

No. 25-927

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**In the Supreme Court of the United States**

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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 SI-ALM, 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.

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

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**BRIEF OF FIRST AMENDMENT SCHOLARS AS AMICI  
CURIAE SUPPORTING PETITIONER**

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\* Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief. Under this Court’s Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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#### SUMMARY OF ARGUMENT

The suppression of constitutionally protected speech violates the First Amendment. A speaker need not be punished to be able to state a cause of action if the government has suppressed or threatens to suppress his or her speech through other means. This Court, across decades, and in a range of contexts, repeatedly has reaffirmed that principle. It has done so in cases affirming that a party may challenge a criminal statute penalizing speech without first incurring that punishment, *see Steffel v. Thompson*, 415 U.S. 452 (1974); in cases addressing efforts by government officials to suppress disfavored speech by issuing coercive threats, *see Nat’l Rifle Ass’n v. Vullo*, 602 U.S. 175 (2024); and in numerous other cases where government action risked deterring individuals from engaging in protected free expression, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), or association, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The Fifth Circuit turns that principle on its head, requiring that public employees be subjected to a “completed” adverse employment decision—such as a formal discharge or demotion—before those employees may state a claim for retaliation on the basis of protected

speech. The Fifth Circuit’s rule not only contravenes long-established doctrine and is an outlier among decisions of the Courts of Appeals; it serves as an invitation to censorship of disfavored speech, insulating state actors whose threats actually succeed in silencing speech.

This Court should grant certiorari and correct the Fifth Circuit’s erroneous standard governing when a public employee may bring a claim for First Amendment retaliation.

### ARGUMENT

The Fifth Circuit’s rule conflicts with decades of precedent from this Court. Public employees in the Fifth Circuit may state a claim for retaliation based on efforts to stifle their protected speech *only* if they are subjected to “discharges, demotions, refusals to hire, refusals to promote, and reprimands.” Pet.App.22a (quoting *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000)). Threats—no matter how coercive, no matter how effective—are categorically excluded as a basis for stating a claim.

That rule ignores the broad span of decisions from this Court holding a party need not be subjected to punishment in order to bring a First Amendment claim and that governmental threats that silence or risk chilling speech are actionable. This Court has made that clear through the pre-enforcement challenge doctrine, holding that a speaker need not first suffer punishment for exercising his rights in order to challenge government action that chills his speech, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); through this Court’s teachings 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,” *Laird v. Tatum*, 408 U.S. 1, 11 (1972); and through this Court’s holdings that government officials may not wield their authority to coerce conformity with their preferred viewpoints, *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175 (2024).

The Fifth Circuit’s rule also conflicts with common sense. The First Amendment does not only protect those employees who are brave enough to speak and risk adverse employment actions; it equally protects those who are effectively silenced by the threat of such adverse action. As reflected in the decisions of ten circuits and this Court’s precedent, a public employee *threatened* with missing “considerable increases in pay and job satisfaction attendant to promotions,” loss of a valued position, or other actions, can be deterred from speaking on matters of public concern—and such deterrence can state a constitutional injury. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990); *see also, e.g., Bennie v. Munn*, 822 F.3d 392, 399 (8th Cir. 2016).

The Fifth Circuit’s standard rewards censorship by insulating government employers who successfully silence their employees through threats, such that the discipline never need be carried out. Threats that succeed do not require subsequent punishment and thus will never face a legal challenge. Such a rule inverts this Court’s expansive protection for speech on matters of public concern and repeated admonitions against threats that chill speech. The Fifth Circuit’s rule also conflicts with the law in nearly every other Circuit.

**I. The First Amendment Protects Against the Suppression of Speech Whether or Not Due to Formal Discipline**

The First Amendment prohibits government actions that seek to suppress protected speech even when those actions fall short of formal punishment. For decades, this Court has reiterated a fundamental premise that what the government may not command “directly,” it also may not accomplish through “indirect[]” pressure, such as “coerc[ive]” threats. *Vullo*, 602 U.S. at 190 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67–69 (1963)).

In various contexts, this Court has held that a speaker need not wait to be punished to bring suit for First Amendment violations. In *Steffel v. Thompson*, 415 U.S. 452 (1974), this Court held that a protestor, who feared prosecution for the distribution of anti-war handbills, need not “first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Id.* at 459. In permitting the petitioner to proceed with a preemptive lawsuit challenging a prosecution on First Amendment grounds, this Court explained that it need not “place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity.” *Id.* at 462.

This Court has confirmed that principle repeatedly, explaining that individuals facing “a credible threat of prosecution” for “engag[ing] in” arguably protected conduct, *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979), need not wait for “an actual arrest, prosecution, or other enforcement action . . . to challeng[e] the” suppression of speech, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). When it comes to speech, a court may step in when government action

“chills potential speech before it happens.” *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 468 (1995). This Court has therefore allowed pre-enforcement lawsuits because of the “danger . . . of self-censorship; a harm that can be realized even without an actual prosecution.” *Virginia v. American Booksellers Ass’n*, 484 U.S. 383, 393 (1988).

The same principle can be found in this Court’s decisions striking down government action that chilled free speech and free association. For example, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451 (1958), this Court addressed an Alabama statute compelling the NAACP to reveal “the names and addresses of all its Alabama members and agents.” *Id.* The NAACP feared Alabama’s production order “abridge[d] the rights of its rank-and-file members to engage in lawful association in support of their common beliefs” even though Alabama’s demand would “not [have] directly suppress[ed] association.” *Id.* at 460. This Court told Alabama it could do no such thing.

That Alabama had “taken no direct action . . . to restrict the right of [the NAACP’s] members to associate freely” did not remove its production order from First Amendment scrutiny. *Id.* at 461. Alabama’s production order “may [have] induce[d] members to withdraw from the association and dissuade[d] others from joining it because of fear of exposure of their beliefs,” which would have been a “substantial restraint upon the exercise . . . of their right to freedom of association.” *Id.* at 462–63. Accordingly, even if a “governmental action challenged may appear to be totally unrelated to protected liberties,” this Court has emphasized that the action may unconstitutionally chill “indispensable liberties.” *Id.* at 461.

The next year, in *Smith v. California*, 361 U.S. 147 (1959), this Court confronted whether California’s strict criminal liability for booksellers who sold obscene material unconstitutionally chilled speech. *Id.* at 148-49. Although obscene materials were not constitutionally protected, the nature of the strict liability scheme threatened to deter booksellers from offering even protected material out of fear of prosecution. This Court reiterated that “legal devices . . . cannot be applied in settings where they have the *collateral* effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.” *Id.* at 150–51 (emphasis added). Because California’s strict-liability ban on obscene writings could make booksellers more “timid[]” in their selection of non-obscene books to display in their shops, this Court concluded that the California law unconstitutionally “compelled” “self-censorship.” *Id.* at 153–54.

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court confronted a different type of government action that threatened to chill speech through threats of prosecution. A Rhode Island commission had a scheme of “informal censorship” under which officials sent threatening notices to book distributors, warning of potential legal sanctions if they continued carrying disfavored publications. *Id.* at 67. There was no formal ban and no formal administrative action. The State therefore argued that there could be no constitutional violation “because [the commission] d[id] not regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d] them of their legal rights.” *Id.* at 66. But this Court “look[ed] through forms to the substance” and held that the commission’s threats alone suppressed speech and violated the Constitution. *Id.* at 67–68. Rhode Island’s contention that it could not violate the First Amendment rights of book distributors through “informal” action was “untenable.” *Id.*

at 66-67. The commission’s “informal censorship” had the effect of suppressing speech and violated the First Amendment. *Id.* at 71.

This Court reaffirmed that line of authority just two years ago when it unanimously held in *National Rifle Association v. Vullo*, 602 U.S. 175 (2024) that a government official violates the First Amendment by making “coercive threats aimed at punishing or suppressing disfavored speech.” *Id.* at 197. Maria Vullo, the Superintendent of the New York Department of Financial Services, threatened legal sanctions against insurance companies her office regulated unless they cut off their business relationships with the National Rifle Association, allegedly to “help her stifle the NRA’s pro-gun advocacy.” *Id.* at 180–81, 183–85. The insurance companies acceded and entered into consent decrees binding them to end certain business relationships with the NRA. *Id.* at 185. The NRA sued. The Court had no trouble deciding that Vullo could not “use the power of the State to punish or suppress disfavored expression.” *Id.* at 188.

In other words, “threat[s] . . . and other means of coercion . . . ‘to achieve the suppression’ of disfavored speech violates the First Amendment.” *Id.* at 180 (quoting *Bantam Books*, 372 U.S. at 67). The Court emphasized that it did “not break new ground in deciding this case.” *Id.* at 197. Rather, it simply “reaffirm[ed] the general principle from *Bantam Books* that where, as here, the complaint plausibly alleges coercive threats aimed at punishing or suppressing disfavored speech, the plaintiff states a First Amendment claim.” *Id.*

It is a basic principle. And it is fundamental. Coercive threats, no less than direct punishment, can endanger free speech. A “fixed star in our constitutional constellation . . . is that no official . . . can prescribe what shall be

orthodox” by unduly controlling speech. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). And “it is perilous to permit” government officials to try to create that orthodoxy through direct action and coercive threats alike, each of which would improperly cause speakers to self-censor. *United States v. Alvarez*, 567 U.S. 709, 752 (2012) (Alito, J., dissenting); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. Rev. 685, 693 (1978). Simply put, “[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff’s First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant’s direct regulatory or decision making authority over the plaintiff, or in some less-direct form,” and “such a threat is actionable and thus can be enjoined even if it turns out to be empty—the victim ignores it, and the threatener folds his tent.” *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (Posner, J.). Where that threat actually silences the speaker, the violation is all the more pronounced.

## **II. The Fifth Circuit’s Rule Improperly Chills Free Expression**

The Fifth Circuit has adopted a standard that, by the Circuit’s own reckoning, permits government employers to chill constitutionally protected speech on matters of public concern. It also provides a roadmap for would-be censors to silence public employees without legal consequence.

### **A. The Fifth Circuit’s Rule Inverts Established First Amendment Principles**

The constitutional deficiency in the Fifth Circuit’s approach is apparent from the face of its opinions articulating its “completed” employment action test. The Fifth

Circuit’s rule disregards this Court’s precedent, discussed above, that the suppression of speech through threats can violate the First Amendment no less than direct punishment. And it further disregards this Court’s consistent precedent on the importance of protecting speech on matters of public concern.

As in *Bantam Books*, Professor Lowery alleges here that government officials (this time from his public university) “tr[ie]d to silence him” through threats, stopping short of discipline. Pet.App.2a. In the face of those threats, Professor Lowery alleges that he “self-censored as a form of self-preservation,” as the Fifth Circuit itself recognized. Pet.App.3a, 13a. Yet, contrary to *Bantam Books*, the Fifth Circuit elevated form over substance. It held that Professor Lowery could not state a claim absent a “completed” employment action—no matter the severity of the threats allegedly faced by Professor Lowery and the effect they had on his exercise of free expression. Pet.App.18a, 23a.

Indeed, in ruling that Professor Lowery could not state a claim, the Fifth Circuit recognized that its “completed” action requirement will lead to the chilling of speech, expressly noting that the Circuit has “long declined to expand the list of actionable items” beyond completed actions, even though “they have the effect of chilling the exercise of free speech.” Pet.App.23a (quoting *Breaux* 205 F.3d at 157). While not every incidental chilling of speech may rise to a constitutional violation, the Fifth Circuit’s test surely goes too far by precluding public employees from raising an entire category of First Amendment claims simply because the suppression occurred by threat rather than formal discipline.

Under the Fifth Circuit’s approach, “[a]dverse employment actions are discharges, demotions, refusals to

hire, refusals to promote, and reprimands.” *Breaux*, 205 F.3d at 157 (citation omitted). “[O]ral threats or abusive remarks,” “investigations,” “criticism,” and other forms of coercive pressure—no matter how severe—cannot qualify. *Id.* at 157–58. In this case, Professor Lowery alleges that he spoke out on a number of issues of public concern. Pet.Br.12. In retaliation, he alleges, University of Texas officials “threaten[ed] to reduce [his] pay” and his “research opportunities,” and university officials even “request[ed] that his speech be placed under police surveillance.” Pet.App.22a–23a. But the Fifth Circuit’s test barred Professor Lowery’s lawsuit because there was not a “completed” employment action, even if the University’s alleged actions “would dissuade a reasonable employee from speaking freely.” Pet.App.19a; *see also* Pet.App.15a (recognizing that “[t]aking Lowery’s allegations as true, as we must at this stage of the litigation, Lowery’s decision to self-censor is reasonable.”).

The Fifth Circuit justifies its admittedly “narrow” view of protected speech for public employees by arguing that its approach “ensure[s] that § 1983 does not enmesh federal courts in ‘relatively trivial matters.’” *Breaux*, 205 F.3d at 157 (quoting *Dorsett v. Bd. of Trs. for State Colls. & Universities*, 940 F.2d 121, 123 (5th Cir. 1991)). Yet there is nothing “trivial” about the suppression of speech on matters of public concern, whether it be accomplished through coercive threats or completed adverse actions.

In decision after decision, this Court has emphasized that the free flow of ideas on issues of public concern is essential—and, for that reason, the protection of that expression must be expansive. There is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As this

Court has explained, “[t]he freedom of thought and speech is ‘indispensable to the discovery and spread of political truth.’” *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

This Court repeatedly has emphasized that speech on “matters of public concern” receives “*special protection*” because it lies “at the heart of the First Amendment.” *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (quotations omitted) (emphasis added). That commitment exists because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Id.* at 452 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). And the very reason for elevating speech on public issues to the “highest rung” of “First Amendment values,” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) (quoting *Phelps*, 562 U.S. at 452), is to prevent citizens from “self-censor[ing] on matters of public import,” *Phelps*, 562 U.S. at 452 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (opinion of Powell, J.)).

Instead of elevating the importance of speech expressing views on a churning political debate, the Fifth Circuit’s test shrugs off the serious risk of chilling in the name of judicial expediency.

#### **B. The Fifth Circuit’s Standard Provides a Roadmap for Government Censorship**

The Fifth Circuit’s rule furnishes a how-to guide for government officials seeking to silence criticism: simply threaten employees with significant enough adverse consequences to deter them from speaking and you will never have to make good on those threats and thus face a retaliation claim. *See* Pet.App.59a (citing *Breaux*, 205 F.3d at 160). Rather than ensuring the “breathing space” that

First Amendment freedoms need . . . to survive,” *N.Y. Times*, 376 U.S. at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)), the Fifth Circuit’s standard creates a zone of permissible censorship.

The Fifth Circuit’s rule also produces a perverse result: where efforts to censor employees succeed and effectively silence speech, no cause of action will lie. *See* Pet.App.15a, 59a. Only those who are willing to continue speaking until the government carries out its threatened punishment can seek relief. Put differently, the more effective a government employer is at silencing speech through threats, the more insulated that employer is from liability.

But as this Court recognized in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), it is simply “not credible” to argue that there is no First Amendment violation unless government employment decisions are “punitive,” or “adversely affect the terms of employment.” *Id.* at 73. There, this Court confronted a political patronage system in which the Governor of Illinois conditioned hiring, promotions, transfers, and recalls on support for the Republican Party. *Id.* at 65–67. The Seventh Circuit had proposed that only employment decisions amounting to the “substantial equivalent of a dismissal” could violate a public employee’s First Amendment rights. *Id.* at 75 (quotation omitted). This Court rejected that standard as “unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.” *Id.* (citations omitted).

The First Amendment prohibits efforts by government actors to stifle their employees’ speech through a range of pressures that coerce conformity, including

threats of losing “increases in pay and job satisfaction.” *Id.* at 73–74. Such harms, even though not termination or demotion, are “significant penalties . . . imposed for the exercise of rights guaranteed by the First Amendment.” *Id.* at 74. This Court recognized the coercive dynamic at work even in the absence of formal discipline: employees who found themselves “in dead-end positions due to their political backgrounds” would “feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder.” *Id.* at 73. Employees denied transfers would “feel a daily pressure” from their circumstances to capitulate. *Id.* This Court understood, in other words, that the threat of adverse consequences—not merely their consummation—is what drives self-censorship.

The concerns raised in *Rutan* map directly onto the Fifth Circuit’s standard. Like the Seventh Circuit test rejected in *Rutan*, the Fifth Circuit rule confines actionable retaliation to a closed list of completed employment actions: “discharges, demotions, refusals to hire, refusals to promote, and reprimands.” *Breaux*, 205 F.3d at 157. By categorically excluding threats and coercive pressure from the adverse-action inquiry, the Fifth Circuit has effectively reinstated the very test this Court found “unduly restrictive” over three decades ago.

In sum, the Fifth Circuit’s “completed” action requirement cannot be reconciled with this Court’s First Amendment jurisprudence. From *Bantam Books* to *Rutan* to *Vullo*, this Court consistently has held that the government need not deliver a final blow to violate the First Amendment; the threat of one can be enough. The Fifth Circuit’s standard inverts that principle, immunizing the most effective forms of censorship precisely because they

succeed in silencing speech before formal discipline is ever imposed. And it disregards this Court’s repeated insistence that speech on matters of public concern occupies the “highest rung” of First Amendment values. *Phelps*, 562 U.S. at 452.

### III. The Fifth Circuit’s Approach Is an Outlier

The Fifth Circuit has constructed a constitutional framework that is not only outside of this Court’s First Amendment jurisprudence, but an outlier among decisions of the Courts of Appeals. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits all have endorsed a functional framework that gauges the severity of governmental retaliation by its capacity to deter a speaker—not by whether a personnel file reflects a formal sanction. *See, e.g., Barton v. Clancy*, 632 F.3d 9, 29 (1st Cir. 2011); *Specht v. City of New York*, 15 F.4th 594, 604 (2d Cir. 2021); *McKee v. Hart*, 436 F.3d 165, 169 (3d Cir. 2006); *Snoeyenbos v. Curtis*, 60 F.4th 723, 730–31 (4th Cir. 2023); *Hill v. Lappin*, 630 F.3d 468, 475 (6th Cir. 2010); *Massey v. Johnson*, 457 F.3d 711, 720 (7th Cir. 2006); *Bennie v. Munn*, 822 F.3d 392, 399 (8th Cir. 2016); *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 779–80 (9th Cir. 2022); *Couch v. Bd. of Trs. of the Mem’l Hosp.*, 587 F.3d 1223, 1237–38 (10th Cir. 2009); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002).

More precisely, each of these circuits outright rejects the Fifth Circuit’s narrow interpretation of adverse actions in First Amendment cases. In the Ninth Circuit, “the mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect,” even when the threat is not “explicit.” *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th

Cir. 2009). Threats chill speech not because of “any negative actions eventually taken, but [because] the apprehension” causes the “recipient” to self-censor. *Id.* at 1271. Similarly, the Eighth Circuit has concluded that a “threat—not to mention the reality—of continued” retaliatory action can constitute a First Amendment violation. *Bennie*, 822 F.3d at 399 (quotations omitted). So too in the Fourth Circuit, where actionable retaliation includes “a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow.” *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000).

But it is not only threats that the Fifth Circuit would improperly exclude. “A campaign of informal harassment,” just as much as threats, “would support a First Amendment retaliation claim” in the First Circuit “if the alleged harassment would have . . . a chilling effect.” *Barton*, 632 at 29. The same goes in the Seventh Circuit where “harassment,” even if relatively minor, “just as much as a formal discharge, may be actionable if it is designed to deter a public employee’s free speech.” *Massey*, 457 F.3d at 720; *Mosely v. Bd. of Educ. of Chi.*, 434 F.3d 527, 534 (7th Cir. 2006). As the Sixth Circuit realizes, the key is not the type of adverse action, but whether the action, including a “threat[,] is capable of deterring a person of ordinary firmness from engaging in protected conduct.” *Lappin*, 630 F.3d at 474–75.

The flexibility that circuits deploy for assessing adverse action makes sense given the “kaleidoscopic array” of jobs with their “variety of circumstances” and “variety of perquisites.” *Bergeron v. Cabral*, 560 F.3d 1, 8 (1st Cir. 2009). It is self-evident that First Amendment rights cannot be protected if a whole array of retaliatory actions is excluded from judicial review just because those actions

are not part of a discrete list of adverse events the Fifth Circuit deemed to be bad enough. *Cf. Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1215–18 (1st Cir. 1989) (listing broad examples of adverse actions). And even the sole circuit whose precedent bears any resemblance to the Fifth Circuit’s approach—the Eleventh Circuit—has openly questioned the continuing vitality of its precedent, *Bell v. Sheriff of Broward Cnty.*, 6 F.4th 1374, 1377–78 & n.2 (11th Cir. 2021), and has warned that a verbal censure designed “to dissuade [a speaker] from exercising a constitutional right” will have “a tremendous chilling effect on the exercise of First Amendment rights,” *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1268–69 (11th Cir. 2004).

Outside of the Fifth Circuit, circuits nearly unanimously examine how a person of ordinary firmness would respond to threats, recognizing that chilling speech on matters of public concern diminishes the “uninhibited, robust, and wide-open” debate on which self-governance depends. *N.Y. Times*, 376 U.S. at 270. In contrast to the Fifth Circuit’s approach, those circuits’ standards reflect the principle that government action designed to suppress protected expression “strikes at the very heart of the First Amendment.” *Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994) (citation omitted).

The circuit split is mature, case-dispositive, and will not be resolved by further deliberation in the circuits. The proceedings below starkly illustrate the consequences of the Fifth Circuit’s outlier standard. Professor Lowery’s detailed allegations that university administrators orchestrated a coordinated campaign of threats to his salary, his research-center appointment, and his scholarly opportunities were deemed per se inadequate under the Fifth Circuit’s rigid taxonomy—even though the same

court acknowledged, in its Article III standing analysis, that the alleged conduct could prompt a “reasonable” speaker to fall silent. Pet.App.15a.

This Court’s intervention is needed to resolve the split and to restore coherence to the constitutional safeguards governing retaliatory suppression of protected speech. It should confirm what the overwhelming weight of circuit authority already recognizes. Government threats sufficient to deter a reasonable employee from speaking on matters of public concern are constitutionally actionable, whether or not they ripen into formal discipline.

#### CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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