

NO. 08-1475

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

JUSTIN HOLMES AND
R.J. PARTINGTON III

Plaintiffs – Appellees

v.

STEVEN G. POSKANZER,
DAVID ROONEY,
PAUL ZUCKERMAN,
AND JONATHAN RASKIN

Defendants – Appellants.

On Appeal from the United States District Court for
the Northern District of New York State
(District Court Docket #06-0977)

BRIEF OF APPELLANTS JUSTIN HOLMES AND R.J. PARTINGTON III
Pro-Se

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

This is a fairly complex case that is now more than 2 years old. Plaintiffs respectfully request oral argument in this appellate stage so that the many nuances of fact, upon which plaintiffs assert some legal questions turn, can be made plain before the court.

Plaintiffs are energetic students of the 'information age' who, in order that no future SUNY New Paltz student will endure such anguish, are excited to engage the legal system and navigate the many complex legal issues related to free expression on campus through oral argument.

JURISDICTIONAL STATEMENT

As plaintiffs allege that defendants have violated their rights to due process and free speech, expression, and political association, assured respectively by the 1st and 14th amendments to the United States Constitution, the Federal Court for the Northern District of New York State had jurisdiction over this case pursuant to 28 U.S.C. Secs. 1331 and 1343 (3) & (4) and 42 U.S.C. Secs 1983 and 1988.

The United States Court of Appeals for the Second Circuit now has jurisdiction over this appeal because the district court granted the State's motion to dismiss all claims.

STATEMENT OF FACTS

As set forth in the Complaint and in a memorandum of law responding to defendants' motion to dismiss, plaintiffs allege as follows:

On April 28, 2006, Corinna Caracci, then Director of Residence Life at SUNY New Paltz and a subordinate of defendant Rooney's, filed charges of harassment in both criminal and campus justice systems against plaintiffs. A video tape of the incident, which was introduced at a campus disciplinary hearing, demonstrates that plaintiff Holmes did not engage in the conduct for which he was charged. Plaintiff Partington also did not engage in the conduct alleged by Caracci.

Caracci made her allegations the day plaintiffs had been elected to leading positions in the student government at SUNY-New Paltz. With other staff subordinate to defendant Rooney, Caracci had impermissibly sought to influence students to oppose plaintiffs' election.

At the time of this election, Partington already was serving as President of the student government at SUNY and Holmes as Chair of the Student Senate.

By the contested election of April 28, 2006, both plaintiffs were elected to new positions in the campus student government, Holmes as President and Partington as Vice President.

On May 3, 2006, plaintiffs received notice that they were being summoned to

answer charges before a campus judicial proceeding. On May 28, 2006, plaintiff Holmes was served with a notice advising him that a hearing on the campus disciplinary charges was to be held on June 2, 2006.

Since two of plaintiffs' critical witnesses were then unavailable, counsel to the Student Association requested an adjournment of the hearing. The three member judicial committee convened to consider the disciplinary charges against plaintiffs after the Dean of Students, Linda Eaton, denied plaintiffs' request for a reasonable adjournment to allow them to obtain necessary eye-witness testimony.

At the June 2, 2006 hearing, plaintiffs appeared without counsel [they were not permitted to be represented by counsel at the hearing] and were deprived of the right to cross-examine adverse witnesses. As a matter of policy and practice, students subjected to such disciplinary proceedings are typically denied the right to counsel or to cross-examine adverse witnesses regardless of the potential disciplinary sanction or the criminal liability to which their conduct may expose them.

At the hearing, plaintiffs denied harassing the complainant Caracci and, instead, accused her and her subordinates of having tried to influence student voters in the just-completed election for student government.

On July 3, 2006, the judicial committee, which was constituted in a manner contrary to university regulations, determined to expel plaintiff Partington from SUNY-

New Paltz and to suspend plaintiff Holmes for one year.

Before delivering their decision, the judicial committee did not meet as a body to deliberate concerning their “verdicts,” though university regulations require that process.

In rendering its decisions on June 30, 2006, a majority of the judicial committee relied upon matters not before it, including prior alleged “bad acts” about which no testimony was adduced at the hearing.

Defendants Zuckerman and Raskin both were pre-disposed against plaintiffs before commencing the hearing, were not impartial members of the judicial committee and should have recused themselves from it. Both defendants Zuckerman and Raskin explicitly held totally irrelevant and baseless “facts” against the plaintiffs.

Upon information and belief, defendants Zuckerman and Raskin [or either or both of them] improperly spoke with third parties about the plaintiffs while the disciplinary proceedings were pending and relied upon information obtained in this manner in reaching and defending their decisions in this matter.

Plaintiffs timely appealed the determination and sanction, as directed, to Mary Beth Collier, Executive Assistant to the College Provost. Collier is not an “administrative officer,” though university regulations require that any such appeal is to be heard by the Associate Vice President for Student Affairs or another “administrative officer” at his/her delegation. In late July, Collier upheld the suspension of plaintiff

Holmes and reduced the expulsion of plaintiff Partington to a one year suspension.

Under university practice, any suspension of one year or expulsion must be approved by defendant Poskanzer. Defendant Poskanzer ratified the process used to “try” plaintiffs and the decision to suspend them for one year. Before initiating their federal case, plaintiffs exhausted all appellate authority within the university.

During the 2005-06 school year, both plaintiffs repeatedly took public positions in opposition to policies implemented by defendants Poskanzer and Rooney. Both advocated greater accountability from the college’s administration, changes in the deployment and use of campus police, changes in the composition of the committee tasked with planning the renovation of the student union facility, liberalization in the permitted use of student funds for food services and other policies, including substantial alteration of the administration’s handling of cases involving students caught in possession of controlled substances.

During the 2005-06 school year, both plaintiffs antagonized the administration, including defendants Poskanzer and Rooney, by mobilizing significant student demonstrations concerning issues of public importance and by creating a web site openly and freely used by members of the college community to, inter alia, hold accountable the college administration by publishing information from diverse sources concerning administrative practices

Before the commencement of the hearing concerning the Caracci complaint, in defendant Poskanzer's presence, at a May 18 meeting, defendant Rooney explicitly stated that the administration was looking for ways to get rid of three students, including both plaintiffs.

Likewise, during the student government election, at least two of defendant Rooney's subordinates, Caracci and Director of Athletics, Stuart Robinson, campaigned against the plaintiffs' election and sought to influence both staff and students to oppose plaintiffs. Such involvement of the college administration in student elections is prohibited.

In addition to denying both plaintiffs their interest in property without due process, defendant Poskanzer has conducted a series of breakfast meetings with faculty from New Paltz and therein made numerous highly disparaging comments about the plaintiffs. These comments have been intended to ruin these students' reputations and justify the adverse and hostile conduct defendants have taken against them. In so proceeding, defendant Poskanzer has acted with actual spite and malice toward plaintiffs.

Caracci lodged criminal charges of harassment against plaintiffs simultaneous with her initiation of campus charges. At the time this action was initiated, the criminal charges were pending in the Justice Court for the Town of New Paltz. In their

complaint, plaintiffs accurately predicted that statements which they had made during the transcribed campus disciplinary proceedings would be used against them in the then pending criminal proceeding.

Students who have not been involved in political activism have been punished in a manner far less punitive than the sanctions defendants imposed upon plaintiffs who have been punished in this instance to send a message to all students and to intimidate students from engaging in political activity contrary to the will of the administration.

In August 2006, plaintiffs sought a preliminary injunction allowing their re-entry to school pending resolution of this case. On January 3, 2007, before the start of the second semester of the 2006-07 school year, District Court granted that injunction.

In October 2006, after this suit was filed, plaintiffs were both tried in the Town of New Paltz Justice Court on criminal charges arising from their encounter with Caracci. That Court convicted Holmes of the violation of harassment in the second degree and exonerated Mr. Partington of any offense.

In District Court, plaintiffs alleged that by retaliating against them for their protected speech and associational activities, defendants violated their rights as protected by the First Amendment and by failing to accord plaintiffs basic elements of due process while infringing upon their property and liberty interests, defendants violated the due process clause of the Fourteenth Amendment as made actionable by 42

U.S.C. sec. 1983.

Defendants moved to dismiss the Complaint pursuant to Rule 12(b)(6), arguing that plaintiffs have failed to state a claim for which relief may be granted. District Court granted this motion.

QUESTIONS PRESENTED

1) Whether the district court committed reversible error when it overlooked certain facts regarding the campus judicial hearing, including:

A) That the standard in-person, three-way deliberation, which is required by the guidelines governing campus judicial hearings, was substituted with a deliberation to which only defendants Zuckerman and Raskin were apprised and were in fact parties, during which a verdict was reached without any involvement of the student member. **See Exhibit 2: Complaint** - DC Docket #1, Para. 24.

B) That defendants Zuckerman and Raskin, during telephone conversations with William Pizzano, an alum that SUNY placed on the judicial committee to fill the 'student' seat, misconstrued a number of previous actions of plaintiffs, including exercise of plaintiffs' protected speech, and relied on the same to arrive at a verdict despite prohibitions on doing so in university regulations. Pizzano recorded these conversations and provided them to the Court. **See Exhibit 2: Complaint** – DC Docket #1, Para. 25 and 27.

C) That, upon information and belief, defendants Zuckerman and Raskin improperly spoke with third parties about plaintiffs and relied on information

obtained in this manner in reaching their decision. **See Exhibit 2: Complaint**

– DC Docket #1, Para 28.

2) Whether, in believing that there was “no dispute that the actions at issue in this case were within the scope of Defendants’ official capacities,” (**See Exhibit 1: Order**, Page 4, Paragraph 2.) the district court committed reversible error in that it overlooked a number of such allegations by plaintiffs, including:

A) That defendants Poskanzer and Rooney engaged in a series of secret breakfast meetings, which unlike previous similar meetings, were unannounced and unbeknownst to the majority of the campus community. At these meetings, both made numerous highly disparaging comments about plaintiffs designed to tarnish plaintiffs' names, diminish faculty sympathy, and justify adverse and hostile action taken by defendants. (**See Exhibit 2: Complaint** - DC Docket #1, Paragraphs 49, 50).

B) That the SUNY Administration effectively became a political campaign organization during the Spring 2006 elections, spreading a number of false and highly disparaging comments about plaintiffs in an effort to prevent them from attaining office, including some personally overheard by plaintiff Holmes. (**See Exhibit 3: Holmes Affidavit** - DC Docket #2-6 Page 4).

- 3) Whether the district court committed reversible error in that it overlooked the apparently unprecedented reversal of plaintiff Partington's acceptance into the Humanistic / Multicultural Education Graduate Studies Program at SUNY New Paltz. (See **Exhibit 2: Complaint** - Docket #1 paragraph 45).
- 4) Whether the district court committed reversible error in that it overlooked plaintiffs' allegations that defendants Zuckerman and Raskin did specifically target plaintiffs in retaliation for protected speech and that, to the extent that Zuckerman and Raskin caused and allowed deviations from the campus judicial procedure in order to exact such retaliation, such deviations were starkly different from those described in *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972).
- 5) Whether the district court properly assessed the import and meaning of a decision rendered in local court and / or overlooked plaintiffs' claims that the sanction leveled against them was unprecedented per their alleged conduct.
- 6) Whether the district court committed reversible error by dismissing the case outright rather than asking defendants for further specificity as allowed and suggested by *Crawford-El v. Britton*, 523 U.S. 574 (1998).

BRIEF PROPER

On a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all of the well-pleaded facts as true and consider them in the light most favorably to plaintiffs. See, *Scheur v. Rhodes* 416 U.S. 232, 236 (1974), overruled on other grounds, *Davis v. Scherer*, 468 U.S. 183 (1984); *Hertz Corp. V. City of New York*, 1 F.3d 121, 125 (2d Cir. 1993).

1. **FACTS DIRECTLY RELATED TO THE CAMPUS JUDICIAL HEARING**

A central incident of this case, but far from the only one in which defendants' retaliatory animus are transparent, is the campus judicial process launched in response to claims by a non-party SUNY Administrator. Plaintiffs allege a number of facts encapsulated in this process which constitute cognizable instances of defendants acting, *cum mala fides*, upon retaliatory animus toward plaintiffs' protected speech.

Plaintiffs' claims regarding a pivotal part of this process, the rendering of the verdict, seem to be misunderstood in the District Court Order, which reads in part: "On June 2, 2006, a hearing on the matter was held before a campus hearing committee, composed of two faculty members, Defendants Zuckerman and Raskin, and one student, William Pizzano. That same day, the Hearing Committee issued a decision finding by clear and convincing evidence that Plaintiffs had harassed Caracci, as defined by SUNY

New Paltz's rules." **See Exhibit 1: Order** - page 2 paragraph 2.

This statement contains two departures from the facts:

1) The decision of the committee did not come "that same day," meaning June 2, 2006.

(**See Exhibit 2: Complaint** – DC Docket #1 Para. 24 and Para. 25) .

2) The hearing committee never concluded, in full or in part, that "clear and convincing evidence" existed, despite this standard being explicitly required for all verdicts of 'responsible' in the student handbook. (**See Exhibit 4: Appeal** – DC Docket #5-14, Page 19)

The first error is significant and problematic because it fostered, plaintiffs allege by design, a strange and seemingly unprecedented occurrence: The committee substituted the standard in-person, three-way deliberation, which is required by the guidelines governing campus judicial hearings, with a deliberation to which only defendants Zuckerman and Raskin were apprised and were in fact parties, during which a verdict was reached without any involvement of the 'student' member. **See Exhibit 2: Complaint** - DC Docket #1, Para. 24.

Defendants argue, (*quamquam*) *incommodum non solvit argumentum*, that this break from established and codified procedure was warranted and even required precisely because the hearing committee waited ten days to consider written evidence to be submitted by two non-party students who were witnesses to the original event. **See**

Exhibit 5: Eaton Affidavit - DC Docket #17-7 Para. 9.

However, despite this unusual practice which was undertaken at SUNY's discretion and not by request of plaintiffs, the committee could surely and easily have followed the procedural guidelines to "seclude themselves and confer as to each item of Specification of Charges" and "decide as a body whether each item of the specification of charged has been established by clear and convincing evidence." as required by regulations governing the hearing committee (**See Exhibit 6: Procedure - Docket #15 - Exhibit 1, Page 23 Section IV Subsect. D Para. 2f**) rather than convening with only two members and excluding the student member.

Specifically, plaintiffs allege, and believe that evidence already gleaned through pre-discovery investigation shows, that several bizarre breaks from standard deliberative procedure demonstrate actual spite and malice stemming from retaliatory animus toward plaintiffs' protected speech on the part of defendants Zuckerman and Raskin:

- Defendants Zuckerman and Raskin, in contravention to both the letter and spirit of university guidelines, intentionally excluded a member of the committee to ensure delivery of a verdict of 'responsible.' **See Exhibit 2: Complaint – DC Docket #1, Para. 24.**
- Defendants Zuckerman and Raskin, during telephone conversations with William Pizzano, an alum that SUNY placed on the judicial committee to fill the 'student'

seat, misconstrued a number of previous actions of plaintiffs, including exercise of plaintiffs' protected speech, and relied on the same to arrive at a verdict despite prohibitions on doing so in university regulations. Pizzano recorded these conversations and provided them to the Court. **See Exhibit 2: Complaint** – DC Docket #1, Para. 25 and 27.

- Upon information and belief, defendants Zuckerman and Raskin improperly spoke with third parties about plaintiffs and relied on information obtained in this manner in reaching their decision. **See Exhibit 2: Complaint** – DC Docket #1, Para 28.

That these events were allowed to occur (and we allege encouraged) even after plaintiffs' campus appeal revealed them (**See Exhibit 4: Appeal** – DC Docket #5-14) is demonstrative of actual failure to take corrective action on the parts of defendants Rooney and Poskanzer, as either or both could and should have intervened once misconduct on the part of defendants Zuckerman and Raskin became known.

The order seems to misunderstand our allegations regarding the roles of Defendants Rooney and Poskanzer in the judicial process: "Plaintiffs have not alleged that either Defendant had any involvement in the filing of charges or the disciplinary process itself." (**See Exhibit 1: Order** - page 15 paragraph 2)

However, Plaintiffs do allege several avenues of involvement of both Defendant Rooney and Defendant Poskanzer in various stages of the campus judicial process.

Additionally, plaintiffs have alleged that Caracci, during the hearing itself, consulted with a superior (and another subordinate of Rooney's) (**See Exhibit 4: Appeal – DC Docket #5-14 Page 10**), in violation of the judicial procedure. While this interaction is *inter alios* the current proceeding, plaintiffs have always believed that discovery would show direct involvement of Defendant Rooney in this very matter.

2. DEFENDANTS DID ACT UNREASONABLY

AND OUTSIDE THE SCOPE OF THEIR DUTIES

To be clear, Plaintiffs allege that all four Defendants acted in a way that they should reasonably have known to be contrary to applicable laws and regulations. Additionally, plaintiffs assert that at least two defendants, Poskanzer and Rooney, acted outside the scope of their duties during the course of their retaliatory activities against plaintiffs. **See Exhibit 2: Complaint – DC Docket #1 Paras. 49, 50, and 54.**

These allegations appear to have been overlooked in the Order: "There is no dispute that the actions at issue in this case were within the scope of Defendants' official capacities." **See Exhibit 1: Order**, Page 4, Paragraph 2.

Defendants Poskanzer and Rooney engaged in a series of secret breakfast meetings, which unlike previous similar meetings, were unannounced and unbeknownst

to the majority of the campus community. At these meetings, both made numerous disparaging comments about plaintiffs designed to tarnish plaintiffs' names, diminish faculty sympathy, and justify adverse and hostile action taken by defendants. (See **Exhibit 2: Complaint** - DC Docket #1, Paragraphs 49, 50).

At a meeting on May 18th with the labor management caucus of a faculty union, Defendant Poskanzer referred to plaintiffs as "Confrontational Anarchists" (See **Exhibit 7: Brown Deposition DC Docket #15 Exhibit 2 page 14 line 12**), a highly disparaging and inaccurate remark, while defendant Rooney plainly said that SUNY was "looking for an opportunity to get rid of" plaintiffs.

Defendants' efforts to dupe the faculty were met with limited success as two very prominent and respected members of the faculty have effectively become whistleblowers in this case. See **Exhibit 7: Brown Deposition DC Docket #15, Exhibit 2 AND See Exhibit 8: Miller Affidavit DC Docket #15-7**. One of these, Professor Jeff Miller, Director of the campus Honors Center, personally expressed concern to defendants Poskanzer and Rooney that their comments "had created a work environment in which college employees could reasonably expect that they were being encouraged to assist in the process of getting rid of three students." (See **Miller Affidavit DC Docket #15-7 page 2 paragraph 6**).(See **Exhibit 2: Complaint** - DC Docket #1, paragraph 49).

Additionally, Plaintiffs have alleged specific facts regarding SUNY's involvement in the use of state resources to campaign in the Spring 2006 Student Government election in New Paltz. The district court decision may have overlooked these:

"Generally, Plaintiffs allege that they suffered an adverse action in that members of the administration attempted to influence students against their candidacy. However, Plaintiffs have not alleged any specific facts which tend to show that any such interference ever took place." **See Exhibit 1: Order** - DC Docket #34, Page 12,

Paragraph 2. Plaintiff Holmes personally "overheard [Corinna] Caracci speaking with her subordinates and expressly directing them to influence the student election.

[Holmes] sent her an email (attached hereto) which challenged this conduct." **See**

Exhibit 3: Holmes Affidavit - DC Docket #2-6 Page 4. This email, which was vetted by plaintiff Holmes' staff attorney, notes that "Several colleagues and supporters of [Holmes'] within Residence Life ha[d] informed [Holmes] that this campaign [wa]s underway, and specifically that staff members ha[d] been told that [Holmes] want[ed] to cut the residence hall programming budget." **See Exhibit 9: Email Notice** – Paragraph 4.

Of course plaintiffs look forward to discovering the testimony of these people and many others who have first hand knowledge of SUNY's intense campaign efforts as plaintiffs continue to believe that the use of state resources for the purpose of political

campaigning was authorized from the highest levels of the SUNY New Paltz Administration.

Plaintiffs would also note that although they were victorious in the election, and thus do not seek any relief related directly to the election, their reputations on campus were tarnished with two influential groups - Resident Assistants and Athletes, by dint of which their positions as student leaders were made immeasurably more difficult.

3. PLAINTIFF PARTINGTON'S ADMISSION TO GRADUATE SCHOOL WAS REVERED IN RETALIATION FOR PROTECTED SPEECH.

Another significant fact overlooked by the Order is the apparently unprecedented reversal of plaintiff Partington's acceptance into the Humanistic / Multicultural Education Graduate Studies Program at SUNY New Paltz. (See **Exhibit 2: Complaint - Docket #1** paragraph 45)

Were it not for his suspension, plaintiff Partington would have completed his undergraduate degree during the summer of 2006. See Exhibit 2: Complaint - Docket #1 Para. 47.

4. **DISAMBIGUATING PLAINTIFFS' CLAIMS VIS A VIS 1ST AND 14TH**
AMENDMENT PROTECTIONS AND THE APPROPRIATE ROLE OF A
“RANDOM AND UNAUTHORIZED” TEST

The Order from the District Court rightly and thoroughly embarks on the task of distilling plaintiffs' due process claims from the rest of the complaint, and ascertaining whether or not those claims arise from conduct on the part of defendants which is "random and unauthorized."

"As noted in this Court's previous Order, the availability of a post-deprivation remedy will satisfy any procedural due process deficiency if the violation of due process is random and unauthorized. See *Hellenic American Neighborhood Action Committee v. City of New York* ("HANAC"), 101 F.3d 877, 880 (2d Cir. 1996); *Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 465 (2d Cir. 2006)."

While plaintiffs, even in our limited and amateur level of knowledge of this area of jurisprudence, understand the "random and unauthorized" doctrine to be somewhat porous (notably in *Zinermon v. Burch* 494 U.S. 113), we would like to note that our passion for access to section 1983 in this case is driven overwhelmingly by our like passion for free speech on campus. Our due process claims largely operate as a tangent to this passion, as we believe that the only animus in the background of the lacking due

process in our case has been retaliatory and directly related to our protected speech, press, and assembly.

The district court decision proceeds with an apparent perception that allegations of any retaliatory animus on the part of defendants Zuckerman and Raskin are *dehors* our complaint: "As to Defendants Zuckerman and Raskin, Plaintiffs have not alleged that they had any retaliatory animus against Plaintiffs or pled any facts linking them to Plaintiffs' protected speech." (**See Exhibit 1: Order** - page 14 paragraph 2).

The Order also overlooks significant breach of basic procedural standards. "The Complaint also describes certain minor deviations from university regulations with regard to the disciplinary process. However, such deviations do not constitute a denial of due process. *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972)" (**See Exhibit 1: Order**, Footnote 3).

However, the facts in the case before the Court are in very stark contrast to *Winnick*, where the alleged deviation, as noted by the Court, was a matter of the charges being heard by a different committee than expected - a practice the Court in fact found to be compliant with university guidelines, finding that "the alleged deviations did not rise to constitutional proportions and did not constitute in themselves a denial of due process. Furthermore, the alleged deviations were minor ones and did not affect the fundamental fairness of the hearing." *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972).

By contrast, the facts in this case show deviations that are unprecedented at SUNY New Paltz and which specifically target plaintiffs in retaliation for protected speech (Please see **FACTS DIRECTLY RELATED TO THE CAMPUS JUDICIAL HEARING** above).

Plaintiffs continue to assert a due process claim in this area. However, even if we are unable to satisfy all prongs of the due process claim in this area, plaintiffs still allege that this conduct was in direct retaliation to plaintiffs' protected speech - an allegation that is supported by numerous disparaging comments concerning plaintiffs' protected speech made by defendants Zuckerman and Raskin, including pertaining to a project called "Student Militia," a satirical and peaceful protest in which plaintiffs were involved which sought to respond to local police officers being armed with assault rifles. Such comments were noted and recorded by William Pizzano prior to, during, and subsequent to the judicial proceeding. See **Exhibit 2: Complaint** - DC Docket #1, Para. 25, Para. 26, Para. 27 AND See **Exhibit 10: Pizzano Affidavit** – DC Docket #2-2.

5. A FINDING IN FAVOR OF PLAINTIFFS WOULD NOT UNDERCUT THE RESULT OF ANY LOCAL COURT PROCEEDING.

Plaintiffs allege that defendants' retaliatory animus is demonstrated by, *inter alia*, the entirety of a judicial procedure conducted surrounding a claim of harassment by

Corinna Caracci, a non-party subordinate of defendant Rooney.

The District Court Order regards the result of a local trial in which Plaintiff Holmes was convicted of "harassment" as a "significant obstacle faced by Plaintiffs in pursuing their retaliation claim." The Order goes on to point out that "Defendants note correctly that to the extent a ruling in favor of Plaintiffs would undercut a criminal conviction that has not been set aside, Plaintiffs' claim is not cognizable." (**See Exhibit 1: Order - page 13 paragraph 3**)

Fortunately for Plaintiffs, the notion that "a ruling in favor of Plaintiffs would undercut a criminal conviction that has not been set aside" is a non sequitur, for at least two reasons:

A) The harassment statute on which the conviction rests differs substantially from that of the campus handbook, and the findings in the respective cases are radically different - a fact plaintiffs regard as a red flag in itself. The decision in the local court did not, in fact, find that the incident in the hallway amounted to harassment, and acquitted for this reason both Plaintiff Partington and Dan Curtis, a non-party student leader. Holmes was convicted on the basis that his office sent Caracci a cease-and-desist notice, vetted by his staff attorney, and that Holmes subsequently carried a video camera in her presence. Neither of these acts are mentioned in Caracci's complaint or in any documents produced by the campus judicial process.

In fact, no part of the local decision finds truth in Caracci's complaint or in any part of the findings of the campus judicial process, but rather, finds guilt on entirely separate grounds. Additionally, plaintiffs have submitted video evidence showing that Caracci's complaint is in fact perjurious. (*The video, which was submitted on the district court docket as Document 15, Exhibit 5, can now be viewed at*

<http://www.campuscoup.com/hallway>) (**See Also Exhibit 11 - Criminal Charges**)

Thus, a finding that the campus hearing committee acted with bias in retaliation for plaintiffs' protected speech or that Caracci's complaint was not truthful would not in any way undercut or be at odds with the decision of the court.

B) Of greater import: even if plaintiffs had engaged in prohibited conduct under the language of the student handbook, such conduct has never before warranted suspension (**See Exhibit 2: Complaint - DC Docket #1, Paragraph 53**). There are many cases on campus which involve much more significant confrontations, sometimes physical in nature, and do not result in such heavy sanctions.

Defendants assert that “both plaintiffs were then under sanction for prior unrelated misconduct at the University, (**See Exhibit 3: SUNY Brief for Dismissal - DC Docket #26-2 Page 7 Paragraph 1**)” but this is absolutely untrue and thus of course *dehors* the record. Plaintiffs were instead under sanction for an equally baseless charge which was

pressed **the day after the incident involving Caracci** by another non-party Student Affairs administrator. The charge in this case was “failing to comply with an official request.” **See Exhibit 5: Eaton Affidavit** - DC Docket #17-7, Page 4, Para. 5.

The “request” in question was a request that Plaintiffs submit to a search of their persons in their offices during a concert which they were not attending. The chief of campus police, however, informed plaintiffs that they did not have to submit to the search and testified in their defense at the judicial hearing on this matter. Contrary to university regulations, SUNY presented no evidence whatsoever, yet still found plaintiffs guilty. **See Exhibit 6: Procedure** – DC Docket #2-1 page 29 Section D 1(f)

To be clear: Plaintiffs were under no sanction and had never been found responsible for a violation of campus rules prior to the April 27, 2006 incident.

6. Plaintiffs have advanced, and seek to continue to advance, specific factual allegations that establish improper motive causing cognizable injury. To the extent that the district court has not divined these from the complaining instrument, the proper course of action is to insist that Plaintiffs provide additional specificity.

The Order overlooks some crucial holdings in Crawford-El v. Britton, 523 U.S. 574 (1998). For example, a crucial corner of the Order rests as follows: "See Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (noting that a plaintiff should be required to “put

forth specific, nonconclusory factual allegations that established improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment.”). Because there are no factual allegations which suggest that adverse action took place, the question of Defendants' motivations cannot be discussed." (See Exhibit 1: Order - page 12 paragraph 2 AND page 13 paragraph 1)

The part of the paragraph quoted above, however, is part of a broader thought on the part of the Court which, when taken in full, actually suggests an interpretation favorable to plaintiffs. The entire sentence quoted by the Order reads, "Thus, the court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment." Crawford-El v. Britton, 523 U.S. 574 1998. In fact the Court, throughout its decision in Crawford-El, suggests a wide array of alternatives for a district court short of dismissal in this situation.

While plaintiffs assert that such "specific, nonconclusory factual allegations" have already been advanced within the four corners of the complaining instrument, we would be happy to oblige a district court order to provide further specificity, and pray for remand with just such a suggestion. "Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which

sometimes requires complicated analysis of legal issues." Crawford-El v. Britton, 523 U.S. 574 1998.

Interestingly, defendants list and disparage a number of plaintiffs' free speech activities in court filings in an apparent attempt to depict plaintiffs as 'troublemakers.' Plaintiffs look forward to a day in court so that they may show not only that each of these activities were peaceful and productive but that the actual motivation for SUNY's conduct stems from disdain for the movement that these actions represent.

CONCLUSION AND PRAYER FOR APPELLATE RELIEF

Plaintiffs pray for the Court of Appeals to remand this case back to District Court where the various outstanding factual and legal issues can be resolved and plaintiffs can, if so desired by the District Court, provide further specificity as to allegations.

Plaintiffs also pray for discovery so that a clearer picture can be discerned of the many facts that lie near the surface of this case.

RESPECTFULLY SUBMITTED,

JUSTIN HOLMES

R.J. PARTINGTON III