 117 R.I. 440, 451, 367 A.2d 1062, 1068 (1977) (declaring that "before [a court] may act [in equity], the complainant must show that he has suffered an injury to a legally recognized right"). Consequently, the Court concludes as a matter of law that Felkner is not entitled to equitable relief.

IV

Conclusion

For the foregoing reasons, the Court finds that Felkner has failed to present any genuine issues of material fact to demonstrate that he suffered a violation of his constitutional rights. Consequently,

all of his 42 U.S.C. § 1983 and RICRA claims must fail. The Court further finds that Felkner has failed to allege a prima facie case of conspiracy under 42 U.S.C. § 1985(3); thus, this claim also fails for failure to state a claim. The Court rejects Felkner's claim for equitable relief. Accordingly, the Court grants Defendants' Motion for Summary Judgment as to all counts in the First Amended Complaint.

Counsel shall submit an appropriate order for entry.