No. 17-1577

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBERT BREUDER,

Plaintiff-Appellee,

v.

KATHARINE HAMILTON, DEANNE MAZZOCHI, FRANK NAPOLITANO, AND CHARLES BERNSTEIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division
Case No. 1:15-cv-09323
The Honorable Andrea R. Wood

REPLY BRIEF OF APPELLANTS, KATHARINE HAMILTON, DEANNE MAZZOCHI, FRANK NAPOLITANO, AND CHARLES BERNSTEIN

Oral argument requested

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INTRODUCTION

Public officials like the individual defendants in this case are immune from lawsuits unless the allegedly unlawful conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known" at the time. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Public officials "should not need to have the insight of constitutional law scholars, or the hindsight of Monday morning quarterbacks, to succeed in a qualified immunity defense." *Levenstein v. Salafsky*, 164 F.3d 345, 351 (7th Cir. 1998). Yet, that is the lens through which Robert Breuder invites scrutiny of the individual Trustees' actions in this case. Whatever the ultimate merits of his contract claims against the College, defendants Deanne Mazzochi, Charles Bernstein, Frank Napolitano, and Kathy Hamilton are—individually and collectively—immune from suit.

When the College terminated Breuder's employment in October 2015, the law was not clearly established that a property right arose from an employment agreement that (1) sought to extend far beyond the term of the prior Board that voted for it; (2) created supermajority and super quorum provisions at odds with the Public Community College Act; and (3) conflicted with the open meetings provisions of the Open Meetings Act. Breuder points to no case that clearly establishes a property right on any of these three independent bases. Indeed, as to the supermajority / superquorum provisions, Breuder acknowledges that "no court has offered an opinion on whether a 'supermajority' termination provision in an employment contract executed under the PCCA is proper." Doc. No. 30 at 24-25.

That admission alone is fatal to his Count I claim against the Trustees. The law was just as unsettled concerning the legality of Breuder's beyond-term contract and the provisions within it in conflict with the Open Meetings Act. For each of those reasons, the Trustees are qualifiedly immune as to Count I.

As to Count II, the Trustees did not waive the argument that the statements pled by Breuder are not defamatory or stigmatizing. Those arguments were preserved throughout the briefing in the district court. On the merits, it was not clearly established in Fall 2015 that the Trustees' alleged speech was defamatory or stigmatizing—rather than simply opinion. Breuder attempts to confuse the issues by attributing speech for the first time in his response brief to the Trustees (rather than the Board as a whole) and by citing to case law that has no relevance to his liberty due process claim.

And as to Count VI, because the alleged statements that survived the district court's analysis do not constitute defamation as a matter of Illinois law—either as to each individual Trustee or to the Trustees collectively—Count VI should be dismissed as well.

Finally, the Court's appellate jurisdiction extends to review of all three counts. Breuder agrees that appellate jurisdiction exists, but contends that the Court's review should not encompass the district court's rulings as to Counts II and VI. The argument is insupportable, however, and the Court's authority under 28 U.S.C. § 1291 permits review of all issues that the Trustees have raised.

ARGUMENT

I. The District Court Erred in Failing to Dismiss Breuder's Deprivation of Property Claim Against the Trustees on the Basis of Qualified Immunity.

1. The Legality of Beyond-Term Contracts was not Clearly Established in Fall 2015.

In Fall 2015, Illinois law stretching back over a century held that public entities could not enter into beyond-term employment contracts without express statutory authority to do so. *See Millikin v. Edgar Cty.*, 142 Ill. 528, 533 (1897); *Cannizzo v. Berwyn Twp. 708 Cmty. Mental Health Bd.,* 318 Ill. App. 3d 478, 486 (1st Dist. 2000); *Grassini v. DuPage Twp.*, 279 Ill. App. 3d 614, 620 (3d Dist. 1996); *see also Crull v. Sunderman*, 384 F.3d 453, 466 (7th Cir. 2004); *Walters v. Village of Colfax*, 466 F. Supp. 2d 1046, 1057 (C.D. Ill. 2006); *Trombetta v. Bd. of Educ., Proviso Twp. High Sch. Dist. No. 209*, No. 02-C-5895, 2003 WL 1193337, at *3 (N.D. Ill. Mar. 13, 2003). The only case to suggest otherwise was *Hostrop v. Bd. of Jr. Coll. Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975), but that case largely analyzed whether "tenure" was suitable board action, despite the fact that it bound future boards.[1] And despite *Hostrop*, at least five cases since have interpreted Illinois law as rejecting beyond-term contracts for administrators. *See Crull*, 384 F.3d 453; *Walters*, 466 F. Supp. 2d 1046; *Trombetta*, 2003 WL 1193337 (N.D. Ill. Mar. 13, 2003); *Cannizzo*, 318 Ill. App. 3d 478; *Grassini*, 279 Ill. App. 3d 614. Where a split in the courts exists regarding the conduct at issue, it is "an indication that the right

[1] The Trustees adopt and incorporate by reference the arguments in the Board of Trustees' brief concerning the legality of the three provisions at issue in Breuder's employment agreement.

was not clearly established at the time of the alleged violation." *Denius v. Dunlap*, 209 F.3d 944, 950 (7th Cir. 2000); *see also Wilson v. Layne*, 526 U.S. 603, 618 (1999) (although bringing reporters into home during attempted execution of warrant violated Fourth Amendment, officers entitled to qualified immunity because issue not open and shut; "If judges thus disagree on a constitutional question, it is unfair to subject [the defendant] to money damages for picking the losing side of the controversy.").

Despite the clear trend in the case law finding beyond-term contracts unlawful, *see Jacobs v. City of Chi.*, 215 F.3d 758, 767 (7th Cir. 2000) (when evaluating whether right is clearly established, courts must "determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time"), Breuder makes three arguments for why he believes the law was clearly established the other way in Fall 2015.

First, Breuder claims that "[f]or the last 40 years, Illinois courts have interpreted 3-30 and 3-32 of the PCCA as providing community college boards 'very broad' authority with respect to the employment of college administrators." Breuder Trs. Br. at 19[2] (citing *Steinmetz v. Bd. of Trs. of Cmty. Coll. Dist. No. 529*, 68 Ill. App. 3d 83 (5th Dist. 1978)); *Penman v. Bd. of Trs. of Ill. E. Cmty. Colls.*, 94 Ill. App.

[2] In the Trustees' Reply Brief, citations to "Breuder Trs. Br." refer to Appellee's brief in response to the Trustees. Citations to "Breuder Bd. Br." refer to Appellee's brief in response to the Board of Trustees.

3d 139 (5th Dist. 1981)[3]). None of those cases dealt with beyond-term employment agreements of college administrators. None of them even dealt with administrators. These were all cases about tenure, and they involved a speech teacher (*Steinmetz*), a librarian (*Penman*), and a business law instructor (*Kerger*). At the very most, these cases establish that clearly established law permitted beyond-term employment agreements for *tenured* academics. They do not clearly establish that it was unlawful for defendants Hamilton, Mazzochi, Bernstein, or Napolitano to terminate the employment of Breuder, a non-tenured administrator.

Breuder nevertheless references the "plain text" of the PCCA as clearly establishing the lawfulness of beyond-term agreements, apparently referring to section 3-30. Breuder Trs. Br. at 21; *see also* Breuder Bd. Br. at 7. Nowhere in the text of section 3-30 is a beyond-term contract discussed. Nor has any court ever interpreted section 3-30 as permitting community colleges to award beyond-term contracts to high-level administrators. The absence of any case law on this issue alone compels a finding of qualified immunity. *See Purvis v. Oest*, 614 F.3d 713, 721 (7th Cir. 2010) (reversing rejection of qualified immunity where "no case law" existed under the circumstances of that case). In fact, it was not until September 2015 that the Illinois legislature for the first time expressly conferred power on community colleges to award Presidents beyond-term contracts—an alteration that

[3] Breuder made the same point in his response to the Board's brief, though discussed *Kerger v. Bd. of Trs.*, 295 Ill. App. 3d 272 (2d Dist. 1997), as well as *Steinmetz* and *Penman*. Breuder Bd. Br. at 10. The Trustees assume the omission of *Kerger* was inadvertent and will discuss it as well.

would have been completely pointless if section 3-30 granted the power that Breuder asserts it does.

Second, Breuder argues that "when evaluating a qualified immunity defense, the constitutional right at issue must not be too generalized . . . [it] must have been 'clearly established' in a more particularized, and hence more relevant, sense." Breuder Trs. Br. at 21 (citation omitted). But Breuder is the one grasping at generalizations, not the defendants. Breuder relies on a general statutory provision, section 3-30 of the PCCA, which says *nothing* about beyond-term contracts. The cases Breuder cites—*Steinmetz*, *Penman*, and *Kerger*—likewise have *nothing* to do with beyond-term contracts or administrators. By contrast, a consistent line of cases going back a century finds with particularity that beyond-term contracts for public administrators are unlawful under Illinois law. The only statutory reference in the PCCA to beyond-term contracts for administrators was created in September 2015.

Third, Breuder relies upon *Hostrop* to argue that "the rule established in *Milliken* [sic] and its progeny has not applied to certain contracting powers granted to public school boards since the 1920s." Breuder Trs. Br. at 22. As discussed more fully in the Board's reply, *Hostrop* reached its conclusion by relying upon a very different statutory scheme applicable to elementary and secondary schools. The Illinois School Code expressly provides for beyond-term contracts for administrators. Until 2015, the PCCA did not.[4]

[4] Breuder concludes this section by making an unsupported (and unsupportable) claim that "the Trustees knew as a matter of fact" that other community college Presidents had beyond-term contracts in the Fall of 2015. Breuder Trs. Br. at 23. Breuder's factual allegations are irrelevant. Qualified immunity is an objective, not subjective, test. *See*

To conclude that a right is clearly established requires the identification of "such a clear trend in the caselaw that [the Court] can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Birdo v. Gomez*, 214 F. Supp. 3d 709, 718 (N.D. Ill. 2016) (citing *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1022 (7th Cir. 2000)). It is not enough for the plaintiff to identify one or two seemingly analogous cases. "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Rabin v. Flynn*, 725 F.3d 628, 632 (7th Cir. 2013). The precedent upon which Breuder relies creates debate, it does not vanquish it—particularly in light of all of the other existing cases that specifically discuss beyond term contracts and go against Breuder's claims.

2. The Legality of Breuder's Super-Quorum and Supermajority Provisions was not Clearly Established in Fall 2015.

Breuder concedes, as he must, that no court has found lawful under the PCCA the type of supermajority and super-quorum provisions in his employment agreement. This is a matter of first impression. Consequently, the law cannot be "clearly established," which is fatal to his claim on Count I against the individual trustees. *See, e.g., Purvis*, 614 F.3d at 721 (reversing district court's rejection of qualified immunity defense when there was "no case law of the U.S. Court of Appeals or Supreme Court … that demonstrates [plaintiff's] constitutional rights would have been violated" under the circumstances of the case); *Burns v. Reed*, 44

Harlow, 457 U.S. at 818-19. Breuder then conflates custom and practice with lawfulness, Breuder Trs. Br. at 23-24 ("beyond-term employment contracts with public college presidents were not just valid and enforceable but were the norm at community colleges across the State of Illinois")—but just because some colleges in Illinois may have awarded beyond-term contracts to their administrators prior to September 2015 did not make it lawful to do so.

F.3d 524, 528-29 (7th Cir. 1995) (affirming summary judgment on the basis of qualified immunity when no case law existed that addressed the constitutionality of using hypnosis in interrogations and thus "it certainly [could not] be said that such a right was 'clearly established' at the time of the alleged violation."); *Deputy v. City of Seymour*, 34 F. Supp. 3d 925 (S.D. Ind. 2014) (holding that defendant was entitled to qualified immunity because the law was not clearly established when plaintiff could not identify a single case recognizing a constitutional violation under the circumstances).

Breuder then asserts that this argument must fail because it "was not stated to be a basis for the Board's action in declaring the employment contract void." Breuder Trs. Br. at 25. No citation is offered for that view, because the subjective intent of the defendants is not at issue when considering qualified immunity. Instead, the question is whether the law was clearly established at the time. Breuder concedes it was not.

3. The Legality of Provisions Concerning the Open Meetings Act was not Clearly Established in Fall 2015.

Breuder's employment agreement violated the Open Meetings Act by (i) providing that Breuder and the Board chair, acting alone, can extend the President's contract for a year without further Board involvement or public action; and (ii) allowing for final board action in closed session. No case interpreting the Illinois Open Meetings Act has found otherwise, making this too a matter of first impression that cements the individual trustees' immunity. The one case cited by Breuder, *Davis v. Board of Education*, 63 Ill. App. 3d 495 (4th Dist. 1978), does not

apply here because it deals with a different statutory scheme and a markedly different contractual provision. Specifically, it addresses the Illinois School Code—not the PCCA; it involves a contractual provision far different from Breuder's—whose contract could be extended without any board action at all and could be terminated in closed session; and it stands for the unremarkable position that a school board in closed session can take "action that is not final." *Davis*, then, is insufficient to establish a clear trend in the case law that would place the issue "beyond debate." *Rabin*, 725 F.3d at 632.

II. The District Court Erred in Failing to Dismiss Breuder's Procedural Due Process Claim Against the Trustees on the Basis of Qualified Immunity.

1. The Defendants did not Waive Appellate Review of this Claim.

The Trustees did not waive their arguments that Breuder fails to state a claim for defamation and stigmatization. An argument is waived on appeal only if it was not presented to or addressed by the district court. *See Bailey v. Int'l Bhd. of Boilermakers*, 175 F.3d 526, 529-30 (7th Cir. 1999). Here, the Trustees included these arguments in their motion to dismiss briefing in the district court, and the district court explicitly ruled on those arguments.

The Trustees' motion to dismiss argued that the allegations in the complaint were not sufficient to plead defamation and stigmatization. Specifically, in their memorandum in support of the motion to dismiss, the Trustees argued that the conclusory allegations in Breuder's complaint failed to state a claim for defamation because the statements were non-actionable opinion and Breuder failed to

adequately plead actual malice. *See* Dist. Ct. Doc. 39 at 8-10 ("the alleged statements about Plaintiff's professional failings . . . are non-actionable opinion statements that are similar to the 'incompetence' statements held to be protected speech in *Hopewell*."). The Trustees argued that Breuder failed to plead defamation, citing *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 518 (1st Dist. 1998), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Id.* Similarly, the Trustees argued that because Breuder failed to plead defamation, he failed to plead sufficient facts to establish stigmatization. *See, e.g.*, Dist. Ct. Doc. 39 at 10.

The Trustees raised these arguments again in their reply in support of their motion to dismiss. *See* Dist. Ct. Doc. 52 at 13-15, n.12 ("'[A] plaintiff must first 'show that a public official made defamatory statements about him' that were 'false assertions of fact.' *Strasburger v. Bd. of Educ., Hardin Cty. Comm. Unit Sch. Dist. No. 1*, 143 F.3d at 356. 'True but stigmatizing statements that preclude further government employment do not support this type of claim. Nor do statements of opinion . . . '"); Dist. Ct. Doc. 53 at 3-5 ("Plaintiff alleges that the criticisms stigmatized him, but it was not clearly established at the time that voicing critical opinions about a public figure was illegal. Indeed, *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 519 (1st Dist. 1998), held that saying someone was 'fired because of incompetence' is nonactionable opinion."). Additionally, the district court considered and ruled on these arguments in denying the Trustees' qualified immunity claim. *See* Dist. Ct. Doc. 100 at 13.

Furthermore, the Trustees have not waived these issues simply because their arguments on appeal are more robust. The Trustees' arguments on appeal are consistent with their arguments below—the Trustees have maintained consistently that they are entitled to qualified immunity because a reasonable person would not have known that the statements at issue were defamatory or stigmatizing. While the Trustees may expound on this argument on appeal, the core tenets remain the same as the issue before the district court. Thus, the Trustees have not waived these arguments. *See Fox v. Hayes*, 600 F.3d 819, 832 (7th Cir. 2010) (holding that defendants did not waive their qualified immunity theory even though some "nuances" of the argument on appeal differed from their stance before the district court because "it is clear that the defendants consistently presented the heart of their qualified immunity argument throughout the proceedings.").

2. The Law was not Clearly Established in Fall 2015 that the Statements at Issue were Defamatory.

Breuder makes two arguments in an attempt to keep his liberty interest claim against the Trustees alive. First, he attempts for the first time to bootstrap allegedly defamatory statements made by the Board onto his allegations against the Trustees, arguing that "on October 16, 2015, the Board posted to its website its Termination Resolution which included a number of charges purportedly supporting the Board's termination of Breuder's employment," and the posting of those allegedly "false charges" was defamatory *per se*. Breuder Trs. Br. at 31. Second, Breuder claims that the Trustees' alleged statements were fact, not opinion, based upon decisions that are easily distinguished from the facts in this case. *Id.* at 8-9. In

doing so, Breuder fails even to attempt to refute the individualized analysis of the handful of alleged statements he claims were made by Trustee Hamilton and the two to three alleged statements he claims were made by Trustees Mazzochi, Bernstein, and Napolitano, respectively. These statements simply do not rise to the level of defamatory or stigmatizing. Breuder also muddles the First Amendment arguments made by the Trustees, and otherwise interjects cases that offer no support for his claim.

Breuder's first claim fails for the simple reason that no allegation exists that any individual Trustee published the allegedly defamatory Termination Resolution. Instead, the Complaint states that "the Board" posted the Resolution. In *McMath v. City of Gary, Ind.*, 976 F.2d 1026 (7th Cir. 1992), cited approvingly by Breuder, this Court found the individual defendants not to have violated plaintiff's liberty due process interests, because McMath failed to establish that "the defendants themselves published the defamatory material . . . beyond the appropriate chain of command within the City of Gary." *Id.* at 1032. Likewise here, there is no allegation that any of the Trustees "published" the allegedly defamatory Termination Resolution at all—much less outside their "appropriate chain of command" within the context of the Board's responsibility to advise the public of its actions within the dictates of the Open Meetings Act. While Breuder may have a claim against the College itself as a result of the allegedly defamatory Termination Resolution, he does not against the Trustees. At the very least, then, the law was not clearly established in Breuder's favor that the publication of the allegedly defamatory

Termination Notice by the Board gave rise to a liberty interest cause of action against any of the respective Trustees.

Breuder next makes a generalized defense of his liberty due process theory, in the process garbling the relevant case law and failing to address the analysis of the two alleged statements made by Trustee Mazzochi and Napolitano, respectively, the three alleged statements made by Trustee Bernstein, or the five alleged statements made by Defendant Hamilton. Breuder Trs. Br. 24-26. The statements were allegedly made by each of the Trustees, respectively, in the run up to the April 2015 election. They are not actionable for a variety of reasons. First, while Breuder cites cases that he believes show that the Trustees' statements are factual rather than opinion, numerous cases cited by the Trustees make the opposite argument. The Trustees are not held out as "constitutional law scholars." *See Levenstein*, 164 F.3d at 351. At the very least, then, where cases exist on both sides of the issue of what constitutes an opinion for defamation purposes, the law was not clearly established and the Trustees are entitled to qualified immunity. *See Denius*, 209 F.3d at 950; *see also Wilson*, 526 U.S. at 618.

Second, the handful of allegedly defamatory statements attributed to the respective Trustees are quintessential opinion about a public figure and a matter of public concern—and the First Amendment vigorously protects such speech. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45 (1974); *Hopewell*, 299 Ill. App. 3d at 518. While Breuder claims that the *N.Y. Times v. Sullivan* doctrine has no relevance here, he seems to want things both

ways. He wants this Court to consider pre-election statements of the Trustees and other statements outside the context of the decision to fire him. But the only statement he relies upon in connection with his dismissal is the Termination Notice, a statement he alleges was made by the Board and not by any individual Trustee. Normally, allegedly defamatory statements touch liberty due process concerns only when they are statements made by public officials which are then coupled with dismissal of employment. *See Paul v. Davis*, 424 U.S. 693, 710 (1976) (rejecting liberty due process claim because there must be both defamation by a state official and it must "occur in the course of the termination of employment"). Alleged statements made prior to the election by Mazzochi, Bernstein, and Napolitano were not made by public officials. They were candidates. And none of the statements made by any of the respective Trustees pre-election were coupled with dismissal of employment. They had no such power. And to even consider whether those statements in conjunction with a very public election were defamatory, *N.Y. Times v. Sullivan* and its progeny are implicated. The only public official involved in pre-election statements was Kathy Hamilton. If her statements were defamatory, Breuder may have a cause of action for defamation. He does not have a claim for deprivation of his liberty due process. *See Elbert v. Bd. of Educ. of Lanark Cmty. Unit Sch. Dist.*, 630 F.2d 509, 513 (7th Cir. 1980) ("*Paul v. Davis* . . . is a reaffirmation of the principle that section 1983 is not, and should not become, a general federal tort law."). At the very least, it was not clearly established in Fall

2015 that he had such a liberty interest claim against any of the respective Trustees based on the allegations in his Complaint.

Breuder mistakenly relies upon *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to support his claim that the allegedly defamatory comments made by the respective Trustees do not enjoy First Amendment protections. *Garcetti,* however, has nothing to do with an individual's exercise of First Amendment speech by elected officials, or about public figures or matters of public concern. In *Garcetti*, a deputy district attorney recommended dismissal of a case on the basis of purported governmental misconduct. *Id.* at 414-15. His supervisors rejected his recommendation and he thereafter claimed that he was subject to adverse employment action in retaliation for engaging in protected speech. *Id.* at 415. The Supreme Court rejected the deputy district attorney's claim because he was simply performing his job duties as a government employee, not a private citizen addressing a matter of public concern, when he made his dismissal recommendation. *Id.* at 423-26. *Garcetti* does not begin to address the issues here involving elected Trustees, who receive no remuneration and are not employees of COD. If anything, *Garcetti* supports the conclusion that the handful or less of alleged statements made by Trustees Mazzochi, Napolitano, Bernstein, and Hamilton rise to the level of First Amendment protected speech. Unlike the district attorney's office employee in *Garcetti*, the Trustees were private citizens making statements regarding matters of public concern in the run-up to an election.

Finally, in a footnote, Breuder claims waiver by the Trustees of individual consideration of their claims. The Trustees did not waive individual consideration of their claims, and they have specifically highlighted their respective defenses on an individual basis to the extent they vary. *See, e.g.,* Breuder Trs. Br. at 3, n.11. The Trustees are of course entitled to individual consideration of their claims, even if, as here, they consolidate their briefing for efficiency reasons and judicial economy. If Breuder were correct, each individual defendant would be required to file a separate brief. That is not the law. Indeed, this Court strongly encouraged consolidation of briefing in this matter. Doc. No. 2.

III. The District Court Erred in Failing to Dismiss Breuder's Defamation Claim Against the Trustees.

Breuder recapitulates the highlights of his complaint in asserting that he met the *Twombly/Iqbal* pleading standard for a defamation claim. In doing so, Breuder acknowledges that he is a public figure and must establish proof of "actual malice" to establish defamation. *See Gertz*, 418 U.S. at 342-45 (adopting for public figures the standards of *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). But he still offers nothing to establish that the Trustees (or any one of them) "either knew the statements to be false or were recklessly indifferent to whether they are true or false." *Pippen v. NBC Universal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013).

Nor does Breuder analyze the alleged statements that remained after the district court applied various immunities and privileges to many of the allegedly defamatory statements. What was left was a handful of statements (*see* Trustees Br. at 24-26) by each of the Trustees in the run up to an important local election.

Robust, caustic, uninhibited, critical, and even inaccurate speech about public figures is protected by the First Amendment, absent clear and convincing proof of "actual malice." *Gertz*, 418 U.S. at 342-45. These statements were non-actionable opinion, *see, e.g., Hopewell*, 299 Ill. App. 3d at 518, not defamation. And Breuder has not alleged any *facts* under *Twombly / Iqbal* to demonstrate that any of the Trustees acted with actual malice or reckless indifference to the truth—rather than expressing their opinions about public reporting of Breuder's tenure and the fact that criminal investigations of the College under Breuder's watch had commenced. Breuder Trs. Br. at 11. Therefore, the Trustees are entitled to dismissal of Breuder's defamation claim as a matter of law.

IV. The Court Has Jurisdiction to Consider The Trustees' Entire Appeal.

Breuder does not dispute that this Court has appellate jurisdiction under 28 U.S.C. § 1291 to hear the Trustees' appeal. Indeed, Breuder concedes that appellate jurisdiction exists to review "the district court's denial of the qualified immunity defenses to Count I of the Complaint (*i.e.*, the property interest due process claim)." Breuder Trs. Br. at 6. And Breuder is right to so concede, as the district court's decision on Count I turns on an issue of law: whether it was clearly established under Illinois law that Breuder's employment contract was legally enforceable. *See* Trustees Br. at 2 ("'[A] district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.'" (quoting *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996)).

The only jurisdictional dispute between the parties, therefore, pertains to the scope of the appeal. Breuder argues that the Court lacks jurisdiction to review the district court's denial of the motion to dismiss with respect to Counts II and VI. Breuder Trs. Br. at 1-6. But Breuder is mistaken: all three counts are properly before the Court.

Count II is Breuder's liberty interest due process claim, which contends that the Trustees deprived him of his liberty interest and defamed him by making false and stigmatizing statements about him to the public. As the Trustees made clear in their opening brief, the district court's denial of qualified immunity on this claim necessarily rested on the court's legal determination that, under clearly established law, the allegedly defamatory statements constituted defamation rather than protected opinion. *See* Trustees Br. at 5, 20-35. Whether a statement constitutes defamation or protected opinion is a question of law. *See, e.g.*, *Madison v. Frazier*, 539 F.3d 646, 654 (7th Cir. 2008) (stating, in defamation case under Illinois law, "[w]hether a statement is an opinion or fact is a question of law"); *Knafel v. Chicago Sun-Times, Inc.*, 413 F.3d 637, 640 (7th Cir. 2005). If the Trustees' alleged statements constituted protected opinion as a matter of law—or if the law on the point was not clearly established—then the Trustees were entitled to qualified immunity. Trustees Br. at 20-21. Because the district court's denial of qualified immunity turns on this question of law, therefore, immediate appeal is permitted.

Breuder cannot dispute that the defamatory nature of the alleged statements is a question of law. Breuder argues, however, that the Court should not review the

denial of qualified immunity on this claim because the ruling "turns on at least one genuinely disputed question of fact," namely whether Trustees acted with malice. Breuder Trs. Br. at 1-2. While it is true that the district court's opinion focuses on malice, that is irrelevant to this appeal. Even accepting for the moment that Breuder adequately alleged malice, the Trustees were still entitled to qualified immunity as a matter of law if the law was not clearly established that their statements constituted defamation. And this Court therefore has appellate jurisdiction to review the district court's ruling on that issue, which is a pure question of law.

Breuder also argues that appellate review of the defamatory nature of the alleged statements is foreclosed because the Trustees supposedly "failed to present [this issue] to the district court in support of their Fed. R. Civ. P. 12(b)(6) motion to dismiss." Breuder Trs. Br. at 3. But as demonstrated above, that is flatly incorrect. *See* Part. II.1, *supra*. And that is Breuder's only asserted basis for avoiding this Court's review of the denial of qualified immunity on Count II. This Court's jurisdiction extends to Count II.

Breuder also asks this Court not to review the denial of the motion to dismiss on Count VI. Count VI contends that the same statements at issue in Count II constitute state law defamation. That Count is inextricably intertwined with Count II because it concerns the very same alleged statements, and a decision that those statements constitute protected opinion would compel dismissal of Count VI as well. *See* Trustees Br. at 38 ("The few statements actually alleged were just the

sort of opinion that courts have routinely dismissed for failure to state a claim."). The claims are therefore inextricably intertwined, and pendent appellate jurisdiction exists as to Count VI. *Id.* at 3 (citing authority).

Breuder argues that the two counts are not inextricably intertwined because "it is not the case that [the liberty interest claim] rises and falls with a viable common law defamation claim." Breuder Trs. Br. at 6. To be sure, there may be circumstances in which one succeeds even where the other fails. A liberty interest claim, for example, requires the plaintiff to establish that the defendant's conduct was so stigmatizing that it crossed the line from mere defamation to an infringement of the plaintiff's constitutional liberty interest. *See* Trustees Br. at 20 (citing authority). But that is of no moment, because there can be no dispute that Breuder's two counts "concern the same single issue." *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010). Specifically, as Breuder himself admits, for *both* counts, he "must plead defamatory statements." Breuder Trs. Br. at 6. Thus, if the Trustees succeed in demonstrating that the alleged statements constitute protected opinion and not actionable defamation, that will necessarily require dismissal of *both* Counts II and VI. The two claims are therefore, inextricably intertwined, and this Court may review both. *Research Automation, Inc.*, 626 F.3d at 977.

CONCLUSION

In Fall 2015, the legality of Breuder's many contract provisions designed to tie the hands of future boards was not clearly established. In fact, to the extent any cases had considered the question, a long line of authority held that contracts like Breuder's were void. Nor had the law clearly established that the opinions expressed by each of the Trustees (many of which were made in the run up to a very public and heated election) were defamatory. In light of this lack of clarity, the district court's judgment should be reversed. Otherwise, the individual Trustees will be required to become the very "constitutional law scholars" this Court warned against. *Levenstein*, 164 F.3d at 351. Accordingly, and for all of the reasons stated herein, the Trustees each respectfully request that this Court reverse the judgment of the district court and dismiss Counts I, II, and VI against the Trustees.

Dated: September 15, 2017

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

The undersigned, counsel of record for the Defendants-Appellants, Charles Bernstein and Frank Napolitano, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with proportionally spaced font. The length of this brief is 5,865 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Andrew C. Porter