

No. 25-927

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

RICHARD LOWERY,

*Petitioner,*

*v.*

LILLIAN MILLS, DEAN OF THE MCCOMBS SCHOOL OF  
BUSINESS AT THE UNIVERSITY OF TEXAS AT AUSTIN,  
ET AL.,

*Respondents.*

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*On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit*

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**BRIEF OF THE MANHATTAN INSTITUTE  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

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March 9, 2026

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**QUESTION PRESENTED**

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.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility.

This case interests *amicus* because MI is committed to the principles embodied in the First Amendment, particularly in higher education. Universities are disturbingly homogenous in their political viewpoints; those holding minority views already feel chastened. Public universities should not be allowed to add to that difficult situation by using threats to employees' status as a method of curtailing professors' speech. That diminishes the quality of higher education and the power of the First Amendment.

## SUMMARY OF ARGUMENT

The bedrock of higher education is free speech and open inquiry. In fact, it is hard to imagine a system of higher education worthy of the name that curtails or forbids free speech. By extension, a thriving climate of free speech and open enquiry in higher education contributes to the health of a democratic system.

Unfortunately, retaliatory tactics are often employed by university administrators against professors who say things the administrators don't like, and that sends a clear message to those with disfavored views: self-censor or face consequences. In ten circuits, the attempts to censor Professor Richard Lowery would

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<sup>1</sup> Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus*, its members, or its counsel funded its preparation or submission.

constitute an adverse employment action for purposes of his § 1983 claim. Not so in the Fifth Circuit. Administrators can and did reduce Prof. Lowery's access to research opportunities and threatened to reduce his pay. Prof. Lowery even found himself placed under police surveillance that was at least condoned by the administration. All of those actions fall short of formal discipline, which dynamic creates a perverse incentive for public employers: the more aggressive their threats—yet still falling short of formal employment actions—the more likely they are to successfully silence dissent without legal repercussions.

Universities are uniquely susceptible to this informal, but effective censorship for several reasons. *First*, ideas—both favored and disfavored—are central to the pursuit of truth, any university's core mission. Thus, universities encourage ideas to be spoken, but not necessarily all ideas. *Second*, university leaders have many proverbial carrots and sticks that fall short of a completed adverse employment action. Research grants, institutional affiliation, teaching schedules, administrative appointments, and other features of the university setting allow administrators to censor. *Third*, universities are often ideologically homogenous and thus can be hostile territory for those with heterodox opinions.

Accordingly, the burden of censorship can often fall on disfavored viewpoints in the current academic climate—which often means conservative views. Without this Court's intervention, the free speech rights of public employees will continue to depend on the geography of the circuit courts, a reality that is particularly destructive in the university context.

## ARGUMENT

### I. THE FIFTH CIRCUIT’S DIVERGENT APPROACH TO PUBLIC EMPLOYEES’ FIRST AMENDMENT RETALIATION CLAIMS UNCONSTITUTIONALLY CHILLS SPEECH

This Court has affirmed that academic freedom “is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Indeed, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet universities retaliate against professors who voice views the administration dislikes, which punishes the speaker and chills the speech of those who might otherwise support him.

Unfortunately, the Fifth Circuit’s standard for adverse employment action exposes public employees like Professor Richard Lowery to unconstitutional censorship. That court requires a completed adverse action before an employee can bring a retaliation claim. Threats—no matter how credible—are never enough. It is unsurprising that *ten other circuits* have abandoned this unconstitutional approach. This Court should clarify that the lower court’s approach inadequately protects public employees’ speech and ensure the uniform protection of speech rights nationwide.

#### A. The Fifth Circuit’s Standard for What Constitutes an Adverse Employment Action Violates the First Amendment.

This case exemplifies a grave misunderstanding of the adverse-employment-action standard. The basis of

this misunderstanding is *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000). Under well-defined § 1983 law, the *Breaux* court held that, to establish a retaliation-for-speech claim, the plaintiff must establish that he suffered an adverse employment decision. The court embraced a “narrow view of what constitutes an adverse employment action.” *Id.* at 157. In short, “[a]dverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands.” *Id.* (quoting *Pierce v. Texas Dep’t of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994)). Accusations, criticism, investigations, suspension without pay, psychological and polygraph testing, and false accusations are not sufficiently adverse for purposes of the Fifth Circuit’s approach.

Strikingly, the *Breaux* court readily acknowledged that this standard would chill the exercise of free speech. But, the court explained “some things are not actionable even though they have the effect of chilling the exercise of free speech.” *Breaux*, 205 F.3d at 157 (quoting *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998)). The circuit’s narrow view of an adverse employment action is motivated by pragmatic considerations. As *Breaux*’s author later explained, “[i]n the employment context, this court’s requirement of an adverse employment action serves the purpose of *weeding out* minor instances of retaliation.” *Keenan v. Tejada*, 290 F.3d 252, 258 n.4 (5th Cir. 2002) (Jones, J.) (emphasis added). The court simply did not want to “enmesh federal courts in ‘relatively trivial matters.’” *Breaux*, 205 F.3d at 157 (quoting *Dorsett v. Bd. of Trustees*, 940 F.2d 121, 123 (5th Cir. 1991)).

But administrative convenience cannot justify trampling constitutional rights. In the educational

context, the First Amendment's unique protections prevent forcing the choice that Prof. Lowery faced: self-censor or lose your job. Under the Fifth Circuit's approach, however, public employers can silence employees without legal reprisal. They can legally retaliate against whistleblowing employees so long as their actions fall short of an official reprimand, demotion, termination, transfer, or failure to promote or hire.

Yet "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows." *Cummings v. Missouri*, 71 U.S. 277, 325 (1867). The Fifth's Circuit's approach does not neutralize retaliatory intent, but rewards administrators who are sophisticated enough to punish dissent through mechanisms that fall below an actionable threshold. Without this Court's intervention, public employers will retain a panoply of tactics in their censorship toolbox to subdue and silence disfavored viewpoints.

**B. The Title VII Standard Embraced by Ten Other Circuits and Endorsed by This Court Better Protects Speech.**

Contrary to the fears expressed in *Breaux*, a more speech-protective standard for adverse employment actions would not be unworkable. Indeed, all but one other circuit have abandoned the requirement of a completed, formal disciplinary action. Pet. 7–10. Most circuits ask a variation of the question of whether the employer's actions would deter a person of ordinary firmness from exercising his constitutional right to speak. App.8a (collecting cases). This standard far predates the *Breaux* standard, see *Bart v. Telford*, 677 F.2d 622, 625 (6th Cir. 1982), and has been a functional, reasonable, and common-sense test to determine whether an employer's actions were sufficiently

bad to give rise to a § 1983 claim for First Amendment retaliation. The Fifth Circuit is a stubborn outlier.

Indeed, in the Title VII context, the Fifth Circuit applies the standard established by this Court in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006). The circuit has effectively applied this standard in the statutory context without getting embroiled in “trivial” and “minor” workplace “internecine strife.” App.27a. The lower court’s concern that a more speech-protective standard would open the floodgates of litigation belies its application in Title VII disputes.

In fact, the panel’s reaffirmation of *Breaux* sits uncomfortably with this Court’s decision in *Burlington Northern*. In the latter case, this Court held that, for purposes of the antiretaliation provision of Title VII, an adverse employment action would be met when “the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington N.*, 548 U.S. at 57. Here, as the panel admits, the University of Texas’s censorship of Prof. Lowery would meet that statutory standard. Nonetheless, the Fifth Circuit found the university’s actions to fall short of the standard in the First Amendment context. In essence, the Fifth Circuit’s standard privileges statutory rights over constitutional rights. As the panel below explained, *Burlington Northern* is merely “‘illuminating’ with respect to retaliation claims.” App.20a (quoting *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021)). The circuit’s “strong rule of orderliness” cannot justify such an incongruity and give license to justify constitutional violations.

To be sure, public employers have greater latitude to regulate employee speech than they have to regulate the speech of citizens generally. *Pickering v. Bd.*

*of Educ.*, 391 U.S. 563 (1968). But *Pickering* is about balancing employee/employer interests, not about whether a cause of action exists in the first place. And public employers' latitude is not limitless. Individuals do not relinquish their First Amendment rights by accepting public employment. *Id.* at 568. This is especially true in "a case involving speech related to scholarship or teaching." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). Here, Prof. Lowery's speech criticizing his public employer lies at the intersection of two areas of special concern for First Amendment purposes: the educational context and sociopolitical speech. Allowing public universities to silence unfavorable viewpoints under the pretext of efficient administration will further endanger the future of higher education.

## II. PUBLIC UNIVERSITIES ARE UNIQUELY SUSCEPTIBLE TO RETALIATORY ACTIONS

Discourse on university campuses is the paradigmatic example of speech "on matters of public concern." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). Universities educate future leaders and shape public opinion. It is no surprise that throughout our nation's history there have been repeated attempts to compel orthodoxy and silence dissent on university campuses. Public universities are not just any public employer, and protecting speech there is of paramount importance. Unfortunately, under the guise of institutional administration, universities have used a myriad of tools to silence dissenting voices. Such tactics have been extraordinarily successful, particularly as universities have become places of broad hegemony in political opinions.

### **A. UT–Austin’s Actions Are Part of a Broader Free Speech Problem in Higher Education.**

Given the centrality of freedom of expression in higher education, the Supreme Court has long recognized the importance of vibrant First Amendment protections on university campuses. This Court has emphatically declared: “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The need for free expression of ideas is perhaps no greater than on public college and university campuses. Yet, as has often been observed, free speech protections are not needed primarily to protect majority viewpoints. Majority opinions are much more likely to be preserved by the political process based on the simple premise that people don’t usually pass laws censoring themselves. Disfavored, minority speech benefits most from free speech protections. “[T]he point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). Indeed, “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Matal v. Tam*, 582 U.S. 218, 246 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

Moreover, the burden of the Fifth Circuit’s inadequate protection of speech does not fall on all views equally. It is felt most acutely by dissenting viewpoints. On public college and university campuses, dissenting viewpoints are often synonymous with a right-

leaning political orientation. One in three conservative academics and students have been disciplined or threatened with retaliatory action for sharing their views, and “75 percent of conservative academics in the social sciences and humanities in the U.S. and Britain say their departments are a hostile environment for their beliefs.” Eric Kaufmann, “We Have the Data to Prove It: Universities Are Discriminating Against Conservatives,” *Newsweek*, Mar. 3, 2021, <https://tinyurl.com/4wsawbyb>. There were 1,080 attempts to sanction university professors from 2000–2023. Komi Frey and Sean Stevens, *Scholars Under Fire: Attempts to Sanction Scholars from 2000 to 2022*, Foundation for Individual Rights and Expression (2023), <https://tinyurl.com/2a6fnvwu>. Nearly two-thirds of these incidents led to penalties for faculty, including 225 terminations. *Id.*

In higher education, liberals consistently outnumber conservatives, with, ratios in different surveys of 2:1 to as much as 82:1. Erin Shaw & Shiri Spitz Siddiqi, “How Politically Diverse Are University Faculty?”, *Heterodox Academy*, Feb. 25, 2026, <https://tinyurl.com/55jk66tj>. It’s thus unsurprising that self-censorship of conservative and libertarian views is so common. Certain academic disciplines, particularly the humanities and social sciences have fewer than five percent of scholars who identify as conservative. See Phillip W. Magness & David Waugh, *The Hyperpoliticization of Higher Ed: Trends in Faculty Political Ideology, 1969–Present*, 27 *The Indep. Rev.* No. 3, Winter 2022/23 (“[T]he humanities and social sciences have become monolithically left-leaning . . . conservatives are *practically nonexistent*.” (emphasis added)). Conservatives are being driven out of many parts of the academy. Those that stay often remain quiet.

The consequences of widespread self-censorship in higher education are dire. “To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.” *Sweezy*, 354 U.S. at 250. The chilling of speech affects students too. Although the political orientation of faculty members has shifted dramatically to the left, student views have not followed suit. *See, supra*, Magness & Waugh. Thus, a “widening political gap now exists between professors and the students they teach.” *Id.* at 359–60. Eighty-eight percent of students at prominent universities said that they had “pretended to hold more progressive views” so that they could “succeed socially or academically.” Kevin Wallsten, *College Students Are Self-Censoring to Fit In*, City Journal, Jan. 21, 2026. Ideological echo chambers are harmful not only for those silenced but for all students. If the minority view is right, the majority is deprived of the truth. If the minority view is wrong, the majority is deprived of a clearer perception of the truth. *See* John Stuart Mill, *On Liberty* (1859).

**B. The University Context Provides Many Opportunities for Retaliatory Action That Falls Short of the Fifth Circuit’s Standard.**

The university should be the apotheosis of the marketplace of ideas, a place where the First Amendment protections are at their zenith. This Court has repeatedly affirmed the importance of free speech on college campuses: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us.” *Keyishian*, 385 U.S. at 603. Academic freedom is a “special concern of the First Amendment.” *Id.* The Court has vigorously protected against government action in universities that risk a chilling effect upon the exercise of free speech rights

because “First Amendment freedoms need breathing space to survive.” *Id.* at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Since free expression is the lifeblood of the university, there are special concerns for free speech claims arising in the higher-education context.

This special concern is driven, in part, by a recognition that universities are places for speech that “deals with matters of public concern.” *Snyder*, 562 U.S. at 453. Indeed, “speech on public issues occupies the ‘highest rung of First Amendment values,’ and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

Prof. Lowery’s speech, like that of many faculty members, lies at the junction of two areas of “special concern” for the First Amendment: He is seeking to protect (1) his sociopolitical speech in (2) a campus setting. The Fifth Circuit’s standard for adverse employment actions fails to provide the “special protection” needed here. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 913–14 (2018) (quoting *Snyder*, 562 U.S. at 452).

Moreover, university officials have many options to censor faculty short of a completed, formal adverse employment action. They do not have to discharge, demote, fail to promote, or formally reprimand to silence unpopular voices. They can instead assign faculty heavier or less desirable teaching loads. They can exclude them from influential administrative assignments—such as governance, hiring, and curriculum committees—ensuring that their disfavored viewpoints are stifled. They can decline to provide research funding or laboratory space, or reduce the availability of research assistants. They can exclude faculty from

department colloquia and deny conference funding. UT–Austin used many of these tactics to silence Prof. Lowery. All should be judged under the reasonably-likely-to-deter standard used by ten circuits.

The Fifth Circuit panel glosses over these actions as mere “internecine strife.” The lower court blithely explains that the “First Amendment . . . does not require university administrators to be equally charitable to all their colleagues.” App.27a. The court “abjure[s] the opportunity to become the Federal Faculty Lounge Police.” App.31a. Such an attitude risks perpetuating the ideological echo chamber that public universities have become. Prof. Lowery and many other faculty members must endure many retaliatory threats to speak freely. Many stay quiet. Many leave. Our constitutional system does not and should not tolerate such an environment.

### CONCLUSION

For the foregoing reasons, and those stated by the petition, this court should grant certiorari.

Respectfully submitted,

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