No. 25-

IN THE

Supreme Court of the United States

RICHARD LOWERY,

Petitioner,

v.

LILLIAN MILLS, IN HER OFFICIAL CAPACITY AS DEAN OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS AT AUSTIN; ETHAN BURRIS, IN HIS OFFICIAL CAPACITY AS SENIOR ASSOCIATE DEAN FOR ACADEMIC AFFAIRS OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN; CLEMENS SIALM, IN HIS OFFICIAL CAPACITY AS FINANCE DEPARTMENT CHAIR FOR THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS AUSTIN; JAMES E. DAVIS, IN HIS OFFICIAL CAPACITY AS INTERIM PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

University of Texas officials threatened Professor Richard Lowery with reduced pay, loss of a research post, and other consequences, if he did not stop publicly criticizing the UT administration. Wishing to avoid those outcomes, Lowery self-censored.

In ten circuits, employer threats suffice to establish a § 1983 First Amendment retaliation claim if they would dissuade a reasonable employee from speaking. But the Fifth Circuit is one of two outlier courts that require a completed adverse action, such as a discharge, demotion, or reprimand, before an employee can state a retaliation claim—employer threats, no matter how credible or severe, are never enough.

The question presented is whether a public employer's threats against an employee can suffice to establish a First Amendment retaliation claim, if those threats would dissuade a reasonable employee from speaking on a matter of public importance.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner Richard Lowery is a natural person and was the plaintiff-appellant in the court below.

Respondents were defendants-appellees in the court below. They are Lillian Mills, in her official capacity as Dean of the McCombs School of Business at the University of Texas at Austin; Ethan Burris, in his official capacity as Senior Associate Dean for Academic Affairs of the McCombs School of Business at the University of Texas-Austin; Clemens Sialm, in his official capacity as Finance Department Chair for the McCombs School of Business at the University of Texas at Austin; and James E. Davis, in his official capacity as Interim President of the University of Texas at Austin.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.): *Richard Lowery v. Lillian Mills et al.*, No. 1:23-CV-129-DAE.

United States Court of Appeals (5th Cir.): *Richard Lowery v. Lillian Mills et al.*, No. 24-50879.

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PETITION FOR A WRIT OF CERTIORARI

Richard Lowery respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

This petition asks this Court to resolve an important circuit split: how adverse, formal, or complete must a public employer's retaliatory actions be to support a constitutional-tort claim. Unlike almost all other circuits, the Fifth Circuit holds that public employees silenced by their employers' threats suffer no First Amendment injury.

University of Texas Professor Richard Lowery has a history of speaking, posting, and publishing on controversial topics such as DEI (diversity, equity, and inclusion), affirmative action, academic freedom, viewpoint diversity, and capitalism—and criticizing UT leaders and their policies on these issues. Beginning in the summer of 2022, UT officials threatened Lowery's pay, a valuable institute affiliation, and his access to research opportunities, if he did not tone down or stop his critical speech.

The threats worked as intended, eliminating the need to carry them out. Lowery responded by going dark. He stopped tweeting and publicly criticizing UT or its officials—but turned to the courts for relief.

The district court and the Fifth Circuit both determined that UT's actions would chill an employee of ordinary firmness. But both courts applied a narrow

test for what qualifies as an adverse employment action in the retaliation context, holding that only completed employment actions akin to formal discipline suffice. Credible threats or other informal negative actions are never enough, even if they chill speech. In the Fifth Circuit, a formal reprimand for speech is actionable, but a threat to terminate or strip pay is not. The court deems employer threats to be just "hot air" unless and until the employer follows through and implements the threat.

Almost all other circuits would have deemed Lowery's retaliation claim valid. Ten circuits use a practical, common-sense test for determining whether a public employer's actions are sufficiently adverse. In essence, they ask whether a reasonable employee would have been deterred from speaking by the employer's retaliation. Unlike the Fifth Circuit, they do not require formal discipline or the implementation of threats.

The Fifth Circuit's continued adherence to its narrow test conflicts with the decisions of ten circuits and authorizes employer threats to censor unwelcome employee speech on matters of public concern. It merits this Court's review.

OPINIONS BELOW

The order denying rehearing en banc, App. 100a-101a, is currently available at 2026 LX 32559. The opinion of the court of appeals, App. 1a-35a, is reported at 157 F.4th 729. The order of the district court, App. 36a-66a, is reported at 690 F. Supp. 3d 692. The final order of the district court, App. 67a-99a, is currently available at 2024 LX 225909.

JURISDICTION

The court of appeals issued its opinion on October 31, 2025. The court of appeals denied Lowery's petition for rehearing en banc on January 9, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides, as relevant here: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . shall be liable to the party injured . . . ."

STATEMENT OF THE CASE

1. Factual Background.

Richard Lowery is an outspoken professor at the University of Texas at Austin's business school, and also serves in a senior role at UT's Salem Center for Public Policy, a position that pays him an additional $20,000 per

year. App. 2a, 95a. On social media and in online op-eds and interviews, Prof. Lowery has repeatedly criticized UT's administration for its funding decisions, perceived political activism, and hypocrisy. App. 2a-4a. A particular sore point was his perception of how the university administration handled the proposed Liberty Institute, a project that Lowery had actively promoted. *Id.* He also often criticized UT's DEI programs and occasionally tagged elected officials on Twitter (now known as X). App. 4a.

In the summer of 2022, UT administrators began expressing concerns about Lowery's speech and tried to manage it. App. 4a-5a. Matters came to a head in a meeting Dean Lillian Mills and Associate Dean Ethan Burris held with Lowery's supervisor at the Salem Center, Carlos Carvalho. App. 5a. The deans said that Lowery was "crossing the line" and "impeding the operations of the [business] school and the ability to fundraise." *Id.* They asked Carvalho to get Lowery to behave, which he declined to do, causing Dean Mills to threaten to remove Carvalho from his post. *Id.* The deans likewise threatened Lowery's affiliation with the Salem Center, a message that Carvalho conveyed to Lowery. *Id.*

Lowery's department head, Sheridan Titman, also forwarded Lowery an email complaining about one of his tweets criticizing the school's sustainability institute, and advised Lowery to take it easy on that subject. App. 5a.

Lowery got the message. In late August 2022 he set his Twitter account to "private" and soon stopped tweeting altogether. App. 5a. He also refrained from criticizing the UT administration in online op-eds and other venues.

Around this same time, a university employee working for the sustainability institute that Lowery had criticized asked the UT police to look at Lowery's tweets. App. 5a-6a. The university police opened a "threat mitigation investigation." *Id.*

On February 8, 2023, Lowery filed this lawsuit, suing the deans and his department head in their official capacities. He alleged two claims arising under 42 U.S.C. § 1983: (1) chilling of his free speech by state actors and (2) First Amendment retaliation. App. 6a.

2. District Court Proceedings.

The parties cross-moved for a preliminary injunction and to dismiss, respectively. On September 5, 2023, the district court denied Lowery's motion for a preliminary injunction without prejudice, and granted in part and denied in part UT's motion to dismiss. App. 6a-7a, 65a-66a.

The court dismissed, without prejudice, Lowery's First Amendment retaliation claim, because he had purportedly not alleged a sufficient adverse employment action. App. 6a-7a, 58a-59a. "The mere threat or potential of an ultimate employment decision will not suffice." App. 59a.

The court, however, declined to dismiss Lowery's chilled speech claim, finding "that Plaintiff has sufficiently alleged that Defendants' threats would chill a person of ordinary firmness from publicly criticizing UT Administration and programs." App. 60a.

The case proceeded to discovery, and on March 28, 2024, Lowery filed an amended complaint adding UT's president as an official capacity defendant and adding a new unwritten speech-code claim. App. 7a. UT's officials filed a second motion to dismiss and for partial summary judgment. *Id.*

On October 2, 2024, the district court entered its final order and judgment, granting UT's motions. App. 7a-8a. The court found that Lowery's chilled-speech claim was in essence a First Amendment retaliation claim, and because Lowery had not alleged a sufficient adverse employment action, he could maintain neither a retaliation claim nor a chilled-speech claim. App. 7a, 81a-82a. "Plaintiff's allegations of *threats* are insufficient to establish an adverse employment action for a First Amendment retaliation claim in the Fifth Circuit." App. 82a. The court also dismissed Lowery's unwritten speech-code claim. App. 8a, 89a-90a.

3. Fifth Circuit Proceedings.

The Fifth Circuit affirmed. App. 35a. The court agreed that "Lowery's chilled speech and retaliation claims are functionally identical," App. 13a, and declined Lowery's request to apply a reasonably-likely-to-deter test such as that adopted in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006), for Title VII retaliation claims. App. 18a-22a. Instead, it reaffirmed the Fifth Circuit's "narrow view of what constitutes an adverse employment action" in First Amendment retaliation cases. App. 22a. "Adverse employment actions are discharges, demotions, refusal to hire, refusals to promote, and reprimands." App. 19a, 22a. The court found that Lowery's claims that UT threatened to reduce his pay, end his institute affiliation, reduce his

access to research opportunities, inquire about his tweets, label him, and placed him under police surveillance were all insufficiently adverse actions. App. 22a-23a.

The court denied Lowery's petition for rehearing en banc. App. 101a.

REASONS FOR GRANTING THE PETITION

The overwhelming majority of circuits use a functional, common-sense test to determine whether a public employer's actions were sufficiently adverse to give rise to a § 1983 claim for First Amendment retaliation. In essence, they ask whether the employer's retaliatory conduct would deter a reasonable employee from speaking. But the Fifth Circuit takes a much narrower view of what constitutes an adverse action, leaving employees exposed to retaliatory threats and other forms of pressure that fall short of completed or formal discipline. This Court should correct this anomaly.

I. The Fifth Circuit's narrow view of what constitutes an adequate adverse employment action conflicts with all but one other circuit.

The Fifth Circuit upheld the dismissal of Lowery's claim for First Amendment retaliation because Lowery's allegations of adverse employment actions did not meet its standard under *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000). *See* App. 18a-23a, 26a-27a, 35a. *Breaux* provided that only "discharges, demotions, refusals to hire, refusals to promote, and reprimands" qualify as adverse employment actions; even the most extreme threats do not. 205 F.3d at 157-59.

As a result, public employees who cave-in to a threat and stop speaking to avoid punishment—just like Richard Lowery did—never have an actionable claim. A government employer is permitted to silence speech via threats so long as those threats succeed. Employees who accede to their employer's pressure won't see the threats carried out as formal disciplinary action. Thus, under the Fifth Circuit's *Breaux* standard, the more effective the threat, the more likely the official is to be immunized for chilling speech.

Six years after *Breaux*, this Court defined adverse employment action more broadly for Title VII retaliation claims. In that context, a plaintiff need only show "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (cleaned up). This Court warned that more restrictive standards for adverse actions "would not deter the many forms that effective retaliation can take." *Id.* at 64.[1]

Burlington Northern did not concern a First Amendment claim. 548 U.S. at 68-69. But ten other circuits have applied a variant of the *Burlington Northern* test to First Amendment retaliation cases and held that completed, formal discipline is unnecessary. *See, e.g.*, *Alston v. Spiegel*, 988 F.3d 564, 575, 577 (1st Cir. 2021); *Specht v. City of New York*, 15 F.4th 594, 604 (2d Cir. 2021); *McKee v. Hart*, 436 F.3d 165, 169-70 (3d Cir. 2006);

1. The *Burlington Northern* decision abrogated much of the Fifth Circuit's prior Title VII retaliation case law, as that court has recognized. *See McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007).

Snoeyenbos v. Curtis, 60 F.4th 723, 730-31 (4th Cir. 2023); *Benison v. Ross*, 765 F.3d 649, 659 (6th Cir. 2014); *Massey v. Johnson*, 457 F.3d 711, 720 (7th Cir. 2006); *Tyler v. Univ. of Ark. Bd. of Trs.*, 628 F.3d 980, 986 (8th Cir. 2011); *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 778-79 (9th Cir. 2022); *Couch v. Bd. of Trs. of the Mem'l Hosp.*, 587 F.3d 1223, 1238 (10th Cir. 2009); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994).[2]

A heavily lopsided majority of circuits apply an adverse action standard to First Amendment retaliation claims that is functionally analogous to the *Burlington Northern* standard, regardless of whether those circuits explicitly look to *Burlington Northern* in the First Amendment context.

Minor variations in phraseology exist. The Second, Third, Fourth, Sixth, Seventh, and D.C. Circuits use a deter-a-person-of-ordinary firmness standard. *Specht*, 15 F.4th at 604; *McKee*, 436 F.3d at 170; *Snoeyenbos*, 60 F.4th at 730-31; *Benison*, 765 F.3d at 659; *Massey*, 457 F.3d at 720; *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002). The First Circuit uses a deter-a-reasonably-hardy-individual standard. *Barton*, 632 F.3d at 29. And the Eighth, Ninth, and Tenth Circuits use a deter-a-reasonable-employee standard. *Delgado-O'Neil v. City of Minneapolis*, 435 F. App'x 582, 584 & n.5 (8th Cir. 2011); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013); *Couch*, 587 F.3d at 1238.

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2. Indeed, some circuits have indicated that the First Amendment retaliation standard must be more lenient, not more restrictive, than the Title VII standard. *See, e.g.*, *Barton v. Clancy*, 632 F.3d 9, 29 (1st Cir. 2011); *Lore v. City of Syracuse*, 670 F.3d 127, 163-64 (2d Cir. 2012); *Matrisciano v. Randle*, 569 F.3d 723, 730 & n.2 (7th Cir. 2009).

In practice, these standards are about the same, and none of them require a completed adverse employment action like a termination, reprimand, or demotion. *See, e.g.*, *Muti v. Schmidt*, 96 F. App'x 69, 74-75 (3d Cir. 2004) (equating the "reasonably hardy individuals" and the "person of ordinary firmness" standards); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 697 n.12 (4th Cir. 2018) (equating *Burlington Northern* and "person of ordinary firmness" standards); *Dodge*, 56 F.4th at 778-79 (equating "reasonably likely to deter" and "person of ordinary firmness" standards).

Other than the Fifth Circuit, only the Eleventh Circuit continues to sometimes use a more restrictive, *Breaux*-like standard for First Amendment retaliation against a public employee—but not for Title VII retaliation or for First Amendment retaliation against a private citizen. *See Bell v. Sheriff of Broward Cty.*, 6 F.4th 1374, 1377-78 & n.2 (11th Cir. 2021). Yet the Eleventh Circuit also sometimes uses the ordinary firmness standard in public-employee speech cases. *See Bailey v. Wheeler*, 843 F.3d 473, 481 (11th Cir. 2016); *see also Butler v. Johnson*, No. 4:16cv222-RH/CAS, 2017 U.S. Dist. LEXIS 3638, at *3 (N.D. Fla. Jan. 9, 2017) ("Older Eleventh Circuit cases adopting a more exacting standard are no longer good law."). The Eleventh Circuit's caselaw is "muddled" on this point, and that circuit has called its restrictive pre-*Burlington Northern* precedents "ripe for re-examination" and potentially "abrogated by *Burlington Northern*." *Bell*, 6 F.4th at 1377-78 & n.2.

Apart from the Fifth Circuit, *see* App. 22a, 27a, no circuit still defends the merits of restrictive pre-*Burlington Northern* standards for First Amendment

retaliation. The Fifth Circuit's requirement of a completed employment action thus constitutes an extreme outlier—and one the circuit appears to be unwilling to reevaluate on its own.

II. The Fifth's Circuit's standard allows employers to chill speech by threatening employees.

In the Fifth Circuit, public employers can legally retaliate against whistleblowing employees simply by engaging in adverse actions that fall short of an official reprimand, demotion, termination, transfer, or failure to promote or hire. False accusations, unwarranted investigations, informal harassment campaigns, or threats to terminate, demote, or impose discipline remain readily available in the employers' censorship toolbox. *See Breaux*, 205 F.3d at 157-60. An official's "oral threats or abusive remarks" do not rise to the level of an adverse employment action. *Id.* at 158. In the Fifth Circuit, "retaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over a termination." *Id.* at 160. The implicit message to employers is to accomplish their retaliation by stopping short of a formal reprimand, demotion, termination, or other completed disciplinary action.

Indeed, both the Fifth Circuit panel in this case and the earlier *Breaux* court acknowledged that the narrow test for adversity will chill speech. App. 23a (quoting *Breaux*, 205 F.3d at 157). "[S]ome things are not actionable even though they have the effect of chilling the exercise of free speech." *Id.* Thus, the violation of constitutional rights is baked into the Fifth Circuit's standard.

This is alarming. There should be no such thing as an acceptable, modest amount of legalized government censorship, but the *Breaux* standard—and the panel opinion—provides a how-to guide for would-be censors.

In contrast, other circuits have concluded that threats of adverse employment actions can support public employees' First Amendment retaliation claims. *See, e.g., Dodge,* 56 F.4th at 778-79 (viable claim against principal who "suggested that disciplinary action could occur if she saw [plaintiff] with his [MAGA] hat again"); *Kubala v. Smith*, 984 F.3d 1132, 1140 (6th Cir. 2021) (threats alone can constitute adverse action if they would deter a person of ordinary firmness). "The power of a threat lies not in any negative actions eventually taken, but in the apprehension it creates in the recipient of the threat." *Dodge,* 56 F4th at 780 (citations omitted).

Common sense tells us that threats to discipline an employee for speaking on a matter of public concern can be just as effective at obtaining silence as actual discipline. Most people will get the message. And the record shows that UT understood how to apply pressure to Lowery and obtain his silence because UT's threats worked. Lowery stopped speaking.

For example, Defendants pressured Lowery by threatening his job and especially his institute affiliation, knowing that it was subject to their annual, discretionary renewal. App. 5a, 16a, 74a. Losing the institute affiliation would mean the loss of both research opportunities that promote his career advancement and a $20,000 annual stipend. App. 74a, 95a. And Lowery responded exactly

how the Defendants expected he would respond—by self-censoring. App. 5a. Only after he began self-censoring was his academic-center affiliation renewed and his $5,000 annual salary raise authorized. App. 6a.

Given *Breaux*'s carve-out for employer's "threats," it is unsurprising that some university officials have exploited the gap in anti-retaliation protection to silence unwanted criticism. As long as it remains legal to retaliate against such speech by threatening someone's pay or position, some officials will do so, calculating that most employees will keep quiet rather than risk the threats getting carried out. Indeed, that is exactly what happened here. This Court should close the gap.

In the Fifth Circuit, public employers may legally threaten employees for unwelcome, but legally protected speech, so long as they do not carry out the threats by issuing a formal reprimand, demotion, termination, or comparable formal discipline. Such a standard ignores human nature and allows state actors to censor whistleblowers.

Unless one is independently wealthy, it is foolhardy to disregard an employer's threats. Employers know this. Even if a brave employee—who has been formally disciplined for continuing to speak—eventually wins back-pay, that employee could live for months or years on reduced salary—or even no salary—while litigating the case. *See Burlington N.*, 548 U.S. at 72 ("Many reasonable employees would find a month without a paycheck to be a serious hardship.").

Unactionable threats are a useful tool for maintaining a public employer's image. So long as it remains legal to threaten employees for speaking on a matter of public importance in a way that is unwelcome, some public employers will make use of that tool to chill speech. That is what happened here—and it will happen again unless this Court corrects the Fifth Circuit's erroneous standard.

III. The Fifth Circuit's standard privileges statutory rights over constitutional rights.

It does not make sense that a fundamental right like freedom of speech, enshrined in the Constitution, would enjoy less anti-retaliation protection than statutory (Title VII) rights. When First Amendment rights are at stake, "threats alone can constitute an adverse action if the threat is capable of deterring a person of ordinary firmness from engaging in protected conduct." *Hill v. Lappin*, 630 F.3d 468, 475 (6th Cir. 2010). To ignore the danger posed by threats is to ignore both human nature and common sense.

Section 1983 safeguards constitutional rights by imposing liability on officials who, under color of state law, deprive a person of such rights. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). It is not itself a source of substantive rights, but provides a method for vindicating rights that are conferred by the Constitution or federal law. *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 412 (5th Cir. 2015).

In this case, Lowery availed himself of § 1983 to protect his sociopolitical speech, the kind of speech that this Court has repeatedly recognized "'occupies the highest rung

of the hierarchy of First Amendment values' and merits 'special protection.'" *Janus v. AFSCME, Council 31*, 585 U.S. 878, 913-14 (2018) (citing *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)). While Title VII rights also deserve protection, there is no good reason to privilege statutory rights over fundamental First Amendment rights.

Yet the Fifth Circuit's continued adherence to the *Breaux* standard countenances a two-tiered standard—but only in the Fifth Circuit and sometimes the Eleventh Circuit. All other circuits use the *Burlington Northern* standard, or a functional equivalent, to judge whether an employer's actions are sufficiently adverse for *both* Title VII and First Amendment retaliation claims. A uniform standard makes sense.

IV. This case is an optimal vehicle for clarifying the law, resolving the lopsided split of authority, and securing fundamental rights.

For over 35 years, this Court has recognized "that there are deprivations less harsh than dismissal" that may suffice to provide the basis for a First Amendment claim by a public employee. *Rutan v. Republican Party,* 497 U.S. 62, 75 (1990); *Hous. Cmty. Coll. Sys. v. Wilson,* 595 U.S. 468, 477 (2022) (quoting *Rutan*). *Rutan*'s essence is that for ordinary public employees, "promotions, transfers, and recalls after layoffs based on political affiliation or support" violate First Amendment rights. *Rutan,* 497 U.S. at 75. But nothing in *Rutan* declares that its list of adverse actions is exclusive—the court simply evaluated the adverse actions alleged by the plaintiffs in that case. Indeed, the Court suggested that less significant acts would suffice, as long

as those acts deter speech. *Id.* at 75 n.8.

As recently as four years ago, this Court noted that lower courts take "various approaches" to distinguish material from immaterial adverse actions in First Amendment retaliation cases. *Hous. Cmty. Coll. Sys.*, 595 U.S. at 477-78. It acknowledged that the "chill a person of ordinary firmness" test is one approach, but ultimately did not resolve which standard to apply because it wasn't necessary to do in that case. *Id.* at 477-79. The plaintiff was not an employee, but a co-equal elected official, who had been verbally censured by his peers serving on a public body. *Id.*

In contrast, the viability of Lowery's First Amendment relation claim turned on this very issue. App. 6a-8a, 22a-23a. Applying its narrow test, the Fifth Circuit held that "[b]ecause Lowery has not pleaded that he suffered an adverse employment action, his retaliation claim cannot succeed." App. 23a.

Yet even the Fifth Circuit acknowledged that a reasonable person would have been chilled by UT's actions. App. 15a. In its standing analysis, the court discussed that Lowery had alleged that if he kept speaking his pay could be docked, his institute-affiliation revoked, and he could find himself subjected to police surveillance, before aptly concluding that those "are all consequences that could lead a reasonable individual to self-chill." *Id.* Thus, "Lowery's decision to self-censor is reasonable." *Id.*

Likewise, the district court found that UT's threats to end Lowery's Salem Center affiliation and cut his pay "would chill a person of ordinary firmness from publicly

criticizing UT Administration and programs." App. 60a.[3]

Lowery's is thus a case where the standard for adversity was outcome determinative. Under the Fifth Circuit's narrow standard, Lowery loses because he hasn't pleaded one of the completed adverse employment actions—but in ten other circuits he would have a viable claim.

Nor is this area of the law one that would benefit from further development at the circuit level. The circuit split dates back nearly two decades—and all the regional circuits have spoken. Ten circuit courts already favor a practical, common-sense standard, and the Eleventh Circuit signaled that it may be open to re-evaluating its standard. But the Fifth Circuit is holding out and doubling down. Percolation is at an end.

Breaux has been on the books for a quarter century. Nearly two decades have passed since this Court decided *Burlington Northern.* During the intervening years, some Fifth Circuit opinions hinted that the court might need to grapple with whether the *Burlington Northern* standard also applied to First Amendment claims, without deciding to do so. *See, e.g., Johnson v. Halstead*, 916 F.3d 410, 422 n.5 (5th Cir. 2019) ("It is not clearly established whether *Burlington*'s 'materially adverse' standard applies to retaliation for protected speech."); *Gibson v. Kilpatrick*, 734 F.3d 395, 400 n.4 (5th Cir. 2013), judgment vacated on

3. This conclusion ultimately did not help Lowery, because the district court later held that the *Breaux* standard, rather than the ordinary firmness standard, applied to a public employee's retaliation claim. App. 78a-80a.

other grounds, 573 U.S. 942 (2014) ("[T]his court has not yet decided whether the *Burlington* standard for adverse employment actions also applies to First Amendment retaliation case.").

But in Lowery's case, the Fifth Circuit explicitly reaffirmed the standard: "Lowery has offered no reason to displace the Fifth Circuit's long-settled, narrow view of what constitutes an adverse employment action." App. 22a. The court further noted that it had "long declined" to expand the list of "actionable actions . . . *even though they have the effect of chilling the exercise of free speech.*" App. 23a (emphasis added) (internal quotation marks omitted). Lowery's en banc petition was subsequently denied without even a poll. App. 101a.

Curiously, the Fifth Circuit already affords the claims of ordinary citizens the benefit of the would-chill-a-person of-ordinary-firmness standard. *Keenan v. Tejada,* 290 F.3d 252, 258 (5th Cir. 2002). But as to public employees, the Fifth Circuit shows no signs of self-correcting, even though their speech often "holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Lane v. Franks*, 573 U.S. 228, 240 (2014).

Threats and other actions likely to deter reasonable employees from speaking—but falling short of *Breaux*'s list of completed adverse employment actions—will likely remain unavailable as a predicate for a First Amendment retaliation claim in the Fifth Circuit—until this Court intervenes. As it stands today, public employees in the Fifth Circuit (and probably also the Eleventh Circuit) enjoy significantly less anti-retaliation protection for speaking on matters of public concern, than do employees

in the rest of the country. Well-counseled public employers will know this and act accordingly. Threats of adverse employment actions will deter many, if not most, speakers because most people cannot take the chance, especially if they have a mortgage to pay or a family to support.

This case presents an ideal vehicle for this Court to clarify that employer threats and other informal actions that would deter a reasonable employee from speaking on a matter of public importance are sufficiently adverse to give rise to a claim of First Amendment retaliation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 31, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-50879

RICHARD LOWERY,

Plaintiff-Appellant,

versus

LILLIAN MILLS, IN HER OFFICIAL CAPACITY AS DEAN OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS AT AUSTIN; ETHAN BURRIS, IN HIS OFFICIAL CAPACITY AS SENIOR ASSOCIATE DEAN FOR ACADEMIC AFFAIRS OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN; CLEMENS SIALM, IN HIS OFFICIAL CAPACITY AS FINANCE DEPARTMENT CHAIR FOR THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN; JAMES E. DAVIS, IN HIS OFFICIAL CAPACITY AS INTERIM PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-129

Appendix A

Before KING, SMITH, and DOUGLAS, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

Richard Lowery, a professor at the University of Texas at Austin ("UT"), sued several colleagues in their official capacities under 42 U.S.C. § 1983 for alleged violations of his First Amendment rights. The district court granted motions to dismiss and awarded the defendants partial summary judgment on Lowery's chilled-speech claim "to the extent that it is cognizable." Lowery appeals those decisions and adverse rulings on two discovery matters. We affirm.

I. Background

Lowery teaches at the McCombs School of Business and serves as an Associate Director at the Salem Center for Public Policy, an academic institute that is part of the McCombs School. Through social media and written online opinion articles, Lowery has criticized the actions of UT officials and asked elected state-government officials to intervene in the affairs of the school. He alleges that UT officials responded by trying to silence him, including by "threatening his job, pay, institute affiliation, research opportunities, [and] academic freedom." UT also "allowed, or at least did not retract, a UT employee's request that police surveil Lowery's speech."[1] Lowery claims that he

1. "UT" is used as a shorthand for the defendants throughout, even though the University of Texas is not a named defendant. The named defendants are all UT employees sued in their official capacities.

self-censored as a form of self-preservation and that that harm to his First Amendment rights is still ongoing.

Using a range of outlets, Lowery has voiced his opinions about critical-race theory, affirmative action, academic freedom, competence-based performance measures, and the future of capitalism. Some of his criticism is personal. He has criticized "self-interested administrators" who disadvantage "people of the same identity profile as their own children" by implementing affirmative action, while at the same time shielding "their children" from that disadvantage. Lowery levied this charge at Jay Hartzell, then President of UT, though Lowery did not identify Hartzell by name.

Lowery also criticized UT officials after the school neglected his proposal to form "The Liberty Institute," which would have been "dedicated to increasing intellectual diversity and promoting classical liberalism, including support for free markets, ideological neutrality, and ordered liberty." Lowery proposed the creation of that institute with Carlos Carvalho, also a professor at the McCombs School and the Executive Director of the Salem Center (and Lowery's direct supervisor).

To fund the Liberty Institute, Lowery and Carvalho enlisted the support of Hartzell, private donors, and the Texas State Legislature's 2022-23 budget, which allocated $6 million in funding for the Liberty Institute. But after getting recruited to help, Hartzell and other UT officials "hijack[ed]" the project and created a "watered-down 'Civitas Institute.'" Lowery then criticized Hartzell by name in an article in *The Texas Tribune*.

Lowery amplified his criticisms of Hartzell on Twitter (now known as "X"), on a podcast, and in online articles. Lowery's comments often derided UT's "DEI-ideology" and occasionally "tagged" elected officials on Twitter to bring his comments to their attention; one tweet asked why Governor Abbott and Lieutenant Governor Patrick had put Texas's universities on the same "Maoist" path as California's. Lowery's tweets also criticized a different McCombs School institute, the Global Sustainability Leadership Institute ("GSLI"), for "left-wing activism" and called its supporters "shameless and awful."

On July 27, 2022, an anonymous person later identified as Lowery's colleague Kelly Kamm sent an email to the UT compliance office asking the office to review Lowery's appearance on a podcast, to determine whether the episode met UT's standards for ethics and civility. Roughly one month later, Sheridan Titman, the Chair of the Finance Department, was told by Hartzell that Lowery was being "a pain." Around the same time, Titman told Carvalho that they "need[ed] to do something about Richard" and that Hartzell wanted to know if they could "ask [Lowery] to tone it down."

On August 5, 2022, Lowery was quoted in a news article saying that academics like him speaking out against left-wing ideas "will be betrayed by donors, alumni, and politicians." That same day, Hartzell texted Lillian Mills, the Dean of the McCombs School; Ethan Burris, its Senior Associate Dean for Academic Affairs; and a member of UT's legal counsel's office about the media attention Lowery had caused. The following week, Lowery urged his followers on Twitter not to give money

to universities such as UT because the universities were advancing left-wing causes.

On August 12, Mills and Burris met with Carvalho for a mostly routine meeting that eventually included discussion of the school's concern about Lowery's speech. Mills and Burris said that Lowery was "crossing the line" and "impeding the operations of the school and the ability to fundraise." Lowery alleges that after Carvalho declined to pressure Lowery to modify his speech, "Dean Mills threatened to remove Carvalho from his post" unless Carvalho got Lowery to behave. Burris and Carvalho met again on October 17, 2022, after which Carvalho "understood that Titman, Mills, and Burris all wanted [Carvalho] to pressure Lowery to temper his political and academic speech, and to convey to him that his relationship with the Salem Center was in danger if he did not do so." Carvalho gave that message to Lowery.

On August 22, 2022, GSLI's Managing Director, Meeta Kothare, emailed Mills a copy of a Lowery tweet criticizing an event held by the institute. That email was forwarded to Titman, who then shared it with Lowery and advised him to take it easier on the GSLI. Lowery eventually set his Twitter account to "private"—meaning only accounts who follow him can see his tweets, significantly limiting his account's reach—after his discussion with Titman about how his tweets were perceived by colleagues. Lowery stopped tweeting altogether in late August 2022.

Meanwhile, another GSLI employee, Madison Gove, emailed UT police officer Joseph Bishop, advising him to look at Lowery's tweets. Kothare and other UT

administrators were copied on Gove's email to the UT police, which Lowery characterizes as a request to surveil his speech. Discovery indicates that the UT police opened a "threat mitigation investigation."

On February 8, 2023, Lowery sued Mills, Burris, and Titman in their official capacities. Lowery alleged two counts: a 42 U.S.C. § 1983 action for chilling of his free speech by state actors and a § 1983 action for retaliation for protected speech as a citizen and academic.

On February 17, 2023, Lowery filed a Motion for Preliminary Injunction, seeking to enjoin UT from further chilling Lowery's speech. On March 14, the defendants moved to dismiss the original complaint. While that motion was pending, Burris approved Lowery's reappointment to the Salem Center for the 2023-24 academic year, and Titman approved a raise of over $5,000 to Lowery's salary for his tenured teaching position for the 2023-24 academic year.

The district court granted the motion to dismiss in part and denied it in part; the court also denied without prejudice Lowery's motion for a preliminary injunction.

The district court first held that Lowery had standing to bring his pre-enforcement First Amendment claims, that the claims were ripe, and that sovereign immunity did not bar Lowery's claims. The court then dismissed without prejudice Lowery's First Amendment retaliation claim because he had not sufficiently alleged an adverse

employment action. The court declined to dismiss Lowery's chilled-speech claim.

Discovery ensued, which "soon led to numerous conflicts and disputed motions." The first concerns Lowery's motion to compel production of several documents that UT claims are attorney-client privileged; the second concerns a protective order preventing discovery into "allegations that UT President Jay Hartzell used state resources to advantage his son in admission to UT."

On March 28, 2024, Lowery filed an amended complaint, which added Hartzell as an official-capacity defendant, substituted Clemens Siam for Titman as a defendant, added a new unwritten speech code claim, and revised Lowery's pre-existing chilled-speech claim. The amended complaint dropped any explicit reference to the retaliation for protected speech claim. The defendants moved to dismiss the amended claim because "[t]he existence of an unwritten policy is a legal conclusion that needs factual support," and moved for summary judgment on Lowery's chilled-speech claim.

The district court entered its final order and judgment on October 2, 2024, granting UT's motions to dismiss and for partial summary judgment. The court agreed with UT that Lowery's chilled-speech claim was "in essence a First Amendment retaliation claim . . . which requires a plaintiff to demonstrate an adverse employment action." The court then held that because Lowery had not suffered an adverse employment action, he had "not properly alleged

a First Amendment violation—for either retaliation or for the unconstitutional stifling of speech under § 1983." The court also found that Lowery had failed to sufficiently allege a facial or as-applied First Amendment challenge to any unwritten speech code employed by UT, granting UT's motion to dismiss that claim as well.

Finally, the district court considered UT's motion for partial summary judgment on Lowery's chilled-speech claim, concluding that even if Lowery "could make out a plausible claim, he would not survive summary judgment." The court noted that even if Lowery received additional information from Hartzell through a deposition, that "would still not produce sufficient evidence to survive summary judgment that an adverse employment action befell Plaintiff." The court thus denied Lowery's motion to defer consideration of UT's motion for partial summary judgment, entered final judgment, and closed the case. Lowery appeals.

II. Standard of Review

We review *de novo* the grant of a Rule 12(b)(6) motion to dismiss, viewing all facts in the light most favorable to the plaintiff. *Taylor v. Root Ins. Co.*, 109 F.4th 806, 808 (5th Cir. 2024). We review a partial summary judgment *de novo* as well, applying the same legal standards as the district court. *BMC Software, Inc. v. Int'l Bus. Machs. Corp.*, 100 F.4th 573, 578 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 1327, 221 L. Ed. 2d 416 (2025). We review discovery orders for abuse of discretion, but we consider *de novo* whether the district court applied the correct legal standard. *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 697-98 (5th Cir. 2017).

III. Analysis

Lowery raises four issues on appeal: the partial grant of summary judgment for UT for his chilled speech claim, the dismissal of his retaliation claim, the dismissal of his speech code claim, and the denial of two discovery requests. UT asserts that the district court correctly ruled on those matters and avers that Lowery lacks standing to pursue his appeal.

A. Standing

1. Legal Framework

"Before considering the merits of an appeal, we have an obligation to assure ourselves of litigants' standing under Article III." *Texas v. United States*, 126 F.4th 392, 405 (5th Cir. 2025) (citation modified). Under Article III, a plaintiff "must have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 600 U.S. 477, 489, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023).

"The party invoking federal jurisdiction bears the burden of establishing standing," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Susan B. Anthony List v. Driehaus* ("*SBA List*"), 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (citation modified). At

the motion-to-dismiss stage, Lowery "must allege facts that give rise to a plausible claim of his standing," and in "assessing whether [Lowery] has met this standard, we take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021) (citation modified).

2. Application

Lowery asserts that he has standing to challenge "both the UT administrators' self-admitted attempt to chill his speech as well as UT's unwritten speech code." His asserted injury is the "imminent threat of enforcement" of "UT's informal policy of mandating civility when speakers promote disfavored viewpoints or criticize the university president," a policy that Lowery attests chills his speech. To remedy that injury, Lowery requested permanent injunctive relief barring anyone at UT from threatening Lowery for protected speech, counseling him over it, suggesting his speech was "disruptive" or "uncivil" or "rude," or otherwise taking any action against him that would "dissuade a reasonable person in Lowery's position from engaging in protected speech."

a. Unwritten Speech Code

Lowery alleges an injury from an unwritten speech code. "One recur-ring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury." *SBA List*, 573 U.S. at 158. In the First Amendment context, a plaintiff "has suffered an injury

in fact if he (1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably proscribed by the policy in question, and (3) the threat of future enforcement of the challenged policies is substantial." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (citation modified). When those conditions are met, the chilling of a plaintiff's speech "is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Id.* at 330-31.

i. Intention to Engage in Protected Conduct

Lowery's complaint avers that he "seeks to vindicate his right of free expression," specifically his right to "engage [his] colleagues and administrators in debate and discussion concerning academic matters, including what should be taught and the school's ideological direction and balance." These concrete plans show a "direct intention to engage in the particular activity that [he] alleges to be arguably regulated[.]" *Id.* at 331 n.7. "Because [Lowery's] intended future conduct concerns political speech, it is certainly 'affected with a constitutional interest.'" *SBA List*, 573 U.S. at 162 (citation omitted); *see also Speech First*, 979 F.3d at 332.

ii. Arguably Proscribed

"Next, [Lowery] must clearly show a likelihood that [his] constitutionally protected speech is arguably proscribed, or at least arguably regulated, by the University speech policies." *Speech First*, 979 F.3d at 332.

Lowery must support each element of standing "with the manner and degree of evidence required at the successive stages of the litigation," *SBA List*, 573 U.S. at 158, and "general factual allegations suffice to establish standing at the motion to dismiss stage," *Dobbin Plantersville Water Supply Corp. v. Lake*, 108 F.4th 320, 327 n.4 (5th Cir. 2024) (quotations omitted).

Lowery's unwritten-speech-code claim was dismissed per Federal Rule of Civil Procedure 12(b)(6). For standing purposes, then, Lowery need only allege sufficient facts as to the existence of an unwritten speech code. Lowery supports his claim by alleging that UT responded to his speech by seeking to have him "counseled" and by labeling it "uncivil" and "disruptive," facts he says back up his contention that UT maintains an unwritten speech code that attempts to suppress "uncivil" or "rude" speech. Taken as true, that allegation clearly shows a likelihood that Lowery's "constitutionally protected speech is arguably proscribed, or at least arguably regulated" by UT. *Speech First*, 979 F.3d at 332.

iii. Substantial Threat of Future Enforcement

"The last element of injury in fact, in this context, is whether it is clearly likely that the future threat of enforcement of the challenged policy is substantial." *Id.* at 334 (citation modified). In *Speech First*, "the existence of [UT's challenged] policies . . . suffice[d] to establish that the threat of future enforcement, against those in a class whose speech is arguably restricted, is likely substantial." *Id.* at 338. Because "such likelihood is all that is necessary

to establish the final prong of injury-in-fact for standing to seek a preliminary injunction in this kind of case," the plaintiffs had standing. *Id.*

Speech First controls this case. Lowery has alleged the existence of a speech code that, though unwritten, is no less real than the code challenged in *Speech First*. We take Lowery's allegations as true at the motion-to-dismiss stage, meaning we accept the existence of UT's unwritten speech code. That "existence" "is all that is necessary to establish the final prong of injury-in-fact for standing to seek a preliminary injunction in this kind of case." *Id.*

iv. Causation and Redressability

As in *Speech First*, "[t]he causation and redressability prongs of the standing inquiry are easily satisfied here." *Id.* (citation omitted). "After all, potential enforcement of the challenged policies caused [Lowery's] self-censorship, and the injury could be redressed by enjoining enforcement of [those policies]." *Id.* (citation modified). "Accordingly, [Lowery] has standing to seek a preliminary injunction." *Id.*

b. Chilled Speech and Retaliation

As discussed in the next section, Lowery's chilled-speech and retaliation claims are functionally identical. In both claims, Lowery alleges that statements made by Hartzell and other UT employees to the effect that they had to "do something" about Lowery, in response to Lowery's speech, caused Lowery to self-censor. Because

the claims are functionally identical, the same standing analysis applies to each claim.

Although "standing cannot be conferred by a self-inflicted injury," in the context of the First Amendment, "government action that chills protected speech without prohibiting it can give rise to a constitutionally cognizable injury." *Glass v. Paxton*, 900 F.3d 233, 238 (5th Cir. 2018) (quoting *Zimmerman v. City of Austin*, 881 F.3d 378, 389, 391 (5th Cir. 2018)). Such governmental action may therefore "be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 12-13, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972).

UT asserts that the *Speech First* analysis is "ill-fitted" here because Lowery is not complaining of "statutes, regulations, or rules." UT also notes that because Lowery "is seeking prospective relief and not damages, he must allege a continuing (i.e., ongoing) or "imminent" future injury to establish standing." *Jackson v. Wright*, 82 F.4th 362, 369 (5th Cir. 2023). Finally, UT notes that "Lowery's feelings are not enough to satisfy the exception to [the] general rule against self-inflicted injury for First Amendment chill."

The defendants are right about the legal requirements but wrong about their implications. Lowery alleges that he "stopped tweeting altogether as of late August 2022" in response to the threats he perceived to his speech. His self-chilling is thus an ongoing injury, so the only question is whether it is reasonable response to an "objective harm or a threat of specific future harm." *Laird*, 408 U.S. at 14.

Taking Lowery's allegations as true, as we must at this stage of litigation, Lowery's decision to self-censor is reasonable. "It is well settled that plaintiffs may establish standing based on the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights," and in "assessing whether an 'objective chill' exists in a particular case, courts must 'look through forms to the substance' of the government's 'informal sanctions.'" *Speech First, Inc. v. Whitten*, 145 S. Ct. 701, 702, 221 L. Ed. 2d 402 (2025) (mem.) (Thomas, J., dissenting from the denial of certiorari) (citations omitted). Lowery has alleged several sanctions (both informal and formal) that he would face if he continued to speak his mind on public issues; his pay could be docked, his position at the Salem Center could be revoked, and he could find himself subject to police surveillance. Those are all consequences that could lead a reasonable individual to self-chill. Lowery's complaint suffices to establish standing.

Our conclusion in *Speech First* applies equally here: "It is not hard to sustain standing . . . in the highly sensitive area of public regulations governing bedrock political speech." *Speech First*, 979 F.3d at 331. Lowery has standing.

B. Chilled Speech

Lowery brings both his "chilling of free speech" and "retaliation for protected speech" claims under § 1983. As a close reading of his initial and amended complaints make clear, those claims are materially the same.

Lowery's chilled-speech claim alleges that UT's "threats to reduce Lowery's pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, label him, request that his speech be placed under police surveillance, or otherwise discipline him are designed to silence Lowery's criticisms or change the content of this speech to make it less critical, disagreeable, or offensive." His amended complaint modifies but largely repeats that language. His chilled-speech claim concludes by asserting that "[b]y chilling Professor Lowery's freedom of speech, Defendants, under color of law, violated and continue to violate Richard Lowery's free speech rights under the First and Fourteenth Amendment to the United States Constitution."

Lowery's retaliation claim similarly asserts that "Defendants retaliated against Lowery for his protected speech by threatening to reduce Lowery's pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, labeling him, requesting that his speech be placed under police surveillance, or otherwise disciplining him." Those retaliatory steps, Lowery avers, "were such that a reasonable person in Lowery's position would refrain from speaking in the ways at issue in this case," i.e., that Lowery would self-chill.

As pleaded, then, the claims look the same; both counts allege that UT's actions in response to Lowery's speech led Lowery to self-censor. But Lowery asserts they are distinct. Such a distinction matters because an employment retaliation claim requires the plaintiff to

demonstrate an adverse employment action, *see Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016), which, as discussed below, poses a challenge for Lowery. A chilled-speech claim, one presumes, would have easier elements to satisfy.

But Lowery does not say what the "exact elements" of a distinct chilled-speech claim are. *Keenan v. Tejada*, the case the district court initially applied, specifically holds that "to establish a First Amendment *retaliation* claim," plaintiffs "must show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." 290 F.3d 252, 258 (5th Cir. 2002) (emphasis added). So *Keenan* does not help Lowery distinguish his chilled-speech claim from his retaliation-for speech claim.

Nor does *Jackson v. Wright*, a district court case that similarly wrangled over the difference between retaliation claims and "claims of suppression of speech in violation of the First Amendment in the university context." No. 4:21-cv-00033, 2022 U.S. Dist. LEXIS 8684, 2022 WL 179277, at *17 (E.D. Tex. Jan. 18, 2022), *aff'd on standing grounds*, 82 F.4th 362 (5th Cir. 2023). *Jackson* relied on *Buchanan v. Alexander*, which held that a public-school employee bringing a § 1983 claim for violation of his free speech rights "must show that (1) [he was] disciplined or fired for speech that is a matter of public concern, and (2) [his] interest in the speech outweighed the university's interest

in regulating the speech." 919 F.3d 847, 853 (5th Cir. 2019) (citations omitted). Whether the plaintiff was "disciplined or fired" echoes retaliation law, and we have since treated *Buchanan* as a speech-retaliation case. *See Trudeau v. Univ. of N. Tex., By & Through its Bd. of Regents*, 861 F. App'x 604, 609-10 (5th Cir. 2021) (per curiam).

In short, neither *Buchanan* nor any other binding case has recognized any freestanding chilled-speech claim distinct from Lowery's retaliation claim. Lowery's chilled-speech claim, though it proceeded to summary judgment, rises and falls with his retaliation claim.

C. Retaliation

1. Legal Framework

Lowery's retaliation claim hinges on how "adverse" an "adverse employment action" needs to be. He admits that a "First Amendment retaliation claim requires proof that a plaintiff suffered an adverse employment action because of his speech." The question is whether "the *Breaux*- completed-adverse-employment-decision test still governs, or whether the more speech-protective *Burlington Northern* standard applies."

The district court held that *Breaux v. City of Garland* applies. 205 F.3d 150 (5th Cir. 2000). *Breaux* set out four elements a plaintiff must satisfy to establish a retaliation-for-protected-speech claim: (1) He must suffer "an adverse employment decision"; (2) the "speech must involve a matter of public concern"; (3) his "interest in commenting on matters of public concern must outweigh the

Defendants' interest in promoting efficiency"; and (4) the plaintiff's "speech must have motivated the Defendants' action." *Id.* at 156 (quoting *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999)). On the first prong, "[a]dverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Id.* at 157 (quoting *Pierce v. Texas Dep't of Crim. Just., Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994)). In the "education context," "decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures . . . do not rise to the level of a constitutional deprivation." *Id.* (citation omitted).

Lowery asserts that "the more speech-protective *Burlington Northern* standard applies." Under *Burlington*, plaintiffs bringing claims under Title VII's anti-retaliation provision "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (citation modified). The Supreme Court explicitly rejected the "adverse employment action" test employed by the Sixth Circuit, which it "defined as a 'materially adverse change in the terms and conditions' of employment." *Id.* at 60.

The upshot, Lowery contends, is that he need only allege that UT's actions would dissuade a reasonable employee from speaking freely—not that UT took an adverse action against him. To get around the *Breaux* line of cases, Lowery claims that *Burlington* implicitly

overruled *Breaux* and similar Fifth Circuit decisions because, in *Burlington*, the Court "rejected the application of the 'ultimate employment decisions [standard].'"

But the Fifth Circuit adheres to a strong rule of orderliness, which prevents one panel from overturning the decision of another panel unless an intervening Supreme Court decision has "unequivocally overrule[d] [that] prior precedent." *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021) (citation omitted). *Burlington* does not constitute an unequivocal overruling of *Breaux*. *Burlington*'s holding concerns retaliation claims brought under Title VII, not claims like Lowery's that sound in the First Amendment. So even if *Burlington* is "illuminating" with respect to retaliation claims, that is not enough to declare that a prior retaliation case has "fallen unequivocally out of step with some intervening change in the law."[2]

The cases that Lowery cites to support his contention that *Burlington* displaced *Breaux* do not do the work that he needs them to. The first, *Spears v. McCraw*, calls it an "open question" whether the *Burlington* "materially adverse" standard "applies to claims of retaliation for protected speech." *Spears v. McCraw*, No. 20-50406, 2021 U.S. App. LEXIS 23231, 2021 WL 3439148, at *2 (5th Cir. Aug. 5, 2021) (per curiam) (unpublished). That opinion in

2. *Bonvillian*, 19 F.4th at 792; *see United States v. Skrmetti*, 605 U.S. 495, 145 S. Ct. 1816, 1834, 222 L. Ed. 2d 136 (2025) (similarly concluding that a rule announced in a Title VII case—*see Bostock v. Clayton Cnty.*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)—does not automatically apply to a superficially similar constitutional claim).

turn cites *Johnston v. Hal-stead*, which collected further cases reiterating that the Fifth Circuit "has not yet decided whether the *Burlington* standard for adverse employment actions also applies to First Amendment retaliation cases." 916 F.3d 410, 422 n.5 (5th Cir. 2019) (quoting *Gibson v. Kilpatrick*, 734 F.3d 395, 401 n.4 (5th Cir. 2013)). In fact, all the cases Lowery cites merely drive home the point that the Fifth Circuit has not treated *Burlington* as controlling in First Amendment retaliation cases. That is far from the "unequivocal overruling" that our "strict and rigidly applied" rule of orderliness requires. *Bonvillian*, 19 F.4th at 792.

The Supreme Court's recent treatment of First Amendment retaliation cases is no more help to Lowery. In *Houston Community College System v. Wilson*, for instance, the Court wrote that under its precedents, "a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an 'adverse action' in response to his speech that 'would not have been taken absent the retaliatory motive.'" 595 U.S. 468, 477, 142 S. Ct. 1253, 212 L. Ed. 2d 303 (2022) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 399, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019)). Neither *Houston Community College System* nor *Nieves* suggests the *Burlington* framework applies or even mentions it at all. And though individual justices in *Gonzalez v. Trevino* and *NRA v. Vullo* discuss retaliation claims in separate writings, *Burlington* goes unmentioned there too.[3]

3. *See Gonzalez v. Trevino*, 602 U.S. 653, 662-63, 144 S. Ct. 1663, 219 L. Ed. 2d 332 (2024) (Alito, J., concurring); *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 203-04, 144 S. Ct. 1316, 218 L. Ed. 2d 642 (2024) (Jackson, J., concurring).

Lowery has offered no reason to displace the Fifth Circuit's long-settled, "narrow view of what constitutes an adverse employment action." *Breaux*, 205 F.3d at 157. Thus, this court proceeds with the analysis under *Breaux*.

2. Application

As stated above, "[t]o establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *Anderson*, 845 F.3d at 590. The core question is whether Lowery can satisfy that first element.

"Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Breaux*, 205 F.3d at 157. "In the employment context, this court's requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Keenan*, 290 F.3d at 258 n.4. "Given the narrow view of what constitutes an adverse employment action, this court has held that the following are not adverse employment actions:" "mere accusations or criticism," "investigations," and "false accusations." *Breaux*, 205 F.3d at 157-58 (collecting cases).

Lowery alleges that UT retaliated against him "by threatening to reduce Lowery's pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, labeling

him, requesting that his speech be placed under police surveillance, [and] otherwise disciplining him." Given the legal framework discussed above, none of Lowery's allegations is sufficiently adverse. He was not fired or demoted; his contract was renewed and his pay increased.

The "labeling" and "surveillance" he alleges also run headlong into the precedents identified in *Breaux*. An "employer's criticism of an employee" does not constitute an actionable adverse employment action, *Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir. 1997), so whatever rude statements were exchanged about Lowery behind his back also do not qualify as adverse employment actions. Similarly, employees who are investigated but not ultimately sanctioned following the investigation also suffer no adverse action. *See Pierce*, 37 F.3d at 1150. So, although Lowery's colleague's reporting him to the police caused Lowery discomfort, the action does "not amount to adverse employment decisions because no adverse result occurred." *Id.*

This court has long "declined to expand the list of actionable actions, noting that some things are not actionable even though they have the effect of chilling the exercise of free speech." *Breaux*, 205 F.3d at 157 (citations omitted). Lowery has not shown why his case should be an exception. Because Lowery has not pleaded that he suffered an adverse employment action, his retaliation claim cannot succeed.[4]

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4. Lowery's law-of-the-case and judicial estoppel arguments also fail. The former cannot succeed, as the district court did not "finally decide" whether *Keenan* applied. *See United States v. U.S.*

Appendix A

D. Speech Code

Lowery asserted a facial and as-applied challenge to UT's alleged "unwritten speech code." The district court dismissed both challenges.

1. Legal Framework

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Conclusory allegations, naked assertions, and "a formulaic recitation of a cause of action's elements will not do."

Twombly, 550 U.S. at 555. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," *id.* at 570, and a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Smelting Ref. & Mining Co., 339 U.S. 186, 198, 70 S. Ct. 537, 94 L. Ed. 750 (1950). Similarly, his judicial estoppel arguments fail, as the district court did not abuse its discretion in allowing UT to amend its position in a manner that did not create an improper legal advantage. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

Lowery alleges that after UT abandoned the written speech code challenged in *Speech First*,[5] it adopted a materially identical unwritten one that chills Lowery's speech because of its vague proscriptions (e.g., discouraging "rude" and "uncivil" speech) and its selective enforcement. Lowery challenges this alleged speech code on both as-applied and overbreadth grounds. "Although litigants are permitted to raise both as-applied and overbreadth challenges in First Amendment cases, the lawfulness of the particular application of the law should ordinarily be decided first." *Serafine v. Branaman*, 810 F.3d 354, 362 (5th Cir. 2016) (quotation omitted). Following *Serafine*, we consider Lowery's as-applied challenge first and then his facial challenge. 810 F.3d at 362.

2. As-applied Challenge

Although individuals do not relinquish their First Amendment rights by accepting public employment, *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), a public employer "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large," *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995). In evaluating the validity of a restraint on government employee speech, courts must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern

5. The *Speech First* litigation settled, which required UT to revise its written policies and abolish its speech reporting team.

and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

Pickering balancing generally arises in the context of a terminated employee's suing for alleged retaliation.[6] Because, as discussed above, Lowery did not suffer an adverse employment action, the framework for evaluating his speech-code claim is uncertain. Perhaps for that reason, the district court found that, "to the extent that Plaintiff's claim is essentially a [F]irst [A]mendment retaliation claim, it fails for lack of any adverse action." This circuit's caselaw supports that conclusion.[7]

Lowery does not propose an alternative framework by which to evaluate his as-applied challenge. He gestures toward what could be called a reciprocity requirement, positing that it "is inappropriate for UT administrators to pick-and-choose which faculty members' political viewpoints get to use provocative language." He thus

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6. *See, e.g., Pickering*, 391 U.S. 563; *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979); *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

7. *See Buchanan*, 919 F.3d at 853 ("Public university professors are public employees. To establish a § 1983 claim for violation of the First Amendment right to free speech, they must show that (1) they were disciplined or fired for speech that is a matter of public concern, and (2) their interest in the speech outweighed the university's interest in regulating the speech.").

contends that it is improper that he was "counseled" and "placed under surveillance" for his political beliefs, but "leftwing faculty" who use provocative language in their tweets such as "racist," "fascist," or "shameful" are not asked to be more civil or placed under police surveillance.

Even accepting those allegations as true, it is not clear on what ground we could reverse. The First Amendment generally prohibits public employers from disciplining their employees for their political beliefs, but it does not require university administrators to be equally charitable to all their colleagues. Thus, even if Mills said that she thought "Lowery's opinions about the Liberty Institute were 'factually inaccurate,' 'offensive' or 'unmannerly'" but did not similarly disparage the views of left-wing colleagues, it is not evident what § 1983 has to say about that. That sort of internecine strife is likely "too trivial or minor to be actionable as a violation of the First Amendment" and exemplifies "the purpose" of "this court's requirement of an adverse employment action," which is "weeding out minor instances of retaliation." *Keenan*, 290 F.3d at 258 & n.4 (citing *Colson v. Grohman*, 174 F.3d 498, 510, 514 (5th Cir. 1999)).[8]

For these reasons, Lowery's as-applied challenge fails.

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8. Further, as UT notes, allowing Lowery's as-applied speech code claim to proceed on his pleadings would "permit any plaintiff to transform an unsuccessful retaliation claim into a claim that the defendant maintains an 'unwritten speech code,' applicable only to him, with a simple sentence."

3. Overbreadth Challenge

First Amendment overbreadth challenges "are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the [policy] from chilling the First Amendment rights of other parties not before the Court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). Although a facial challenge ordinarily requires a plaintiff to establish "that no set of circumstances exists under which [the challenged law] would be valid," in the First Amendment context, the Supreme Court recognizes "a second type of facial challenge" whereby a law may be invalidated as over-broad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472-73, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (citations omitted).

Lowery asserts that UT did not actually retire the speech code that was successfully challenged in *Speech First*. In Lowery's view, UT still enforces it in an unwritten form. Accepting, *arguendo*, that allegation as true, the question becomes whether the code "will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). Lowery can succeed on his pre-enforcement overbreadth challenge only "if a substantial number of its applications are unconstitutional." *Serafine*, 810 F.3d at 363; *Stevens*, 559 U.S. at 472-73.

In an ordinary pre-enforcement challenge to a policy that arguably circumscribes protected speech, our first step "is to construe the challenged statute." *Serafine*, 810 F.3d at 365. That task is obviously harder where the challenged policy is not written. Lowery alleges that the code allows UT to "counsel or discipline faculty for 'uncivil' or 'rude' speech" and forbids faculty members from "advocating that donors stop donating to UT." But even if that is so, UT's regulation would be "constitutionally overbroad" only if it "prohibits a substantial amount" of protected speech and "is not susceptible to a limiting construction that avoids constitutional problems." *McClelland*, 63 F.4th at 1012.

In the absence of a written code or an adverse employment action, it is difficult to know whether the alleged code prohibits a substantial amount of protected speech or whether it can be narrowly construed. But certain principles can guide our analysis. First is the principle that First Amendment facial challenges should be granted "sparingly and only as a last resort." *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 762 (5th Cir. 2008) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). Next is that, of "all fields that the federal courts should hesitate to invade and take over, education and faculty appointments at the university level are probably the least suited for federal court supervision." *Dorsett v. Bd. of Trs. for State Colls. & Univs.*, 940 F.2d 121, 124 (5th Cir. 1991) (citation modified). Finally, a plaintiff's claim must contain sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Taking those principles together, it is apparent that Lowery's complaint does not establish that he can prevail on the "sparingly" used over-breadth theory. Lowery's complaint alleges little more "than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). As far as factual allegations go, Lowery's brief notes only that Mills discussed with others her views about Lowery's speech, that Mills conveyed her requirement that Salem Center personnel "cooperate positively or neutrally" with other UT institutes, and that Burris told Carvalho that he did not like the tone of Lowery's tweets. None of those allegations supports the existence of an unwritten speech code, and indeed, the defendants "never claimed their alleged actions were the enforcement of policy or that a policy exists."

Further, even assuming the existence of a speech code, to prevail on his overbreadth challenge, Lowery would still need to establish that a "substantial number of its applications are unconstitutional." *Serafine*, 810 F.3d at 363. That would be the case only if applications of the code frequently failed *Pickering*. That test involves "a delicate balancing of the competing interests surrounding [an employee's] speech and its consequences," which considers "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 528, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022) (citation modified).

Whether a "substantial" amount of speech code applications would fail *Pickering* is at this point

entirely speculative, further weighing against Lowery's overbreadth claim. "In other words, [Lowery] asks us to throw out too much of the good based on a speculative shot at the bad." *United States v. Hansen*, 599 U.S. 762, 784-85, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023). That "is not the stuff of overbreadth." *Id.*

This court recently abjured the responsibility of becoming the "Federal Library Police," recognizing that the often-quotidian concerns of librarians about which books to include on their shelves is not the province of federal judges.[9] We must similarly abjure the opportunity to become the Federal Faculty Lounge Police. If UT fires Lowery for his speech or invokes a speech code to enforce ideological conformity, a § 1983 action would be appropriate. But Lowery's complaint offers only general insinuations that the grumblings of the defendants about a troublesome colleague amount to viewpoint suppression. Allowing so conclusory a complaint to proceed would invite federal courts into an area we have already declared particularly poorly "suited for federal court supervision." *Dorsett*, 940 F.2d at 124.

E. Discovery

Lowery challenges two discovery rulings: (1) whether certain communications among UT administrators should be protected by attorney-client privilege and (2) whether

9. *Little v. Llano Cnty.*, 103 F.4th 1140, 1160 (5th Cir. 2024) (Duncan, J., dissenting), *on reh'g en banc*, 138 F.4th 834 (5th Cir. 2025) (en banc) (adopting view of the panel dissent), *petition for cert. filed* (Sept. 9, 2025) (No. 25-284).

Lowery should be permitted targeted discovery regarding nepotism allegations against President Hartzell.

We review a denial of a discovery request for abuse of discretion. *Pustejovsky v. PLIVA, Inc.*, 623 F.3d 271, 278 (5th Cir. 2010). A district court's decision should be reversed only in "unusual and exceptional" cases, *O'Malley v. U.S. Fid. & Guar. Co.*, 776 F.2d 494, 499 (5th Cir. 1985) (internal quotation marks omitted), such as where the decision is "arbitrary or clearly unreasonable," *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 817 (5th Cir. 2004) (quoting *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000)). Even if a district court abuses its discretion, the reviewing court will not reverse the ruling unless it substantially affects the rights of (*i.e.*, prejudices) the appellant. *N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co.*, 898 F.3d 461, 481 (5th Cir. 2018). "The appellant bears the burden of proving abuse of discretion and prejudice." *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258 (5th Cir. 2011)

1. The Privilege Dispute

Lowery challenges the withholding of two categories of documents: (1) August 5, 2022, text messages from President Hartzell to Deans Mills and Burris about Lowery and (2) August 12, 2022, "talking points" from communications official Mike Rosen regarding responses to Lowery's public criticism. The magistrate judge reviewed the Hartzell text string and Rosen email *in camera* and concluded that they were properly withheld, and the district court sustained that ruling without

conducting its own *in camera* review. Lowery asserts that both judges erred.

Lowery does not show that the district court abused its discretion. It properly reviewed the magistrate judge's order under the clearly erroneous standard.[10] Under that standard, it is difficult to see how the district court could have done anything but affirm the ruling.

Lowery's argument relies mainly on the proposition that courts "must differentiate between in-house counsel's legal and business work." But that goes to whether the documents were in fact privileged, not whether the district court abused its discretion in accepting the magistrate judge's finding that they were. Because Lowery "provides no specific argument and cites no authority to support its assertion that the district court abused its discretion," and because "the district court's decision was neither arbitrary nor clearly unreasonable," we affirm.[11]

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10. 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a); *see Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995) (stating that 28 U.S.C. § 636 "specifically requires the district court to apply a 'clearly erroneous' standard when reviewing a magistrate judge's ruling on a non-dispositive, pretrial motion such as a discovery motion").

11. *Sitelock, L.L.C. v. Godaddy.Com, L.L.C.*, No. 22-11109, 2023 U.S. App. LEXIS 14705, 2023 WL 4015117 (5th Cir. June 13, 2023) (per curiam) (unpublished); *see also United States v. Hamilton*, 991 F.2d 797, at *5 (6th Cir. 1993) (per curiam) (unpublished) ("Because the magistrate judge, through an in camera review . . . found that [testimony] would not be helpful, the district court was not required to conduct a second in camera review of [the testimony].").

2. Protective Order

Lowery posits that the district court erred by not allowing him to seek discovery into his allegations of nepotism against Hartzell. That claim, though not directly related to Lowery's complaint, is arguably relevant because Lowery believes that UT's retaliation against him was in part motivated by a *Washington Times* article he authored decrying Hartzell's hypocrisy. Specifically, Lowery "discussed the hypocrisy of university administrators who discriminate against other people's kids [through affirmative action] while exempting their own children from that treatment," ostensibly through nepotism. UT successfully obtained a protective order blocking all nepotism-related discovery.

Even if the district and magistrate judges abused their discretion by blocking discovery into Hartzell's son's admission into UT—and Lowery's brief does not offer compelling reasons to think that they did—Lowery was not prejudiced by that decision. Exposing Hartzell for securing special treatment for his son would do nothing to vindicate Lowery's self-chill or unwritten-speech-code claims. And even if the discovery does provide reason to think that Hartzell was predisposed to retaliate against Lowery, Lowery still could not show that he suffered an adverse action. Thus, Lowery's challenge to the protective order fails, as the order did not affect his substantial rights. *See N. Cypress*, 898 F.3d at 481.

* * * *

Lowery has standing to press his claims, but those claims cannot succeed. His retaliation claim fails because he did not suffer an adverse employment action. His self-chill claim fails because it is a re-packaged retaliation claim. His speech code claim fails because his complaint does not sufficiently allege facts from which to infer the existence of an unconstitutional policy. And his discovery disputes cannot overcome the abuse-of-discretion standard or Lowery's requirement to show prejudice. The judgment is accordingly AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED SEPTEMBER 5, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. 1:23-CV-129-DAE

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, IN HER CAPACITY AS DEAN OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS AT AUSTIN, ETHAN BURRIS, IN HIS OFFICIAL CAPACITY AS SENIOR ASSOCIATE DEAN FOR ACADEMIC AFFAIRS OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN, SHERIDAN TITMAN, IN HIS OFFICIAL CAPACITY AS FINANCE DEPARTMENT CHAIR FOR THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN,

Defendants.

Filed September 5, 2023

Appendix B

ORDER (1) GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS; AND (2) DENYING WITHOUT PREJUDICE MOTION FOR PRELIMINARY INJUNCTION

Before the Court are: (1) Defendants Lillian Mills, in her capacity as Dean of the McCombs School of Business at the University of Texas at Austin ("McCombs"), Ethan Burris, in his official capacity as Senior Associate Dean for Academic Affairs of McCombs, and Sheridan Titman, in his official capacity as Finance Department Chair for McCombs' (collectively, "Defendants") Motion to Dismiss the Complaint for Declaratory and Injunctive Relief (Dkt. # 15); and (2) Plaintiff Richard Lowery's ("Plaintiff" or "Lowery") Motion for Preliminary Injunction (Dkt. # 8). The Court held a hearing on these matters on August 31, 2023. After careful consideration of the memoranda in support of and in opposition to the motions, and in light of the parties' arguments advanced at the hearing, the Court, for the reasons that follow, **GRANTS IN PART** and **DENIES IN PART** Defendants' motion to dismiss, and **DENIES WITHOUT PREJUDICE** Plaintiff's motion for preliminary injunction.

BACKGROUND

This is a free speech case in which Plaintiff, a professor at the University of Texas at Austin ("UT"), has used social media and online opinion articles to publicly criticize university officials' actions, and has asked elected state-governmental officials to intervene. (Dkt. # 1.) Among others, Plaintiff alleges that he "dissents from the

political and academic views held by most UT faculty and administrators, often publicly, and sometimes uses pointed terminology to get his points across." (*Id.* at 4.) He states that he makes his opinions known to elected officials in Texas, including those who oversee UT's funding. (*Id.*)

Plaintiff alleges that he "has a longstanding commitment to increasing viewpoint diversity on the UT campus, through his speech on and off campus, and his work as a Senior Scholar at the school's Salem Center for Public Policy." (Dkt. # 1 ¶ 13.) At the Salem Center, Plaintiff reports to business professor Carlos Carvalho, who serves as the Center's Executive Director. (*Id.* ¶ 14.) Plaintiff alleges that his affiliation with the Salem Center affords him additional pay, as well as access to research opportunities. (*Id.* ¶ 15.) In 2021, according to Plaintiff, he and Carvalho pursued funding for a new "Liberty Institute" at UT whose purpose is to study "classical-liberal, pro-free market viewpoints as a counterweight to the campus-dominated critical race theory and DEI-based ideology."[1] (*Id.* ¶ 16.)

To fund the Liberty Institute, Plaintiff and Carvalho enlisted the support of UT President Jay Hartzell and private donors, as well as the Texas State Legislature's 2022-23 budget which allocated $6 million in funding for the Liberty Institute. (*Id.* ¶ 18-19.) According to Plaintiff, however, the enabling legislation's "vagueness allowed President Hartzell and his UT Administration allies to

1. DEI stands for "diversity, equity, and inclusion." (Dkt. # 1 at ¶ 10.)

hijack the project, remove its independence, re-direct[] its funding to existing personnel and programs, and change its title to 'Civitas.'" (*Id.* ¶ 19-20.)

Thereafter, Plaintiff alleges that he began to publicly criticize "the hijacking of the Liberty Institute, criticizing Hartzell's role and that of Richard Flores, an advocate of critical race theory and DEI-ideology." (Dkt. # 1 ¶ 21-27.) For example, Plaintiff was quoted in papers, appeared on podcasts, and posted on social media, sometimes tagging elected officials or social-media personalities, making those posts visible to those officials. (*Id.*)

Plaintiff further alleges that UT's McCombs School hosts a Global Sustainability Leadership Institute ("GSLI") which promotes Environment Sustainability and Governance ("ESG") based viewpoints which are "consistent with UT's predominant DEI-ideology, but which are often at odds with free-market principles and Lowery's views." (Dkt. # 1 ¶ 29.) Plaintiff states that he has publicly criticized GSLI and its events on social media. (*Id.* ¶ 32.)

Thereafter, Plaintiff alleges that his repeated criticisms of the UT Administration, their DEI initiatives, and GSLI "prompted Defendants to pressure Lowery [and] Carvalho, into censoring Lowery's speech." (Dkt. # 1 ¶ 35.) According to Plaintiff, in late July or August 2022, Defendant Sheridan Titman told Carvalho that "We need to do something about Richard." (*Id.* ¶ 36.) Plaintiff alleges that Titman told him also that President Hartzell and Defendant Dean Lillian Mills were upset about Plaintiff's

political advocacy and wanted to know if "we can ask him to tone it down?" (*Id.*) Plaintiff contends that Carvalho understood the statement as an implicit threat but refused to do anything, explaining to Titman that Lowery has a First Amendment right to express his views. (*Id.* ¶ 37.)

In mid-August 2022, Plaintiff alleges that Dean Mills and Defendant Ethan Burris, McCombs' Senior Associate Dean for Academic Affairs, met with Plaintiff for a routine discussion of the Salem Center. (Dkt. # 1 ¶ 38.) According to Plaintiff, about an hour later the tone shifted when Mills and Burris changed the subject to Plaintiff's speech. (*Id.*) Plaintiff contends that he was told his speech was "crossing the line" in his criticism of school officials, to the point where the UT legal department was concerned about his speech. (*Id.* ¶ 39.) Plaintiff also alleges that Defendants put pressure on Carvalho to reprimand Plaintiff for his speech, but that Carvalho again declined to do so. (*Id.* ¶ 39-41.) Because Carvalho declined to do so, Plaintiff asserts that Defendants threatened Carvalho's Executive Director position. (*Id.* ¶ 41.) According to Plaintiff, Carvalho nonetheless relayed Defendants' threats to Plaintiff. (*Id.* ¶ 44.)

On August 22, 2022, Plaintiff alleges that GSLI's managing director Meeta Kothare emailed a copy of Plaintiff's social media post to Mills and GSLI's executive director Jeffrey Hales, writing about concern of the safety of GSLI's events. (Dkt. # 1 ¶ 45-46.) According to Plaintiff, Kothare's email was forwarded to other UT professors and officials, including Titman, who decided that a discussion with Plaintiff was needed to determine

"what is appropriate on twitter" and that he "wanted to encourage intellectual discourse, but [he didn't] think rude comments [were] acceptable." (*Id.* ¶ 47-48.) Thereafter, Plaintiff alleges that Titman ultimately forwarded him the email from Kothare and added that Plaintiff did not "seem to be making friends" and that it was "probably in [his] best interest to come up with a class for the Spring that is likely to be popular," and "[i]n any event, the appropriate response is to jointly sponsor a panel discussion on ESG." (*Id.* ¶ 52.) Plaintiff alleges that he responded back, stating that he considered the email to him to be a threat and that he "can certainly criticize events." (*Id.* ¶ 53.)

Subsequently, Plaintiff contends that he set his social media account to "private" and that only his followers and not the public can see his activity. (Dkt. # 1 ¶ 54.) And, as of late August 2022, Plaintiff alleges that he stopped posting on his Twitter account, but has not deleted it and would like to resume "tweeting, re-tweeting, replying to other posts, and otherwise commenting on matters as before." (*Id.* ¶ 55.) Plaintiff further alleges that a GSLI employee forwarded his speech to UT police requesting that they survey his speech on social media. (Dkt. # 1 ¶ 56.) Plaintiff states there is no indication that this request for surveillance has been withdrawn. (*Id.* ¶ 59.)

On February 2, 2023, Plaintiff filed suit in this Court alleging two claims against Defendants for violations of his First Amendment Right of Free Speech pursuant to 42 U.S.C. § 1983 for Chilling of Free Speech by State Actors and Retaliation for his Protected Speech. (Dkt. # 1.) Plaintiff believes that UT officials have attempted

to silence his speech by threatening his job, pay, institute affiliation, research opportunities, academic freedom, and labeled his behavior as inviting violence or lacking in civility. According to Plaintiff, he fears that if he continues to be critical and express his speech concerning UT Administration and its policies, his appointment to the Salem Center will not be renewed, costing him the $20,000 stipend and access to research opportunities. (*Id.* ¶ 61.) Plaintiff alleges that "he is not free to speak on campus affairs on terms equal to his peers." (Dkt. # 8 at 15.)

On February 17, 2023, Plaintiff filed a Motion for Preliminary Injunction. (Dkt. # 8.) Defendants filed a response on March 14, 2023 (Dkt. # 14), and Plaintiff filed a reply on March 28, 2023 (Dkt. # 23). On March 14, 2023, Defendants filed a Motion to Dismiss. (Dkt. # 15.) Plaintiff filed a corrected response to that motion on August 8, 2023 (Dkt. # 43), and Defendants filed a corrected reply on August 15, 2023 (Dkt. # 48). Both motions are ripe. Because it is jurisdictional, the Court will first consider the motion to dismiss.

I. Motion to Dismiss

Defendants move to dismiss Plaintiff's suit pursuant to both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. # 15.)

Appendix B

A. Applicable Law

1. Rule 12(b)(1)

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges a federal court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when a court lacks statutory or constitutional authority to adjudicate the claim. *Home Builders Assoc. of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, courts should consider the "jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The Court must first address subject matter jurisdiction because, without it, the case can proceed no further. *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999); *Ramming*, 281 F.3d at 161.

In considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001) (citation omitted).

Standing and ripeness are required elements of subject matter jurisdiction and are therefore properly

challenged in a Rule 12(b)(1) motion to dismiss. *See Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 350 (5th Cir. 1989). A court must dismiss a case for lack of subject matter jurisdiction under Rule 12(b)(1) where it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

2. Rule 12(b)(6)

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the contents of the complaint and matters properly subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). In analyzing a motion to dismiss for failure to state a claim, "[t]he court accept[s] 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

B. Analysis

Defendants assert that Lowery's claim that he fears speculative injuries in the future is not ripe and that he cannot create standing by voluntarily redacting his speech based on an unreasonable fear of harm. (*Id.* at 12-13.) Additionally, Defendants contend that sovereign immunity bars Plaintiff's retaliation claim because he seeks retrospective relief to address threats from the past. (*Id.* at 14.) Finally, Defendants argue that Plaintiff fails to state a claim upon which relief can be granted. (*Id.* at 15.)

1. Standing

"Under Article III of the Constitution, the federal courts have jurisdiction over a claim between a plaintiff and a defendant only if it presents a 'case or controversy.'" *Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (quoting *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)). "In this way, the power granted to federal courts under Article III 'is not an unconditioned authority to determine the constitutionality of legislative or executive acts.'" *Id.* (quoting *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). One limitation requires that a plaintiff show he has standing sufficient to establish a case or controversy. *See Stringer v. Whitley*, 942 F.3d 715 (5th Cir. 2019).

To satisfy standing requirements under Article III, a plaintiff must show an injury in fact that is fairly traceable to the challenged action of the defendant and likely to be

redressed by the plaintiff's requested relief. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). To meet this threshold, the party seeking to invoke federal jurisdiction bears the burden of establishing three elements: injury in fact, causation, and redressability. *Stringer*, 942 F.3d at 720. A plaintiff "need show that only one of his alleged injuries would be redressed by a favorable ruling." *Cramer v. Skinner*, 931 F.2d 1020, 1028 (5th Cir. 1991).

However, the Supreme Court has explained that standing requirements are somewhat relaxed in First Amendment cases:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.

Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). In *Laird v. Tatum*, the Supreme Court noted it had, in recent years "found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect

of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." 408 U.S. 1, 11, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972); *see, e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); *see also* Michael N. Dolich, *Alleging A First Amendment "Chilling Effect" to Create A Plaintiff's Standing: A Practical Approach*, 43 Drake L. Rev. 175, 176 (1994) ("[A]n official action may abridge First Amendment rights without directly proscribing a protected activity. This is the so-called 'chilling effect.'"). Three circuit courts have noted that "when a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements," *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010), in a way that "tilt[s] dramatically toward a finding of standing." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quoting *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010)); *see also Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (favorably quoting *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)).

Here, Defendants maintain that Plaintiff cannot create standing by self-censoring his speech because he interpreted statements allegedly made by Defendants as threats to reduce his pay and strip him of his Salem Center affiliation. (Dkt. # 15 at 13.) Thus, Defendants

argue that Plaintiff lacks standing to pursue any claims against them because he has suffered no cognizable injury that Defendants caused nor one this Court can redress.[2] (*Id.*) In response, Plaintiff argues that both the Supreme Court and the Fifth Circuit have recognized standing to bring pre-enforcement challenges to speech restrictions where there is a credible threat of enforcement. (Dkt. # 43 at 8.) He argues that he not challenging a statute or written policy, but challenging Defendants' actions seeking to prevent him from expressing his opinions in public. (*Id.* at 9.)

"To be an injury in fact, a threatened future injury must be (1) potentially suffered by the plaintiff, not someone else; (2) concrete and particularized, not abstract; and (3) actual or imminent, not conjectural or hypothetical." *Stringer*, 942 F.3d at 720 (internal quotations omitted). "The purpose of the requirement that the injury be 'imminent' is 'to ensure that the alleged injury is not too speculative for Article III purposes.'" *Id.* (first citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) and then quoting *Lujan*, 504 U.S. at 564 n.2, 112 S.Ct. 2130). A litigant must demonstrate "a claim of specific present objective harm or a threat of specific future harm." *Meese v. Keene*, 481 U.S. 465, 472, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (quoting *Laird*, 408 U.S. at 14, 92 S.Ct. 2318 (internal quotations omitted)). "For a threatened future injury to satisfy the imminence requirement, there must

2. Defendants challenge only the injury in fact requirement to standing in their motion to dismiss. (Dkt. # 15 at 13.)

be at least a substantial risk that the injury will occur." *Id.* (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5, 133 S.Ct. 1138)).

"Requests for injunctive and declaratory relief implicate the intersection of the redressability and injury in fact requirements." *Id.* "The redressability requirement limits the relief that a plaintiff may seek to that which is likely to remedy the plaintiff's alleged injuries." *Id.* "Because injunctive and declaratory relief 'cannot conceivably remedy any past wrong,' plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement only by demonstrating a continuing injury or threatened future injury." *Id.* (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). "That continuing or threatened future injury, like all injuries supporting Article III standing, must be an injury in fact." *Id.* (citing *Driehaus*, 573 U.S. 149, 134 S.Ct. 2334, 189 L.Ed.2d 246).

The Supreme Court's "relaxed" standing requirement in First Amendment cases "manifests itself most commonly in the doctrine's first element: injury-in-fact." *Cooksey*, 721 F.3d at 235; *see also Munson*, 467 U.S. at 956, 104 S.Ct. 2839. The Fifth Circuit has consistently reasoned that "government action that chills protected speech without prohibiting it can give rise to a constitutionally cognizable injury." *Glass v. Paxton*, 900 F.3d 233, 238 (5th Cir. 2018) (quoting *Zimmerman v. City of Austin*, 881 F.3d 378, 391 (5th Cir. 2018)); *see also, e.g.*, *Hous. Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007);

Freedom Path, Inc. v. I.R.S., 913 F.3d 503, 507 (5th Cir. 2019); *Fairchild v. Liberty ISD*, 597 F.3d 747, 754-55 (5th Cir. 2010); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006).

However, the chilling effect cannot "arise merely from the . . . individual's concomitant fear that . . . the [government] might in the future take some other and addition[al] action detrimental to that individual." *Laird*, 408 U.S. at 11, 92 S.Ct. 2318. In other words, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14, 92 S.Ct. 2318. Rather, governmental activity constitutes an injury in fact when "the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Id.* at 11, 92 S.Ct. 2318.

The Fifth Circuit has expressly indicated that, in the First Amendment context, "[a] plaintiff has suffered an injury in fact if he (1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) his intended future conduct is 'arguably . . . proscribed by [the policy in question],' and (3) 'the threat of future enforcement of the [challenged policies] is substantial.'" *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (quoting *Driehaus*, 573 U.S. at 161-64, 134 S.Ct. 2334).

At this early stage of the proceedings, the Court finds that, given the relaxed standing requirements in First Amendment cases, Plaintiff has alleged a cognizable injury. Plaintiff has alleged that he felt his appointment at the Salem Center, and associated stipend and research opportunities, were threatened by Defendants should he continue to speak out in the same manner. Plaintiff alleges that he cannot engage in the speech he wishes to publicly express and decided to stop "using Twitter entirely and has curtailed his public speech critical of the UT Administration because of Defendants' threats." (Dkt. # 1 ¶ 67.)

Thus, it appears to the Court that Plaintiff has sufficiently alleged that he suffers, at a minimum, chilled speech. Specifically, Plaintiff has alleged that should he continue to post publicly on social media and speak in public forums in the same manner as before, he would face negative consequences imposed by UT Administrators. Plaintiff has therefore met the first inquiry recognized by the Fifth Circuit in chilled speech cases—an intention to engage in a course of conduct arguably affected with a constitutional interest.

Regarding the second inquiry—the intended future conduct is "arguably proscribed, or at least arguably regulated, by the University speech policies," *Speech First*, 979 F.3d at 330, Plaintiff has not specifically alleged a UT policy or code prohibiting or regulating Plaintiff's speech. (*See* Dkt. # 1.) Plaintiff argues however that "[a] n unwritten code threatens to chill speech even more than a written one, because its meaning is even more

subjective." (Dkt. # 43 at 11.) For instance, Plaintiff asserts that Titman's statements in an email that he did not believe Plaintiff's "rude comments" were acceptable, demonstrates that there is some unwritten code on what speech is acceptable to UT officials. (*Id.*) In any case, Plaintiff argues that even rude comments are protected speech. (*Id.*)

The Court recognizes that there is no unequivocal policy in this case proscribing Plaintiff's intended conduct. However, based on Plaintiff's allegations in his complaint, the Court finds that he has sufficiently alleged an implicit policy on what speech is allowed by employees of the Salem Center. This implicit policy alleged by Plaintiff arguably proscribes Plaintiff's intended conduct, which appears to be all the standard that is required in the Fifth Circuit. *See Jackson v. Wright*, No. 4:21-CV-00033, 2022 WL 179277, at *7 (E.D. Tex. Jan. 18, 2022) ("The Court recognizes, though, in this case, there is no unequivocal policy proscribing his intended conduct. But the implicit policy creating the stagnant Journal arguably proscribes Plaintiff's intended conduct, which is all the standard requires.") (citing Dolich, supra p. 10 at 176 ("[A]n official action may abridge First Amendment rights without directly proscribing a protected activity. This is the so-called 'chilling effect.'")).

The Court also finds that Plaintiff has sufficiently alleged the third inquiry—the threat of future enforcement of the proscribed policy is substantial. Plaintiff has alleged that Defendants have exhibited authority over Plaintiff throughout this controversy. For instance, Plaintiff has

alleged that Titman told Carvalho that "[w]e need to do something about Richard," and that President Hartzell and Dean Mills were about upset about Plaintiff's "political advocacy," and asked Carvalho if "we can ask him to tone it down?" (Dkt. # 1 ¶ 36.) Plaintiff further alleges that Mills and Burris were concerned Plaintiff was "crossing the line" in his criticisms of school officials and that the UT legal department was concerned about his speech. (*Id.* ¶ 39.) Additionally, Plaintiff has alleged that Carvalho was told that he has "the power to have him not be attached to the center" and that Burris told Carvalho that "he might not approve Lowery's appointment to the center in the future because of his speech." (*Id.* ¶ 43.)

Thus, given the foregoing—at this stage of the case—Plaintiff has stated an injury in the First Amendment context. "It is not fatal that [UT] never explicitly stated that disciplinary charges would be brought if [Plaintiff] continued to voice his views. It is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat." *Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992) (citing *Trotman v. Bd. of Trustees of Lincoln Univ.*, 635 F.2d 216, 228 (3d Cir. 1980)), *cert. denied*, 451 U.S. 986, 101 S.Ct. 2320, 68 L.Ed.2d 844 (1981). The Court thus finds that Plaintiff has standing to assert his First Amendment claims.

2. Ripeness

Defendants also argue that Plaintiff's claim that he fears Defendants will punish him for his speech by

removing him from his position at the Salem Center is not ripe. (Dkt. # 15.) Defendants assert that Plaintiff himself admits that he was reappointed to his position as Associate Director of the Salem Center in September 2022, which is just a few weeks after the August 2022 emails and meetings upon which Plaintiff complains. (*Id.* at 12.)

Ripeness is "a question of timing." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (quoting *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)). "[I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Id.* (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). "The ripeness inquiry reflects 'Article III limitations on judicial power' as well as 'prudential reasons for refusing to exercise jurisdiction.'" *DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218 (5th Cir. 2021) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010)).

The standard for constitutional ripeness mirrors the injury-in-fact requirement for standing. *See Driehaus*, 573 U.S. 149, 157-58 n.5, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). Both stem from "Article III's case-or-controversy requirement, which mandates that an 'actual controversy' exist between the parties." *DM Arbor Ct., Ltd.*, 988 F.3d at 218 n.1 (quoting *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016)). An actual controversy exists when the injury alleged is "actual

or imminent rather than conjectural or hypothetical." *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)).

As discussed above, Plaintiff has adequately alleged that he is being harmed by Defendants' threats to remove his Salem Center affiliation should his speech continue as before he self-regulated it. Plaintiff has also alleged a substantial risk that this harm will occur if he continues to post his criticisms of the UT Administration on social media and in public platforms. The Court therefore finds that Plaintiff's claims are ripe for adjudication.

3. Sovereign Immunity

Defendants also move to dismiss Plaintiff's First Amendment retaliation claim on the basis that sovereign immunity bars his ability to seek retrospective relief to address threats from the past. (Dkt. # 15 at 14.) Defendants contend that Plaintiff's retaliation claim alleges that he was threatened in the past and there is nothing ongoing about those alleged past threats on which he can presently seek relief. Because he was not terminated, demoted, or disciplined Defendants maintain there is no ongoing harm, and the retaliation claim must be dismissed. (*Id.*)

"Pursuant to the *Ex parte Young* exception, the Eleventh Amendment is not a bar to suits for prospective relief against a state employee acting in his official capacity." *Nelson v. Univ. of Tex. at Dall.*, 535 F.3d 318, 321 (5th Cir. 2008). Therefore, "prospective injunctive or declaratory relief against a state [official] is permitted . . . but retrospective relief in the form of a money judgment in compensation for past wrongs . . . is barred." *Id.* (quoting *Brennan v. Stewart*, 834 F.2d 1248, 1253 (5th Cir. 1988)) (alterations in original).

Here, Plaintiff does not seek retrospective relief in the form of a money judgment, but only prospective relief in the form of injunctive and declaratory relief. (Dkt. # 1 at 24-25.) Additionally, while Plaintiff alleges that retaliation may have occurred in the past, his allegations of such appear related to the present controversy and the relief he requests is all prospective. Therefore, Plaintiff's First Amendment retaliation claim is not barred by sovereign immunity.

4. Whether Plaintiff Has Stated Claims Upon Which Relief Can Be Granted

Defendants argues that Plaintiff's retaliation claim fails because he has not suffered any adverse employment action. (Dkt. # 15 at 15.) Defendants also contend that Plaintiff fails to adequately allege a chilled-speech claim. (*Id.* at 17.) Plaintiff responds that he has sufficiently alleged both a First Amendment chilled speech and retaliation claim. (Dkt. # 43 at 16.)

Appendix B

a. First Amendment retaliation

To establish a First Amendment retaliation claim, a plaintiff must allege: "(1) he suffered an adverse employment decision, (2) he spoke as a citizen on a matter of public concern, (3) his interest in the speech outweighs the government's interest in the efficient provision of public services, and (4) the protected speech motivated the adverse employment action." *Bevill v. Fletcher*, 26 F. 4th 270, 276 (5th Cir. 2022) (citing *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007)). Defendants dispute only the sufficiency of the first element.

Regarding adverse employment actions in a First Amendment retaliation context, Plaintiff advocates for the Court to use the application of a "material adverse" standard used in Title VII retaliation actions. (Dkt. # 43 at 19.) Under that standard, an employee "must show that a reasonable employee would have found the challenged action materially adverse." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In other words, the question is whether the action "might have dissuaded a reasonable worker from" engaging in the protected conduct at issue. *Id.* (quotation marks and citation omitted).

Notably, neither the Supreme Court nor the Fifth Circuit have spoken on whether that standard applies to First Amendment retaliation claims. *See Hous. Cmty. Coll. Syst. v. Wilson*, 595 U.S. 468, 142 S. Ct. 1253, 1261, 212 L.Ed.2d 303 (2022) (noting that "lower courts have taken various approaches" to distinguish material from

immaterial adverse actions); *Spears v. McCraw*, No. 20-50406, 2021 WL 3439148, *2 (5th Cir. Aug. 5, 2021) (per curiam) (citing *Johnson v. Halstead*, 916 F.3d 410, 422 n.5 (5th Cir. 2019)). Regardless, the Fifth Circuit has consistently limited adverse employment actions to "ultimate employment decisions," such as "discharges, demotions, refusals to hire, refusals to promote, and reprimands."[3] *Foley v. Univ. of Hous. Sys.*, 355 F.3d 333, 341 (5th Cir. 2003); *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (quotation marks and citation omitted).

Indeed, the Fifth Circuit has "declined to expand the list of actionable" claims in the First Amendment context, "noting that some things are not actionable even though they have the effect of chilling the exercise of free speech." *Benningfield v. City of Hous.*, 157 F.3d 369, 376 (5th Cir. 1998). As explained in *Breaux*, "[t]he reason for not expanding the list of adverse employment actions is to ensure that § 1983 does not enmesh federal courts in relatively trivial matters." 205 F.3d at 157 (quotation marks and citation omitted).

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3. The Court also takes notice of the Fifth Circuit's recent decision in *Hamilton v. Dallas Co.*, 79 F.4th 494 (5th Cir. 2023), in which the standard for pleading "adverse employment action" changed regarding Title VII disparate treatment discrimination claims. In that case, the Fifth Circuit determined that a plaintiff adequately alleges such a claim by pleading that he or she was discriminated against because of a protected characteristic, with respect to hiring firing, compensation, or the "terms, conditions, or privileges of employment." *Id.* Without further guidance from the Fifth Circuit, the Court will not expand this definition to First Amendment retaliation claims such as pled here.

Given the above considerations and relevant Fifth Circuit precedent, the Court will not apply the materially adverse standard used in Title VII actions in this case. Instead, the Court finds that adverse employment actions in the First Amendment retaliation context are restricted to ultimate employment decisions. *See Foley*, 355 F.3d at 341; *Breaux*, 205 F.3d at 164; *see also Jackson v. Tex. Southern Univ.*, 997 F. Supp. 2d 613, 638 (S.D. Tex. 2014).

Here, Plaintiff alleges that he experienced an adverse employment action when Defendants threatened "to reduce [his] pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, labeling him, requesting that his speech be placed under police surveillance, or otherwise disciplining him." (Dkt. # 1 ¶ 90.) However, these allegations of threats are insufficient to establish an adverse employment action for a First Amendment retaliation claim in the Fifth Circuit. *See Breaux*, 205 F.3d at 160. The mere threat or potential of an ultimate employment decision will not suffice. *Id.* Because he has not sufficiently alleged an adverse employment action, the Court will dismiss without prejudice Plaintiff's First Amendment retaliation claim.

b. Chilled Speech

To establish a chilled speech claim, a plaintiff must allege: "(1) [he was] engaged in constitutionally protected activity, (2) the defendants' actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the

defendants' adverse actions were substantially motivated against the plaintiff['s] exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Defendants argue that Plaintiff cannot meet the second element because a person of ordinary firmness would not be chilled from engaging in a protected speech by Defendants' purported actions. (Dkt. # 15 at 17.)

At this stage of the proceedings, the Court finds that Plaintiff has sufficiently alleged that Defendants' threats would chill a person of ordinary firmness from publicly criticizing UT Administration and programs. Plaintiff has alleged that Carvalho—Plaintiff's supervisor at the Salem Center—was told that "[w]e need to do something about Richard," and that President Hartzell and Dean Mills were about upset about Plaintiff's "political advocacy," and asked Carvalho if "we can ask him to tone it down?" (Dkt. # 1 ¶ 36.) Plaintiff further alleges that Mills and Burris were concerned Plaintiff was "crossing the line" in his criticisms of school officials and that the UT legal department was concerned about his speech. (*Id.* ¶ 39.) Additionally, Plaintiff has alleged that Carvalho was told that he has "the power to have him not be attached to the center" and that Burris told Carvalho that "he might not approve Lowery's appointment to the center in the future because of his speech." (*Id.* ¶ 43.) The Court finds these allegations sufficiently allege the second element of a chilled speech claim, and it will not be dismissed on this basis.

C. Conclusion

Based on the foregoing, the Court will **GRANT IN PART** and **DENY IN PART** Defendants' Motion to Dismiss the Complaint for Declaratory and Injunctive Relief (Dkt. # 15). The motion is **GRANTED** as to Plaintiff's First Amendment Retaliation claim and it is **DISMISSED WITHOUT PREJUDICE**. The motion is **DENIED** in all other respects.

II. Motion for Preliminary Injunction

Plaintiff has moved for a preliminary injunction, asking the Court to enjoin Defendants from threatening his affiliation with the Salem Center and associated stipend and research activities. (Dkt. # 8.) Plaintiff seeks relief to freely post as he did before he felt threatened. (*Id.*)

A. Applicable Law

"Rule 65 of the Federal Rules of Civil Procedure governs both preliminary injunctions and temporary restraining orders." *Total Safety U.S., Inc. v. Rowland*, Civil Action No. 13-6109, 2014 WL 793453, at *5 (E.D. La. Feb. 26, 2014); *see also* Fed. R. Civ. P. 65. The grant of injunctive relief is an extraordinary remedy which requires the movant to unequivocally show the need for its issuance. *Opulent Life Church v. City of Holly Springs, Miss.*, 679 F.3d 279, 288 (5th Cir. 2012); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997).

"The prerequisites for preliminary injunctive relief are long-established in this circuit." *Libertarian Party of Tex. v. Fainter*, 741 F.2d 728, 729 (5th Cir. 1984). A preliminary injunction should not be granted unless the movant demonstrates by a clear showing: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury to the movant outweighs any harm that may result from the injunction to the non-movant; and (4) that the injunction will not undermine the public interest. *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107 (5th Cir. 1987); *Valley*, 118 F.3d at 1051. Accordingly, "[b]ecause a preliminary injunction may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) (internal quotations and citation omitted), the "denial of a preliminary injunction will be upheld where the movant has failed sufficiently to establish *any one* of the four criteria." *Black Fire Fighters Ass'n v. City of Dall.*, 905 F.2d 63, 65 (5th Cir. 1990) (emphasis in original).

At the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence. *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993). However, even when a movant establishes each of the four requirements described above, the decision whether to grant or deny a preliminary injunction remains within the court's discretion, and the decision to grant a preliminary injunction is treated as the exception rather than the rule. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

B. Analysis

Plaintiff argues that he is likely to succeed on the merits of his claim, he will suffer irreparable harm if Defendants' censorship continues, the balance of equities is in his favor, and that enjoining Defendants is in the public interest. (Dkt. # 8.) Defendants oppose any injunction on the basis that Plaintiff misrepresents Defendants' speech and actions and that no First Amendment violation has occurred or is imminent to occur. (Dkt. # 14 at 10.) Moreover, Defendants argue that the relief Plaintiff seeks would be an unconstitutional restraint on Defendants' speech. (*Id.* at 22.)

In the First Amendment context, the other three elements necessary for preliminary injunctive relief ordinarily rise and fall together with Plaintiff's likelihood of success on the merits. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295-98 (5th Cir. 2012). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 295 (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). And, a state "would need to present powerful evidence of harm to its interests" to show that the potential negative effects of an injunction would outweigh the infringement of a plaintiff's First Amendment rights. *Id.* at 297. Additionally, "injunctions protecting First Amendment freedoms are always in the public interest." *Id.* at 298 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)).

Even so, "invocation of the First Amendment cannot substitute for the presence of an imminent, non-

speculative irreparable injury." *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir. 2016). That is, "[a] preliminary injunction is not appropriate . . . unless the party seeking it can demonstrate that First Amendment interests are either threatened or in fact being impaired at the time relief is sought." *Id.* (quoting *Nat'l Treasury Emp. Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991)) (citations and quotation marks omitted). Furthermore, "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11A Wright et al., Federal Practice & Procedure § 2948.1 (3d ed. 2020); *see also Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quoting 11A Wright et al., Federal Practice & Procedure § 2948.1 (2d. ed. 1995)); *Texas v. United States*, 86 F. Supp.3d 591, 674 (S.D. Tex. 2015) (same).

In this case, while Plaintiff has certainly alleged that he felt his affiliation with the Salem Center, and associated stipend and research abilities, were threatened, the evidence that such threat is imminent or currently impaired to warrant preliminary injunctive relief is lacking. Plaintiff argues only that he has been "self-censoring since August 22[, 2022]" in support of his contention that he will suffer irreparable harm without an injunction. (Dkt. # 8 at 25.) However, there is no evidence that any adverse employment action has yet befallen Plaintiff, nor that any adverse employment action will imminently occur. Plaintiff is a tenured professor at UT

which is protected under university policies. (Dkt. # 14-15; Dkt. # 14-16.) Additionally, the evidence indicates that Plaintiff was reappointed to his position at the Salem Center for a one-year term in September 2022—after the alleged threats occurred—and that he is currently still employed in that capacity.[4] Thus, because Plaintiff was reappointed to his position after the alleged threats were made and before he chose to self-censor, the Court finds that he is not experiencing any ongoing or imminent harm at this time or in the near future. In such case, the Court finds that even if Plaintiff could establish a clear likelihood of success on the merits, his request for preliminary injunctive relief is denied because he has not shown a likelihood of imminent, irreparable harm.[5] *See Hood*, 822 F.3d at 228.

C. Conclusion

Given the foregoing, because Plaintiff has failed to demonstrate irreparable harm, the Court finds that Plaintiff is not entitled to preliminary injunctive relief. The Court will however deny the motion without prejudice subject to refiling should Plaintiff's circumstances change and should Defendant take different actions. Plaintiff's

4. At the hearing, more evidence was presented that Plaintiff was in fact reappointed to his position at the Salem Center for a another one-year term in August 2023, and that he received a pay raise at the beginning of both the 2022-23 and the 2023-24 school terms.

5. Given this finding, the Court does not consider the other requirements—the balance of equities or whether an injunction would serve the public interest.

Motion for Preliminary Injunction (Dkt. # 8) is therefore **DENIED WITHOUT PREJUDICE**.

CONCLUSION

Based on the foregoing, the Court will **GRANT IN PART** and **DENY IN PART** Defendants' Motion to Dismiss the Complaint for Declaratory and Injunctive Relief (Dkt. # 15). The motion is **GRANTED** as to Plaintiff's First Amendment Retaliation claim and it is **DISMISSED WITHOUT PREJUDICE**. The motion is **DENIED** in all other respects. The Court will further **DENY WITHOUT PREJUDICE** Plaintiff's Motion for Preliminary Injunction (Dkt. # 8). Additionally, the Court will **ORDER** the parties to submit their proposed scheduling orders **within 21 days of the date of this Order**.

IT IS SO ORDERED.

DATED: Austin, Texas, September 5, 2023.

s/ David Alan Ezra
David Alan Ezra
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED OCTOBER 2, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. 1:23-CV-129-DAE

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, IN HER CAPACITY AS DEAN OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS AT AUSTIN, ETHAN BURRIS, IN HIS OFFICIAL CAPACITY AS SENIOR ASSOCIATE DEAN FOR ACADEMIC AFFAIRS OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN, CLEMENS SIALM, IN HIS OFFICIAL CAPACITY AS FINANCE DEPARTMENT CHAIR FOR THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN, AND JAY HARTZELL, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF TEXAS-AUSTIN,

Defendants.

Filed October 2, 2024

Appendix C

ORDER: (1) GRANTING MOTION TO DISMISS; (2) GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT; (3) DENYING MOTION TO DEFER RULING ON PARTIAL SUMMARY JUDGMENT; AND (4) DENYING AS MOOT MOTION TO DISSOLVE PROTECTIVE ORDER

Before the Court are: (1) Defendants Lillian Mills, in her capacity as Dean of the McCombs School of Business at the University of Texas at Austin ("McCombs"), Ethan Burris, in his official capacity as Senior Associate Dean for Academic Affairs of McCombs, Clemens Sialm, in his official capacity as Finance Department Chair for the McCombs School of Business at the University of Texas-Austin, and Jay Hartzell, in his official capacity as President of the University of Texas-Austin's (collectively, "Defendants") Motion to Dismiss Amended Complaint (Dkt. # 129); (2) Defendants' Motion for Partial Summary Judgment (Dkt. # 132); (3) Plaintiff Richard Lowery's ("Plaintiff" or "Lowery") Motion to Defer Consideration of Defendants' Motion for Partial Summary Judgment (Dkt. # 135); and (4) Plaintiff's Motion to Dissolve Protective Order re: Nepotism Allegations (Dkt. # 140). A hearing was held on these motions on September 25, 2024.

After careful consideration of the memoranda in support of and in opposition to the motions as well as arguments of counsel at the hearing, the Court, for the reasons that follow, **GRANTS** Defendants' motion to dismiss, **GRANTS** Defendants' motion for partial summary judgment, **DENIES** Plaintiff's motion to defer consideration of motion for partial summary judgment,

and **DENIES AS MOOT** Plaintiff's Motion to Dissolve Protective Order.

BACKGROUND

This is a free speech case in which Plaintiff, a professor at the University of Texas at Austin ("UT"), has used social media and online opinion articles to publicly criticize university officials' actions, and has asked elected state-governmental officials to intervene. (Dkt. # 126.) Among others, Plaintiff alleges that he "dissents from the political and academic views held by most UT faculty and administrators, often publicly, and sometimes uses pointed terminology to get his points across." (*Id.* at 4.) He states that he makes his opinions known to elected officials in Texas, including those who oversee UT's funding. (*Id.*)

Plaintiff alleges that he "has a longstanding commitment to increasing viewpoint diversity on the UT campus, both through his work with the Salem Center [for Public Policy] and through his speech on and off campus." (Dkt. # 126 ¶ 20.) At the Salem Center, Plaintiff reports to business professor Carlos Carvalho, who serves as the Center's Executive Director. (*Id.* ¶ 21-22.) Plaintiff alleges that his affiliation with the Salem Center affords him additional pay, as well as access to research opportunities. (*Id.* ¶ 22.) In 2021, according to Plaintiff, he and Carvalho pursued funding for a new "Liberty Institute" at UT whose purpose is to study "classical-liberal, pro-free market viewpoints on a campus, as a counterweight to the dominant critical race theory and DEI-based

ideology[1] that was metastasizing from its origins in the humanities into more evidence-based disciplines such as business, economics, and STEM disciplines." (*Id.* ¶ 23.) Plaintiff alleges that their goal for the Liberty Institute is "to remain independent within UT, without having to answer to the general faculty within existing schools" in order "to avoid becoming subject to the ideological bias inherent in most academic hiring decisions at UT, where DEI filtering mechanisms are applied," resulting "in the removal of candidates who dissent from DEI ideology and critical race theory." (*Id.* ¶ 24.)

To fund the Liberty Institute, Plaintiff and Carvalho enlisted the support of Defendant UT President Jay Hartzell and private donors, as well as the Texas State Legislature's 2022-23 budget which allocated $6 million in funding for the Liberty Institute. (*Id.* ¶ 25-26.) According to Plaintiff, however, the enabling legislation "was somewhat vague," allowing President Hartzell and his UT Administration allies "to hijack the project, remove its independence, re-direct its funding to existing personnel and programs, and change its title to 'Civitas.'" (*Id.* ¶ 27.)

Thereafter, Plaintiff alleges that he began to publicly criticize "the hijacking of the Liberty Institute, criticizing the role of UT President Hartzell and Richard Flores, who is an advocate of critical race theory and DEI-ideology." (Dkt. # 126 at ¶ 29.) For example, Plaintiff was quoted in papers, appeared on podcasts, and posted on social

1. DEI stands for "diversity, equity, and inclusion." (Dkt. # 1 at ¶ 11.)

media, sometimes tagging elected officials or social-media personalities, making those posts visible to those officials. (*Id.* at 28-35.)

Plaintiff further alleges that UT's McCombs School hosts a Global Sustainability Leadership Institute ("GSLI") which promotes Environment Sustainability and Governance ("ESG") based viewpoints which are "consistent with the predominant DEI-ideology at UT and are often at odds with free-market principles and Lowery's views." (Dkt. # 126 ¶ 36.) Plaintiff states that he has publicly criticized GSLI and its events on social media. (*Id.* ¶ 39.)

Thereafter, Plaintiff alleges that his repeated criticisms of President Hartzell, and the UT Administration, their DEI initiatives, and GSLI "drew the attention of Defendants who decided to pressure Lowery and his friend and ally, Carlos Carvalho, into censoring Lowery's speech." (Dkt. # 126 at ¶ 44.) According to Plaintiff, in late July or August 2022, Sheridan Titman, the former Chair of the Finance Department and to whom Lowery reported to,[2] told Carvalho that "We need to do something about Richard." (*Id.* ¶ 45-54.) Plaintiff alleges that Titman told him also that President Hartzell and Defendant Dean Lillian Mills were upset about Plaintiff's political advocacy and wanted to know if "we can ask him to tone it down?" (*Id.* ¶ 54.) Plaintiff contends that Carvalho understood the

2. Titman was previously a defendant in this case, but Plaintiff's amended complaint states that Titman is now a witness "because he no longer serves as the department chair." (Dkt. # 126 at ¶ 45.)

statement as an implicit threat but refused to do anything, explaining to Titman that Lowery has a First Amendment right to express his views. (*Id.* ¶ 55.)

On August 12, 2022, Plaintiff alleges that Dean Mills and Defendant Ethan Burris, McCombs' Senior Associate Dean for Academic Affairs, met with Carvalho to discuss the Salem Center. (Dkt. # 126 at ¶ 56.) According to Plaintiff, about an hour later the tone shifted when Mills and Burris changed the subject to Plaintiff's speech. (*Id.*) Plaintiff contends that Carvalho was told Lowery's speech was "crossing the line" in his criticism of school officials, to the point where the UT legal department was allegedly concerned about his speech. (*Id.* ¶ 57.) Plaintiff also alleges that Defendants put pressure on Carvalho to reprimand Plaintiff for his speech, but that Carvalho again declined to do so. (*Id.* ¶ 57-58.) Because Carvalho declined to do so, Plaintiff asserts that Defendants threatened Carvalho's Executive Director position. (*Id.* ¶ 59.) According to Plaintiff, Carvalho nonetheless relayed Defendants' threats to Plaintiff. (*Id.* ¶ 62.)

On August 22, 2022, Plaintiff alleges that GSLI's managing director Meeta Kothare emailed a copy of Plaintiff's social media post to Mills and GSLI's executive director Jeffrey Hales, writing about concern of the safety of GSLI's events. (Dkt. # 126 at ¶ 68-69.) According to Plaintiff, Kothare's email was forwarded to other UT professors and officials, including Titman, who decided that a discussion with Plaintiff was needed to determine "what is appropriate on twitter" and that he "want[ed] to encourage intellectual discourse, but [he didn't] think rude

comments [were] acceptable." (*Id.* ¶ 70-72.) Thereafter, Plaintiff alleges that Titman ultimately forwarded him the email from Kothare and added that Plaintiff did not "seem to be making friends" and that it was "probably in [his] best interest to come up with a class for the Spring that is likely to be popular," and "[i]n any event, the appropriate response is to jointly sponsor a panel discussion on ESG." (*Id.* ¶ 75.) Plaintiff alleges that he responded back, stating that he considered the email to him to be a threat and that he "can certainly criticize events." (*Id.* ¶ 76.)

Subsequently, Plaintiff contends that he set his social media account to "private" and that only his followers and not the public can see his activity. (Dkt. # 126 at ¶ 78.) And, as of late August 2022, Plaintiff alleges that he stopped posting on his Twitter account, but has not deleted it and would like to resume "tweeting, re-tweeting, replying to other posts, and otherwise commenting on matters as before." (*Id.* ¶ 79.) Plaintiff further alleges that a GSLI employee forwarded his speech to UT police requesting that they survey his speech on social media. (Dkt. # 1 ¶ 56.) Plaintiff states there is no indication that this request for surveillance has been withdrawn. (*Id.* ¶ 59.)

On February 2, 2023, Plaintiff filed suit in this Court alleging two claims against Defendants for violations of his First Amendment Right of Free Speech pursuant to 42 U.S.C. § 1983 for Chilling of Free Speech by State Actors and Retaliation for his Protected Speech. (Dkt. # 1.) On September 5, 2023, the Court dismissed without prejudice Plaintiff's First Amendment Retaliation claim. (Dkt. # 51.) On March 28, 2024, Plaintiff filed an amended

complaint which added UT President Hartzell as a defendant, and added a claim for Right of Free Speech pursuant to § 1983 alleging that UT has an unwritten speech code or practice that allows administrators to label such speech as "disruptive to university operations," amounting to "a ban on calling for boycott of donations to UT." (Dkt. # 126 at 30.)

Among others, Plaintiff believes that UT officials have attempted to silence his speech by threatening his job, pay, institute affiliation, research opportunities, academic freedom, and labeled his behavior as inviting violence or lacking in civility. According to Plaintiff, he fears that if he continues to be critical and express his speech concerning UT Administration and its policies, his appointment to the Salem Center will not be renewed, costing him the $20,000 stipend and access to research opportunities. (*Id.* ¶ 87.)

On April 11, 2024, Defendants filed a motion to dismiss Plaintiff's amended complaint. (Dkt. # 129.) On April 25, 2024, Plaintiff filed a response in opposition. (Dkt. # 130.) On May 2, 2024, Defendants filed a reply. (Dkt. # 131.) On May 20, 2024, Defendants filed a motion for partial summary judgment. (Dkt. # 132.) On May 31, 2024, Plaintiff filed a response in opposition to that motion. (Dkt. # 134.) On June 7, 2024, Defendants filed their reply. (Dkt. # 136.) On May 31, 2024, Plaintiff filed a motion to defer the Court's consideration of Defendants' motion for partial summary judgment. (Dkt. # 135.) On June 7, Defendants filed a response in opposition to that motion. (Dkt. # 136.) On June 13, 2024, Plaintiff filed his reply. (Dkt. # 137.) On September 12, 2024, Plaintiff filed a motion to dissolve

the protective order in this case regarding his nepotism allegations against President Hartzell. (Dkt. # 140.) On September 19, 2024, Defendants filed a response to the motion (Dkt. # 141); on September 21, 2024, Plaintiff filed his reply (Dkt. # 142). All pending motions are ripe and ready for the Court's consideration.

I. Motion to Dismiss

Defendants move to dismiss Plaintiff's suit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. # 129.)

A. Applicable Law

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the contents of the complaint and matters properly subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In analyzing a motion to dismiss for failure to state a claim, "[t]he court accept[s] 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Analysis

Defendants move to dismiss both of Plaintiff's claims on the basis that his self-chill claim is essentially a rebranded retaliation claim and that he has failed to allege facts supporting the existence of an unwritten speech code or practice. (Dkt. # 129 at 6.)

1. Chilled Speech

Defendants maintain Plaintiff's "chilled speech" claim is really a retaliation claim that is foreclosed for lack of any adverse employment action. (Dkt. # 129 at 6.) In response, Plaintiff contends that the Court has already determined that Lowery stated a viable chilled-speech claim in its prior order and thus reasserting dismissal of the claim on the same basis is barred by the law of the case doctrine. (Dkt. # 130 at 9.) Additionally, Plaintiff asserts that UT previously cited a different standard to apply to his chilled speech claim in its prior motion to dismiss and therefore UT is judicially estopped from asserting that a different standard applies now. (*Id.* at 11.)

In its Order on Defendants' motion to dismiss Plaintiff's original complaint, the Court determined that:

> To establish a chilled speech claim, a plaintiff must allege: "(1) [he was] engaged

in constitutionally protected activity, (2) the defendants' actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff['s] exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Defendants argue that Plaintiff cannot meet the second element because a person of ordinary firmness would not be chilled from engaging in a protected speech by Defendants' purported actions. (Dkt. # 15 at 17.)

At this stage of the proceedings, the Court finds that Plaintiff has sufficiently alleged that Defendants' threats would chill a person of ordinary firmness from publicly criticizing UT Administration and programs. Plaintiff has alleged that Carvalho—Plaintiff's supervisor at the Salem Center—was told that "[w]e need to do something about Richard," and that President Hartzell and Dean Mills were about upset about Plaintiff's "political advocacy," and asked Carvalho if "we can ask him to tone it down?" (Dkt. # 1 ¶ 36.) Plaintiff further alleges that Mills and Burris were concerned Plaintiff was "crossing the line" in his criticisms of school officials and that the UT legal department was concerned about his speech. (*Id.* ¶ 39.) Additionally, Plaintiff has alleged that Carvalho was told that he has "the power to have him not

> be attached to the center" and that Burris told Carvalho that "he might not approve Lowery's appointment to the center in the future because of his speech." (*Id.* ¶ 43.) The Court finds these allegations sufficiently allege the second element of a chilled speech claim, and it will not be dismissed on this basis.

(Dkt. # 51 at 25-26.) Although Defendants advocated for the standard above in *Keenan* to apply to Plaintiff's chilled-speech claim in their original motion to dismiss (Dkt. # 15 at 17), Defendants now argue that it is the wrong standard to apply in cases which concern public employees as opposed to ordinary citizens. (Dkt. # 129 at 6.) Defendants assert that the standard cited above in *Keenan* applies only to ordinary citizens' allegations of chilled speech, but in cases where as here, public employees are challenging their alleged chilled speech by their employer, the Court must apply a different First Amendment retaliation standard which requires a plaintiff to show an adverse employment action. (*Id.*)

Furthermore, Defendants argue that Plaintiff's first count in his amended complaint—chilling of free speech by state actors—is not a distinct cause of action separate from his now-dismissed First Amendment retaliation claim in his original complaint. Instead, it is simply a type of injury-in-fact that provided standing for a retaliation claim. (Dkt. # 129 at 8.) In such case, Defendants assert that Plaintiff's "'self-chill' claim is simply a retaliation claim that disavows that label in an effort to avoid the adverse-employment action element." (*Id.*)

Upon careful consideration, the Court agrees with Defendants' that a different legal standard is used in the Fifth Circuit for First Amendment retaliation claims brought by employees of governmental entities, but not without chiding Defendants for citing an incorrect standard to the Court in their original motion to dismiss.[3] The Fifth Circuit has repeatedly stated that in the employment context, "[t]o establish a § 1983 claim for *employment retaliation related to speech*, a plaintiff-employee must show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016) (emphasis added) (quoting *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007)); *Wilson v. Tregre*, 787 F.3d 322, 325 (5th Cir. 2015); *Hawkland v. Hall*, 860 F. App'x 326, 331 (5th Cir. 2021).

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3. The Court declines to consider the merits of Plaintiff's arguments concerning the law of the case and judicial estoppel; the Court will not purposefully apply an incorrect legal standard in this case. The Court further notes that neither of the parties' briefing was particularly clear as to what standards they rely on for any of the claims in this case. Even more baffling is Defendants' citation again to the *Keenan* standard in their response to Plaintiff's motion to dissolve the protective order even after they argued in their motion to dismiss and motion for partial summary judgment that a different standard for employment retaliation related to speech applies. (*See* Dkt. # 141 at 5.) In any case, this Court takes full responsibility for itself applying the incorrect standard in its previous order.

In contrast, the Fifth Circuit has stated that when a First Amendment retaliation case "does not involve an employment or other contractual relationship between the plaintiffs and the government officials," a First Amendment retaliation claim against "*an ordinary citizen*," may be shown by demonstrating that: "(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Keenan*, 290 F.3d at 258 (emphasis added).

In distinguishing between First Amendment retaliation claims in the employment context and those brought by ordinary citizens, the Fifth Circuit noted that, "[i]n the employment context, this court's requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Id.* at 258 n.4 (citing *Colson v. Grohman*, 174 F.3d 498, 510, 514 (5th Cir. 1999)). Regarding this, the Fifth Circuit determined that "some retaliatory actions—even if they actually have the effect of chilling the plaintiff's speech—are too trivial or minor to be actionable as a violation of the First Amendment." *Id.* at 258; *see also Breaux v. City of Garland*, 205 F.3d 150, 160 (5th Cir. 2000) (noting "retaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over a termination"); *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) ("[P]ublic employees . . . may be required to tolerate more than average citizens, before an action taken against them is considered adverse.").

The Court also agrees with Defendants that Plaintiff's allegations in his § 1983 First Amendment claim for "chilling of free speech by state actors" is in essence a First Amendment retaliation claim. Therefore, because Plaintiff was an employee of UT, the Court will consider whether Plaintiff has stated a § 1983 First Amendment retaliation claim pursuant to the standard cited above for use in the employment context, which requires a plaintiff to demonstrate an adverse employment action. *See Anderson v. Valdez*, 845 F.3d at 590. Defendants dispute only the sufficiency of the first element.

The Fifth Circuit has consistently limited adverse employment actions to "ultimate employment decisions," such as "discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Foley v. Univ. of Hous. Sys.*, 355 F.3d 333, 341 (5th Cir. 2003); *Breaux*, 205 F.3d at 157 (quotation marks and citation omitted). The Fifth Circuit has "declined to expand the list of actionable" claims in the First Amendment context, "noting that some things are not actionable even though they have the effect of chilling the exercise of free speech." *Benningfield v. City of Hous.*, 157 F3d 369, 376 (5th Cir. 1998). In *Breaux*, the Fifth Circuit specifically noted that the following are *not* adverse employment actions: (1) mere accusations or criticism; (2) investigations; (3) psychological testing; (4) false accusations; and (5) polygraph examinations that do not have adverse results for the plaintiff. *Breaux*, 205 F.3d 150, 157-68 (citations omitted). As explained in *Breaux*, "[t]he reason for not expanding the list of adverse employment actions is to ensure that § 1983 does not enmesh federal courts in relatively trivial matters." 205 F.3d at 157 (quotation marks and citation omitted).

Here, Plaintiff alleges that Defendant Hartzell "asked directed, or suggested that Defendants Mills and Burris take action to cause Lowery to change the tone and content of his tweets and other public speech or stop speaking altogether." (Dkt. # 126 at ¶ 106.) Plaintiff further alleges that Hartzell's "directives, requests, hints, and suggestions were carried out by people down the chain of command, such as Mills and Burris." (*Id.* ¶ 107.) Additionally, Plaintiff asserts that Defendants' "*threats* to counsel Lowery about his speech, reduce [his] pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, label him, allow other McCombs faculty to request that his speech be placed under police surveillance, or otherwise discipline him are designed to silence" his criticisms or change the tone of his speech. (*Id.* ¶ 109 (emphasis added).)

Plaintiff's allegations of *threats* are insufficient to establish an adverse employment action for a First Amendment retaliation claim in the Fifth Circuit. *See Breaux*, 205 F.3d at 160. The mere threat or potential of an ultimate employment decision will not suffice. *Id.* Because he has not sufficiently alleged an adverse employment action, the Court will dismiss without prejudice Plaintiff's First Amendment retaliation claim for chilled speech.

Still, Plaintiff urges the Court to consider a chilled-speech claim separate from a retaliation claim, citing the Fifth Circuit's holding in *Jackson v. Wright*, 82 F.4th 362, 369 (5th Cir. 2023). (Dkt. # 130 at 13.) The district court below in *Jackson* noted the distinction between alleging

a "First Amendment claim for *suppression of speech* with a retaliation claim for adverse action *following protected speech*," which utilizes a different standard. *Jackson v. Wright*, No. 4:21-CV-00033, 2022 WL 179277 (E.D. Tex. Jan. 18, 2022) ("To establish a § 1983 claim for violation of the First Amendment right to free speech, [a plaintiff] must show that (1) they were disciplined or fired for speech that is a matter of public concern, and (2) their interest in the speech outweighed the university's interest in regulating the speech." (citing *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019))).

To the extent Plaintiff urges the Court to employ this standard in evaluating his "chilled speech" claim, he has not adequately alleged the elements of such—particularly he fails to allege any actual discipline or that he was terminated following his protected speech.[4] For instance, in *Jackson*, a professor who made protected speech in a university journal in which he served on the editorial board was criticized for speaking by the university he worked for and others. *Id.* The professor was first asked to implement recommendations concerning the editorial nature of the journal; however, prior to his implementation of the recommendations, the professor was informed that he would be removed from the journal and that the university would eliminate the resources previously provided to the journal. *Id.* at *2. Although the plaintiff responded that he would not be forced to resign from the journal, no editorial board thereafter existed, and no one

4. *See also* the Court's analysis below in Plaintiff's second claim utilizing this standard.

applied for the editor-in-chief position. *Id.* at 3. In such case, "[b]ecause of this indefinite suspension, [the p]laintiff ha[d] been de facto removed from the Journal." *Id.*

Here, Plaintiff has not been removed from the Salem Center, and in fact was reappointed to his position at the Salem Center for another one-year term in August 2023, and he received a pay raise at the beginning of both the 2022-23 and the 2023-24 school terms. (*See* Dkt. # 51 at 30 n.4.) Therefore, even if the speech constitutes a matter of public concern, Plaintiff has not alleged that was disciplined or terminated for such. And, even using this standard, Plaintiff has not properly alleged such claim to survive dismissal. Thus, the Court finds that Plaintiff has not properly alleged a First Amendment violation—for either retaliation or for the unconstitutional stifling of speech under § 1983.

2. Unwritten Speech Code

Defendants next move to dismiss Plaintiff's Free Speech claim based on an unwritten speech code or practice. (Dkt. # 129 at 10.) Defendants contend Plaintiff has failed to allege sufficient facts to support this claim. (*Id.*) Specifically, Defendants again assert that Plaintiff's allegations that UT maintains an "unwritten speech code" as applied solely against Lowery is "another recasting of his First Amendment retaliation claim," which again fails for lack of any adverse action. (*Id.* at 11.) Defendants further argue that UT is not a named defendant, and Plaintiff has not alleged that any of the named defendants created this purported speech policy or actually enforced it against Plaintiff. (*Id.*)

In response, Plaintiff contends that he has sufficiently alleged facts which show that UT has an unwritten speech code or practice that forbids his public speech. (Dkt. # 130 at 16.) Additionally, Plaintiff asserts that he has alleged facts that Defendants enforced this speech code or practice against him in this case. (*Id.* at 21.)

Plaintiff appears to allege both a facial and as-applied challenge to UT's alleged unwritten speech code or practice.[5] (Dkt. # 126 at 29.) In other words, Plaintiff appears to allege a facial challenge to an unwritten speech code or practice, and an as-applied challenge to the manner in which Defendants "applied" the alleged unwritten speech code or practice to Lowery. (*Id.*) *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (noting that, in contrast to an as-applied challenge, a "facial challenge means a claim that a law [or policy] is invalid *in toto*, and therefore incapable of any valid application"). "Although litigants are permitted to raise both as-applied and facial challenges, the lawfulness of the particular application of the law should ordinarily be decided first." *Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020).

To support these allegations, Plaintiff's amended complaint alleges that "UT maintains an unwritten speech

5. Plaintiff also apparently alleges a viewpoint discrimination claim, although only specifically references such in passing in his response to the motion to dismiss. (*See* Dkt. # 130 at 20.) To the extent, however, that this is a separate claim from his as-applied challenge, the viewpoint discrimination claim fails for the same reasons discussed below.

code or practice that allows for administrators to counsel or discipline faculty for 'uncivil' or 'rude' speech," but those terms "are subjective and not defined in writing or limited by objective criteria and invite UT administrators to apply their own biases to determine when a faculty member has said something that is 'uncivil' or 'rude.'" (Dkt. # 126 at 30.) As applied to Plaintiff, he alleges that the "unwritten speech code or practice" forbids faculty member like himself "from advocating that donors stop donating to UT or that elected officials defund UT as a way of advocating for policy changes at UT." (*Id.*) Plaintiff contends that the result of this unwritten policy "allows administrators to label such speech as 'disruptive to university operations' and amounts to a ban on calling for a boycott of donations to UT." (*Id.*)

Furthermore, Plaintiff alleges that UT's "unwritten speech code or practice" fails to "sufficiently cabin official discretion and thereby invites selective enforcement against disfavored viewpoints or speakers." (Dkt. # 126 at 30.) Plaintiff thereafter cites examples of the conduct of other UT faculty members "expressing leftwing views" who "are not asked to tone-down their tweets or make them more civil and less rude." (*Id.*) As applied to him, Plaintiff contends that this unwritten speech policy was enforced against him because "it was embarrassing to [Defendants] and others in the UT administration and also because they feared the possibility of elected officials or the public scrutinizing their behavior." (*Id.*)

First, to the extent that Plaintiff's claim is essentially a first amendment retaliation claim, it fails for lack of any

adverse action as described above. Plaintiff's allegations that "Defendants retaliated against [him] for his protected speech by seeking to have him 'counseled' over his speech, labeling his speech as 'uncivil' and 'disruptive,' threatening to reduce [his] pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, labeling him, requesting that his speech be placed under police surveillance, or otherwise disciplining him," (Dkt. # 126 at 31), are not sufficient adverse employment actions in the Fifth Circuit to support a First Amendment retaliation claim. *See Foley*, 355 F.3d at 341; *Breaux*, 205 F.3d at 157.

To the extent the claim can be understood as alleging both as-applied and facial challenges, it is unclear from the pleadings exactly what standard of review Plaintiff relies on for this claim. Even if Plaintiff has properly alleged the existence of an unwritten speech code or practice as cited above, and which the Court will take Plaintiff's allegations as true at this stage of the proceedings, he has failed to adequately allege this claim.

Regarding Plaintiff's as-applied challenge, the Fifth Circuit has held that to establish a § 1983 First Amendment right to free speech claim brought by a public university professor, he must show that: (1) he was "disciplined or fired for speech that is a matter of public concern," and (2) his "interest in the speech outweighed the university's interest in regulating the speech." *Buchanan*, 919 F.3d at 853 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Again, Plaintiff has failed to sufficiently allege that he was disciplined or terminated pursuant to either his speech or the University's alleged

unwritten policy prohibiting his speech. As addressed above, Plaintiff has alleged that there were various threats made to him regarding his speech, but not that he was actually disciplined for such, especially where the record demonstrates that Plaintiff was reappointed to his position at the Salem Center for another one-year term in August 2023, and that he received a pay raise at the beginning of both the 2022-23 and the 2023-24 school terms. (*See* Dkt. # 51 at 30 n.4.) *Cf. Hiers v. Bd. of Regents of the Univ. of N. Tex. Sys.*, No. 4:20-CV-321-SDJ, 2022 WL 748502 (E.D. Tex. Mar. 11, 2022) (determining plaintiff properly pled elements to sustain as-applied challenge to "Misconduct Policy" where he was terminated after his speech); *Jackson*, 2022 WL 179277, at *17 (determining plaintiff properly pled elements of "unconstitutional stifling of speech" where professor was "de facto" removed from journal in which he was a founding member following his protected speech in a journal symposium).

Regarding a facial challenge to the alleged unwritten policy, Plaintiff has not clearly alleged such. To the extent the Court can interpret the claim as an overbreadth constitutional challenge, a plaintiff who invokes the overbreadth doctrine is claiming that a statute, ordinance, or policy "is facially invalid" because it "prohibits a substantial amount of speech."[6] *United States v. Williams*,

6. Generally, a court should "proceed to an overbreadth issue" only if "it is determined that the statute would be valid as applied." *Serafine v. Branaman*, 810 F.3d 354, 362-63 (5th Cir. 2016). Here, however the Court analyzes Plaintiff's overbreadth claim out of an abundance of caution because it is unclear exactly what type of challenge he is asserting.

553 U.S. 285, 292 (2008). Such challenges "are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the [policy] from chilling the First Amendment rights of other parties not before the Court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984).

The overbreadth doctrine is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). It is "ordinarily more difficult to resolve" than an as-applied challenge because it "requires consideration of many more applications than those immediately before the court." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989). A policy may be facially invalidated based on the overbreadth doctrine only if "a substantial number of its applications are unconstitutional, judged in relation to the [policy's] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). The litigant challenging the policy must show "a realistic danger that the [policy] itself will significantly compromise recognized First Amendment protections of parties not before the court." *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 762 (5th Cir. 2008). Such facial challenges should be granted "sparingly and only as a last resort." *Id.* (quoting *Broadrick*, 413 U.S. at 613).

Here, Plaintiff has failed to state a plausible claim that UT's alleged unwritten speech code or practice is facially unconstitutional based on overbreadth. Plaintiff contends the policy "does not sufficiently cabin official discretion and thereby invites selective enforcement against disfavored viewpoints or speakers." (Dkt. # 126

at 30.) Plaintiff fails to sufficiently allege that the so-called unwritten policy is overbroad, only that it is selectively enforced. In other words, Plaintiff does not take issue so much with an unwritten speech code or practice, only that it was not fairly applied to him which the Court has already considered above in the as-applied challenge.

Accordingly, because Plaintiff has not sufficiently alleged a facial or as-applied First Amendment challenge to any unwritten speech code or practice, the Court will dismiss this claim without prejudice.[7]

3. Conclusion

Based on the foregoing, the Court will **GRANT** Defendants' motion to dismiss Plaintiff's first amended complaint. (Dkt. # 129.) Plaintiff has failed to state claims upon which relief can be granted.

II. Motion for Partial Summary Judgment

Defendants' motion for partial summary judgment seeks judgment on Plaintiff's chilled speech claim in Count One to the extent that it is cognizable. (Dkt. # 132.) As discussed, the Court has found that Plaintiff failed to properly allege that he suffered any adverse employment action to sustain such a claim. However, even if Plaintiff

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7. Because the Court finds Plaintiff's has failed to sufficiently allege this claim, the Court will decline to consider the merits of Defendants' alternative argument that Plaintiff has failed to name UT as a defendant. (Dkt. # 129 at 14.)

could make out a plausible claim, he would not survive summary judgment.

Defendants move for summary judgment on Plaintiff's self-chill claim on the basis that he has no evidence of any adverse employment action, thus lacking the elements of a cognizable chilled-speech claim. (Dkt. # 132 at 11.) Defendants further maintain that Plaintiff has not alleged, nor has any evidence that any defendant threatened him with adverse employment action if he continued to speak. (*Id.* at 13.)

A. Applicable Law

"Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Vann v. City of Southaven*, 884 F.3d 307, 309 (5th Cir. 2018) (citations omitted); *see also* Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Bennett v. Hartford Ins. Co. of Midwest*, 890 F.3d 597, 604 (5th Cir. 2018) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Nola Spice Designs, LLC v. Haydel Enter., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"Where the non-movant bears the burden of proof at trial, 'the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating . . . that there is an issue of material fact warranting trial.'" *Kim v. Hospira, Inc.*, 709 F. App'x 287, 288 (5th Cir. 2018) (quoting *Nola Spice Designs*, 783 F.3d at 536). While the movant must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 (5th Cir. 2017) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1076 n.16 (5th Cir. 1994)). A fact is material if it "might affect the outcome of the suit." *Thomas v. Tregre*, 913 F.3d 458, 462 (5th Cir. 2019) (citing *Anderson*, 477 U.S. at 248).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Jones v. Anderson*, 721 F. App'x 333, 335 (5th Cir. 2018) (quoting *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010)). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Infante v. Law Office of Joseph Onwuteaka, P.C.*, 735 F. App'x 839, 843 (5th Cir. 2018) (quoting *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014)). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *McCarty v. Hillstone Rest. Grp., Inc.*, 864 F.3d 354, 357 (5th Cir. 2017) (quoting *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)). In deciding a summary judgment motion, the court draws

all reasonable inferences in the light most favorable to the nonmoving party. *Wease v. Ocwen Loan Servicing, LLC*, 915 F.3d 987, 992 (5th Cir. 2019).

Additionally, at the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. *See* Fed. R. Civ. P. 56(c); *Lee v. Offshore Logistical & Transp., LLC*, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *United States v. Renda Marine, Inc.*, 667 F.3d 651, 655 (5th Cir. 2012) (quoting *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003)).

B. Analysis

As stated above, "[t]o establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action."[8] *Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016).

8. Plaintiff again encourages the Court to use the *Keenan* test discussed above to evaluate this claim. (Dkt. # 134 at 16.) For the reasons above, the Court declines to do so.

Again, Defendants challenge the first element—whether Plaintiff has provided sufficient evidence that he suffered an adverse employment action. Adverse employment actions are "discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir.), *cert. denied*, 531 U.S. 816 (2000). The Fifth Circuit has pointedly "declined to expand the list of actionable actions," noting that "some things are not actionable even though they have the effect of chilling the exercise of free speech." *Id.* Among the type of actions held by the Fifth Circuit not to be adverse employment actions are mere accusations or criticism, investigations, psychological testing, false accusations, and polygraph examinations that do not have adverse results for the plaintiff. *Id.* at 157-58. Importantly, verbal threats of termination and criticism have been held not to rise to the level of an adverse employment action. *See id.* at 159-60 (threats of termination alone do not constitute an adverse employment action); *Chandler v. La Quinta Inns, Inc.*, 2008 WL 280880 at * 3 (5th Cir. Feb. 1, 2008) (threat of termination did not amount to constructive discharge or adverse action). "Some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable." *Id.* at 159.

Regarding academic settings, the Fifth Circuit has repeated on many occasions that decisions "concerning teaching assignments, pay increases, administrative matters, and departmental procedures" are not the kinds of adverse actions that "rise to the level of a constitutional deprivation." *Dorsett v. Bd. of Trs. for State Colls. &*

Univs., 940 F.2d 121, 123 (5th Cir. 1991); *see also Oller v. Roussel*, 609 F. App'x 770, 773 (5th Cir. Apr. 7, 2015).

Plaintiff contends that UT "threatened to harm in ways that qualify as adverse employment actions under Fifth Circuit precedent." (Dkt. # 134 at 20.) For instance, Plaintiff asserts that his evidence shows that "UT leaders threatened to discipline him in ways equivalent to a demotion and a formal reprimand," including by threatening to cancel or refuse to renew his position as a Senior Scholar at the Salem Center, "potentially costing him a $20,000 stipend." (*Id.* at 20-21.) Plaintiff also cites evidence that he is in danger of losing his position at the Salem Center's Research Lab, which would "decrease his prestige and academic freedom, as well as deny him opportunities to publish research that would advance his career." (*Id.* at 21.) Plaintiff argues that removal from the Salem Center would therefore amount to a demotion.

Additionally, Plaintiff asserts that he received a formal reprimand when Defendants sought to "counsel" him and supported an investigation by UT police. (Dkt. # 134 at 21.) According to Plaintiff, the counseling "served as a pre-disciplinary warning that harsh consequences would come later if Lowery did not alter his speech." (*Id.* at 21-22.) Plaintiff also contends that Titman talked to him about his "rude and potentially dangerous" speech and because Titman "played a central role in Lowery's performance reviews and decisions on pay increases . . . [o]nly a fool would ignore these warnings." (*Id.* at 22.) Plaintiff argues that all of these actions "shows that UT threatened him with punishments" which would "constitute adverse employment actions if carried out." (*Id.*)

Unfortunately, despite any evidence that the conversations and actions above occurred, Plaintiff's *fears* that he would be disciplined in ways that would amount to a demotion and formal reprimand are not actionable adverse employment actions in the Fifth Circuit, partially since there is little if any evidence beyond Plaintiff's own perceptions, that any such action took place. Plaintiff has not presented sufficient evidence that he suffered any "serious, objective, and tangible harm," amounting to a "change in or loss of job responsibilities," nor was denied a transfer. *See Serna v. City of San Antonio*, 244 F.3d 479, 482-83 (5th Cir. 2001); *Burnside v. Kaelin*, 773 F.3d 624, 627 (5th Cir. 2014); *Thompson v. City of Waco*, 764 F.3d 500, 504 (5th Cir. 2014); *Alvarado v. Tex. Rangers*, 492 F.3d 605, 614 (5th Cir. 2007). Indeed, the Fifth Circuit takes a "narrow view of what constitutes an adverse employment action[.]" *Breaux*, 205 F.3d at 157. Even if UT's actions here are unpleasant, the Fifth Circuit does not consider them adverse employment actions. *See id.* at 157-58 (observing that Fifth Circuit has held, *inter alia*, that false accusations, criticism, and investigations are not adverse employment actions); *see also Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 555 (5th Cir. 1997) ("Not every negative employment decision or event is an adverse employment action that can give rise to a discrimination or retaliation cause of action under 1983."). And, "even the capacity of an action to stigmatize an employee is inadequate to make it one." *Ellis v. Crawford*, No. 3-03-CV-2416-D, 2005 WL 2005 WL 525406, at *27-28 (N.D. Tex. Mar. 3, 2005) (citing *Breaux*, 205 F.3d at 158 n.14) ("Stigma by itself, without an impact on one's employment, does not constitute an adverse employment

action."); *see also Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995).

"Instead, to qualify as an adverse employment action that will support a First Amendment retaliation claim, the act taken must alter an important condition of employment, result in the denial of an employment benefit, or have a negative consequence on the plaintiff's employment." *Ellis*, 2005 WL 2005 WL 525406, at *8 (citing *Breaux*, 205 F.3d at 159 & n.16 ("Some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable."")). The retaliatory act must also be more than a trivial one. *See Sharp v. City of Hous.*, 164 F.3d 923, 933 (5th Cir. 1999) (recognizing that, "[a]lthough the Supreme Court has intimated that the First Amendment protects against trivial acts of retaliation, this court has required something more than the trivial[.]"). "It must be equivalent to a discharge, demotion, refusal to hire, refusal to promote, or reprimand in its seriousness, causing 'some serious, objective, and tangible harm[.]'" *Ellis*, 2005 WL 525406, at *8 (quoting *Serna*, 244 F.3d at 482-83). Plaintiff has not adequately alleged, nor provided sufficient evidence, that any of these adverse actions have occurred, especially where the evidence demonstrates that Plaintiff was reappointed to his position at the Salem Center for another one-year term in August 2023, and that he received a pay raise at the beginning of both the 2022-23 and the 2023-24 school terms. Nor is there any evidence that an adverse action has been taken against him since that time. (*See* Dkt. # 51 at 30 n.4.)

After considering the record in this case, even if Plaintiff has alleged a plausible claim in his first count, the Court concludes that Plaintiff has failed to present sufficient evidence that he suffered any adverse action as recognized in the Fifth Circuit and the claim will be dismissed. The Court therefore **GRANTS** Defendants' Motion for Partial Summary Judgment. And, although Plaintiff requests additional fact discovered be allowed—specifically, that he be allowed to take the deposition of President Hartzell—this would still not produce sufficient evidence to survive summary judgment that an adverse employment action befell Plaintiff.[9] Thus, the Court will **DENY** Plaintiff's motion to defer consideration of Defendants' motion for partial summary judgment (Dkt. # 135) and **DENY AS MOOT** Plaintiff's Motion to Dissolve Protective Order (Dkt. # 140).

CONCLUSION

Based on the foregoing, the Court will **GRANT** Defendants' Motion to Dismiss Amended Complaint (Dkt. # 129), **GRANT** Defendants' Motion for Partial Summary Judgment (Dkt. # 132), **DENY** Plaintiff's Motion to Defer Consideration of Defendants' Motion for Partial Summary

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9. This Court is compelled to follow Fifth Circuit precedent. However, this Court's order should not be read as sanctioning any of the Defendants' actions in this matter. While Plaintiff may have been zealous in his speech and writings, in the context of a world-class university like UT, different opinions should be welcomed or at least tolerated by those in authority, no matter that they are uncomfortable, so long as they do not incite violence or disrupt the school's ability to function as a teaching institution.

Judgment (Dkt. # 135) and **DENY AS MOOT** Plaintiff's Motion to Dissolve Protective Order (Dkt. # 140). The Clerk's Office is **INSTRUCTED** to **ENTER JUDGMENT** and **CLOSE THE CASE**.

IT IS SO ORDERED.

DATED: Austin, Texas, October 2, 2024.

s/ David Alan Ezra
David Alan Ezra
Senior United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 9, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-50879

RICHARD LOWERY,

Plaintiff-Appellant,

versus

LILLIAN MILLS, IN HER OFFICIAL CAPACITY AS DEAN OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS AT AUSTIN; ETHAN BURRIS, IN HIS OFFICIAL CAPACITY AS SENIOR ASSOCIATE DEAN FOR ACADEMIC AFFAIRS OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN; CLEMENS SIALM, IN HIS OFFICIAL CAPACITY AS FINANCE DEPARTMENT CHAIR FOR THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN; JAMES E. DAVIS, IN HIS OFFICIAL CAPACITY AS INTERIM PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN,

Defendants-Appellees.

Filed January 9, 2026

Appendix D

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-129

ON PETITION FOR REHEARING EN BANC

Before KING, SMITH, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.*

* Judges Richman and Ho are recused and did not participate in the consideration of rehearing.