No. 24-

IN THE

Supreme Court of the United States

KIERAN RAVI BHATTACHARYA,

Petitioner,

v.

JAMES MURRAY, JR., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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September 12, 2024

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QUESTIONS PRESENTED

Was Bhattacharya deprived of his Seventh Amendment right to a jury trial because the district court and Fourth Circuit Majority resolved disputed issues of material fact in favor of the University of Virginia ("UVA") in violation of Federal Rules of Civil Procedure 56, as interpreted by the Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)?

Was Bhattacharya deprived of his First Amendment Right to free speech because UVA suspended and ultimately expelled him from medical school based on the content of his speech at an extracurricular panel discussion regarding microaggression theory, his efforts to defend himself at a hastily convened disciplinary "hearing" at which the only evidence cited for his suspension consisted of his previous questions and comments about microaggression, his "defensiveness" at the suspension hearing, and his online postings seeking to publicize and obtain legal counsel to challenge his suspension?

Was Bhattacharya deprived of his right to due process under the Fifth and Fourteenth Amendments because UVA admittedly failed to follow its own disciplinary procedures and did not afford Bhattacharya notice of and an opportunity to defend the charges against him?

Was Bhattacharya deprived of his right to due process because the Fourth Circuit Majority resolved disputed issues of material fact in ways that were never advocated by UVA, that the district court never found, and that were demonstrably incorrect—as Bhattacharya established in his Petition for Panel Rehearing and Rehearing En Banc after the alleged justification for his suspension surfaced for the very first time in the Majority's opinion?

RULE 29.6 STATEMENT

Petitioner Kieran Ravi Bhattacharya is an individual and therefore has no parent company or publicly held company with a 10% or greater ownership interest:

RELATED PROCEEDINGS

United States District Court (W.D. Va.):

> *Bhattacharya v. Murray, et al.*, No. 3:19-CV-00054 (August 19, 2022) (Order and Memorandum Opinion granting UVA's motion for summary Judgment), July 21, 2022 (Memorandum Opinion denying Plaintiff's appeal of magistrate's discovery orders and granting UVA's motion for judgment on the pleadings), (March 16, 2022) (Order and Memorandum Opinion granting in part and denying in part Plaintiff's motion for leave to file Second Amended Complaint), (March 31, 2021) (Order and Memorandum Opinion granting in part and denying in part UVA's motion to dismiss)

United States Court of Appeals (4th Cir.):

> *Bhattacharya v. Murray, et al.*, No. 22-1999, No. 22-2064 (April 15, 2024) (Denial of Rehearing), (February 26, 2024) (Opinion below)

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JURISDICTION

The Fourth Circuit denied rehearing on April 15, 2024 after issuing an opinion on February 26, 2024 affirming the grant of summary judgment in favor of Defendants. On July 9, 2024, the Chief Justice extended the deadline for filing this Petition until September 12, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I.

The Fifth Amendment Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

The Seventh Amendment provides that, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV.

INTRODUCTION

Recently, the Court reaffirmed the importance of the Seventh Amendment right to a jury trial, albeit in a different context. *SEC v. Jarkesy*, __ U.S. __, 144 S. Ct. 2117 (2024). That right is destroyed, however, when a federal court decides disputed issues of material fact on a motion for summary judgment rather than allowing a jury to do so. Federal Rule 56 is clear that "summary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this case, the Dissent identified material facts from which a jury could have found that Bhattacharya's protected speech resulted in "adverse action" by UVA likely to deter "a person of ordinary firmness" from the exercise of First Amendment rights under precedents such as *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). If a sitting judge of the Fourth Circuit could find sufficient evidence of a First Amendment violation, how can it be that "no reasonable jury" could do so as the Majority opined?

By resolving disputed issues of material fact in favor of UVA, the Majority ignored voluminous evidence from which a jury should have been permitted to find that UVA deprived Bhattacharya of his right to free speech. Earlier this year, Virginia Tech agreed to discontinue its Bias Response Team Policy to avoid having the Court address the merits of the First Amendment challenge to the Fourth Circuit's decision in *Speech First, Inc. v. Sands*, __ U.S. __, 144 S. Ct. 675 (2024). In contrast, UVA Med School continues to maintain its online "Listening Post" soliciting anonymous reports of speech code violations.

(Dkt.335-28) (JA460-462). Here, the record shows that Bhattacharya was disciplined for the content of his speech, which prompted numerous complaints from students and faculty—including at least one "anonymous" Listening Post complaint solicited by a faculty member responsible for the discipline that Bhattacharya later received.[1] UVA's denial of Bhattacharya's free speech and due process rights has since been compounded by the refusal of the district court and the Fourth Circuit to permit him to have his day in court before a jury of his peers.

This error is particularly egregious because the Majority resolved disputed issues of material fact in ways that were never advocated by UVA, that the district court never found, and that were demonstrably incorrect. The alleged justification for the January 3, 2019 No Trespass Order ("NTO") that made Bhattacharya's suspension permanent surfaced for the very first time in the Majority's opinion. Even if the online posting identified by the Majority was not protected free speech, Bhattacharya was able to easily show in his Petition for Rehearing that he did not post the comment at issue.

Today, nearly five years after Bhattacharya first turned to the federal court system to protect his rights to free speech and due process, he has yet to have his day in court before a jury. Notwithstanding UVA's subsequent efforts to muddy the waters and rewrite the record of what UVA faculty and administrators said and did at the time, his constitutional claims are supported by evidence sufficient to support a jury verdict in his favor. Bhattacharya therefore respectfully requests that the

1. (Dkt.368-4) (JA1494-1495).

Court reverse the decision of the Fourth Circuit so that he will finally be afforded the jury trial to which he is entitled under the Constitution, the Court's precedents, and the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Nearly five years ago, on September 16, 2019, Bhattacharya filed his *pro se* Complaint (JA85-194). This was subsequently amended twice after he obtained pro bono counsel, initially with the First Amended Complaint ("FAC") that survived UVA's Rule 12(b)(6) motion to dismiss the First Amendment claim, ultimately resulting in the Second Amended Complaint ("SAC") that the district court dismissed on summary judgment. On October 24, 2018, Bhattacharya was in good standing at UVA Med School. By November 14, 2018, however, he had been reprimanded. By November 29, 2018, he had been suspended. And on January 3, 2019, UVA Med School emailed him the NTO, which ended his efforts to appeal the suspension and subjected him to arrest if he set foot on UVA Grounds during the next four years. What happened?

On October 25, 2018, after completing a required class, Bhattacharya chose to stay seated in the same room for an extracurricular event that was scheduled immediately thereafter: a panel discussion on "microaggressions" sponsored by the UVA Chapter of the American Medical Women's Association ("AMWA"). Following prepared remarks by the featured speaker, a psychologist, the floor was opened for questions and comments. At that point, Bhattacharya had an exchange with the panelists that lasted approximately five minutes, according to the audio

recording (JA7) which has been on file with the district court (JA2836) since the commencement of this litigation.

Unlike the UVA officials who disciplined Bhattacharya in reliance upon the characterizations of students and faculty who complained about his remarks, the district court actually listened to the recording. In denying UVA's Rule 12(b)(6) motion to dismiss, the district court summarized Bhattacharya's remarks:

> Bhattacharya challenged one professor's definitions of "microaggression" and "marginalized group" as "contradictory" and "extremely nonspecific." Dkt.33-2. He also asked several questions about the "evidence" underlying that professor's claims, critiquing it—and the professor's research over "years"—as "anecdotal." *Id.*

(JA296). The district court also rejected UVA's contention that Bhattacharya's speech was not protected by the First Amendment: "These comments and questions might be forward or pointed, but—as alleged—they did not materially disrupt the discussion or substantially invade the professor's, or anyone else's rights." (JA296).

Shortly after the AMWA event ended, UVA Med School received numerous complaints about Bhattacharya's remarks, some of which demanded that he be disciplined for them. Those who complained included three students who were co-presidents of the AMWA UVA Chapter.[2]

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2. UVA00004886 (JA1439); (JA1485); UVA00002446 (Canterbury Dep. Ex. 8).

Although complaints to the online Listening Post (JA461-462) were purportedly anonymous, at least one was solicited by UVA Med School "College Dean" Sean Reed. (JA1495). Reed later participated in the November 14 and November 28, 2018 proceedings before the Academic Standards and Achievement Committee ("ASAC") that led to Bhattacharya's suspension. The complaints about the ***content*** of Bhattacharya's speech included that he "called the legitimacy of one panelist's research into question" and "questioned the validity of the information that [the speaker] had presented, all over the microphone for the entire audience to hear."[3]

Whether those who disciplined Bhattacharya based on such complaints personally agreed or disagreed with Bhattacharya's speech is not material. Silencing Bhattacharya based on others' objections is, like a "heckler's veto," as impermissible under the First Amendment as censoring speech based on their own personal views.[4] In this case, however, students were not the only members of the UVA Med School community who objected to the ***content*** of what Bhattacharya had to say. Regardless of what various faculty members and administrators later claimed as the trial date approached, what they said and wrote at the time made it very clear they objected to his ***opinions***. The jury never got to see or hear these contemporaneous statements by the same UVA faculty and administrators who later saw to it that

3. (JA1019); (JA1021). Like other, similarly worded complaints at the time, both asserted that Bhattacharya repeatedly interrupted the speaker. The recording shows otherwise.

4. *See, e.g.*, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992).

Bhattacharya could never express such opinions again at UVA Med School—and that no one else would ever dare do so.

One student leader of the AMWA event who previously complained about Bhattacharya's remarks and solicited complaints from others insisted that Bhattacharya be barred from practicing medicine altogether.[5] She also joined students at UVA and other institutions of higher learning as far away as Texas[6] who—dissatisfied with the fact that initially Bhattacharya had merely been suspended—claimed on December 30, 2018 that Bhattacharya had made threats against UVA on an "alt-right website." (JA1485).[7] The December 30, 2018 email reminded UVA Med School Deans Peterson and Canterbury that "you both expressed concerns when our AMWA group spoke with you about the microaggressions panel and our display regarding sexual harassment in medicine" before observing "it appears no one else is outspoken in support of Kieran's views or conduct." (JA1485). Shortly thereafter, the organizers of the AMWA event were able to take a "victory lap." On January 7, 2019—four days after Densmore emailed Bhattacharya the NTO barring Bhattacharya from UVA Grounds until after it was too late to complete his medical education (SAC ¶174) (JA444-445)—the AMWA proclaimed on its website that the October 25, 2018 event had been a "success." (JA451).

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5. (JA1485).

6. (SJA99-100); (SJA92-96).

7. Although UVA's "Director of Threat Assessment" found that Bhattacharya had made no such threats (JA2727), UVA cited such alleged threats as the basis for the NTO. (JA502).

Beginning long before their receiving the December 30, 2018 email, Peterson and Canterbury, led the charge in seeing to it that Bhattacharya was disciplined for ***the content of*** his October 25, 2018 questions and comments. Like many in the UVA Med School community, they personally disagreed with ***Bhattacharya's views***.[8] Their personal disagreement was the driving force behind the retaliation that Canterbury and Peterson orchestrated.

Even before the October 25, 2018 event, Canterbury conflated "lack of professionalism" and disagreement with Canterbury's political views. On September 22, 2018, Canterbury tweeted that a UVA Med School student who made statements like those attributed to Mitch McConnell about Brett Kavanaugh's nomination to the Supreme Court would suffer adverse consequences: "If our students behaved so unprofessionally, they'd be called to task." (JA1069). On September 24, 2018, Canterbury invited the entire UVA Med School community to a "Diversity Dialogue" about microaggressions. (UVA00004856) (Canterbury Dep. Ex. 4). The "dialogue" that Canterbury was willing to tolerate, however, did not include Bhattacharya's subsequent questions and comments at the AMWA event.

In response to complaints from students and reports from faculty and administrators, Canterbury said that he "will follow up" and insisted that Bhattacharya be hauled before ASAC for what Canterbury called

8. (JA1066-1067); (JA1230); (JA1239-1245) (32:16-35:24, 36:2-11, 37:23-38:2, 38:6-7); (JA1069); (JA1253); (JA1077-1081) (23:19-21, 23:25-24:25, 25:1-25:13, 25:17-20, 25:25, 26:2-3, 26:7-26:18, 27:5-8, 27:13-17); (JA1042) (132:13-17, 132:21-24); (JA2809).

"unprofessional" behavior.[9] Although Canterbury never listened to what Bhattacharya actually said on October 25, 2018, he did immediately confirm that the offender was the same individual (Bhattacharya) who had expressed "unprofessional" views about the 2016 election results[10] at two UVA Med School "town halls."[11] In response to one complaint, Canterbury told Densmore and another UVA Med School Dean "I think this is the equivalent of a [Professionalism] [C]oncern [C]ard."[12] UVA Med School uses such cards to document various forms of misconduct, including unexcused absences and violations of professionalism. As it turned out, Kern had already lodged a PCC on October 25, 2018 after consulting with Peterson about how and whether to do so.[13] In violation of its own procedures, UVA Med School never disclosed the PCC to Bhattacharya or discussed it with him before November 28, 2018—when Reed disclosed its existence but did not provide Bhattacharya with a copy before or during the "hearing" that day.[14] In fact, UVA did not provide the PCC to Bhattacharya until December 2018.[15]

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9. (JA1084-1086); (JA1066-1067).

10. In other words, he disagreed with Canterbury. Densmore testified that there was nothing inappropriate or unprofessional about the substance and tone of what Bhattacharya had to say. (JA1078) (24:8-25). Yet Peterson brought up these statements that Canterbury found objectionable when she met with Bhattacharya on October 31, 2018 to discuss his "words," "semantics," and "thoughts." (JA2798-2799); (JA2809-2814).

11. (JA1066-1067).

12. (JA2787).

13. (JA756-757).

14. (JA400, JA413-414, JA425) (¶¶63, 95, 128).

15. (JA399, JA410-411, JA440) (¶¶59, 88, 159).

At Canterbury's insistence, ASAC met to consider Kern's PCC on November 14, 2018, when it voted to send the November 15, 2018 letter reprimanding Bhattacharya for his "behavior at a recent AMWA panel," admonishing him to "show mutual respect to all" and "express [his opinions] in appropriate ways," and advising him to "consider getting counseling." (JA465). In fact, the "counseling" that ASAC told Bhattacharya to "consider getting" was—because of the November 14, 2018 Forced Psychiatric Evaluation referenced in the SAC—already underway.

Canterbury himself imposed the November 27, 2018 requirement that Bhattacharya could not return to class without a third psychiatric evaluation by UVA Counseling and Psychiatric Services ("CAPS") after the November 14 and 19, 2018 forced evaluations found no basis for confinement.[16] Canterbury invoked his so-called "emergency powers" to convene the November 28, 2018 "emergency meeting" at which ASAC voted to suspend Bhattacharya.[17] This resulted in the November 29, 2018 letter from ASAC stating that Bhattacharya's "aggressive and inappropriate interactions . . . during a speaker's lecture" violated "the School of Medicine's Technical Standards." (JA492).

Canterbury was also instrumental in having the UVA Police issue the NTO in response to December 30, 2018 emails claiming that Bhattacharya "had posted his story on an alt-right web site/chat room," prompting Canterbury to express concerns that Bhattacharya was

16. (JA2751, JA2772, JA2773, JA2777).

17. (JA2751, JA2765, JA2774, JA2794).

associated with the "Alt Right."[18] On December 30, 2018, Canterbury sent UVA Med School students an email about impending action to address "disturbing online posts" that Canterbury attributed to Bhattacharya.[19] Contemporaneously, in response to communications from Canterbury about the "threat" that Bhattacharya supposedly presented,[20] UVA Threat Assessment Team ("TAT") Director Markowski stated that Bhattacharya "did not make any specific threats of violence towards the SOM or the ASAC committee members although some individuals in chat rooms encouraged Kieran to engage in this behavior."[21] These facts did not stop Canterbury from insisting upon the NTO and the UVA Police from issuing it based on the alleged online threats.

Like Canterbury, Peterson played a major role in the acts of First Amendment retaliation. Shortly after attending the October 25, 2018 event, Peterson emailed one of its student organizers that she was "hoping to sit down with [Bhattacharya] and chat a bit about the challenges [Bhattacharya] raised. ***Words are important and semantics matter***. . . ."[22] That same day, while instructing Nora Kern how to submit a PCC, Peterson referenced Bhattacharya's "semantic challenges."[23] Kern's October 25, 2018 PCC cited Bhattacharya for asking a

18. (JA1177); (JA1226).

19. UVA00003267.

20. (JA2777-2786).

21. (JA1488-1492).

22. UVA00002454 (JA1431) (emphasis added).

23. (JA756-757).

"series of questions that were quite antagonistic toward the panel." (JA459). The foregoing verbiage from Kern's PCC was cited, paraphrased, or quoted as a basis for subsequent discipline that Bhattacharya received—including the November 14, 2018 Forced Psychiatric Evaluation, the November 15, 2018 ASAC Letter of Reprimand, the November 19, 2018 Forced Psychiatric Evaluation, and the November 29, 2018 Suspension Letter.

On October 26, 2018, Peterson sent an email to another faculty member, Joanne Mendoza, who complained that "Kieran engaged in a line of questioning that was viewed by many to be combative and aggressive against the panelists"[24] and expressed concern that Bhattacharya posed a threat to patients' "emotional safety." (JA1063). Peterson responded that she hoped to meet with Bhattacharya the following week "to explore ***his thoughts about the topic of microaggressions***" but expressed concern whether he would "be able to get ***beyond the concrete semantics*** he seemed to be concerned about." (UVA00002471) (JA1431) (emphasis added).

Peterson was one of several UVA witnesses who, after some remedial First Amendment education, later claimed to have objected not to "what" Bhattacharya said but to "the way in which he said it." (JA1027) (45:13-21)[25] Yet

24. UVA00002471 (JA1431).

25. While insisting that Bhattacharya's "tone of voice" was inappropriate, Peterson testified that she never confirmed her recollection by listening to the recording of the panel discussion "because it's irrelevant." (JA1029) (47:1-8). On the last day of discovery, however, UVA produced handwritten notes showing that she had listened to the audio and made detailed notes about it. (JA1060-1061).

as part of the very same answer, Peterson complained that "it was clearly intended to discredit the speaker, to supplant her way of looking at things with a—a different take." (JA1027) (45:15-17). Under Peterson's view of the First Amendment, asking tough questions of a "guest on a panel" is so "unprofessional" and "rude"[26] as to warrant banishment from UVA Med School.

These and other unhelpful facts prompted UVA to claim in support of its summary judgment motion that the only discipline Bhattacharya received for his questions and comments about microaggressions was the November 15, 2018 letter "recommending" the "counseling" that he was already being ***forced*** to undergo. This "factual" assertion—which the district court accepted at face value and resolved in favor of UVA—was contrary to the evidence cited in opposition to UVA's summary judgment motion (JA2739-2796) ("MSJ Opposition"). For example:

- On November 27, 2018, Mendoza followed up on her October 26, 2018 complaint, inquiring about the consequences that Bhattacharya had already faced and would continue to face for questioning microaggression theory.[27] Densmore responded immediately that Bhattacharya would be required to obtain "medical clearance" before returning to UVA Med School and would be the subject of an "emergency ASAC meeting" the following day as directed by Canterbury.[28] ASAC voted to suspend Bhattacharya the very next day.

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26. (JA1035) (105:3-15).

27. (JA1063-1064); (JA1497, JA1499).

28. (JA1499); (JA818); (JA828).

- On November 28, 2018, Bhattacharya asked why he was being hauled before ASAC on a few hours' notice to discuss his "current enrollment status."[29] Reed responded by disclosing for the very first time the existence of a complaint about Bhattacharya's questions and comments at the AMWA event.[30] These questions and comments were the only speech or conduct on the part of Bhattacharya specifically discussed during his brief meeting with ASAC on November 28, 2018.[31]

- The November 29, 2018 Suspension Letter stated that Bhattacharya's "aggressive and inappropriate interactions . . . during a speaker's lecture" violated "the School of Medicine's Technical Standards." (JA492).

- The NTO was expressly based on Bhattacharya's alleged—but unspecified—online postings.[32]

Internal documents show that, by November 2018, UVA Med School recognized that it had insufficient grounds to suspend Bhattacharya for violating "Technical Standards," for academic reasons, or pursuant to the Title IX investigation that UVA had begun (but never disclosed to Bhattacharya for years thereafter, until discovery in this case).[33] Once UVA had to respond to the merits of

29. (JA421) (¶120); (JA481).

30. (JA425) (¶128); (JA489).

31. (JA385, JA430-431) (¶¶12, 139, 140); (JA464-465).

32. (JA924); (JA933).

33. (JA2820-2831).

Bhattacharya's Complaint, it cited grounds for suspension that went way beyond those cited in the November 29, 2018 Suspension Letter:

> November 14, 2018 meeting between Plaintiff and John Densmore at which Plaintiff's behavior was erratic and troubling, to the point that Dean Densmore was sufficiently concerned about Plaintiff's health and welfare that he accompanied him to the University's counseling center; Plaintiff's involuntary admission to the hospital thereafter; a later meeting between Dean Densmore and Plaintiff during which Plaintiff's behavior was extremely erratic, aggressive, and concerning, to the point that Dean Densmore had to call the police; another involuntary hospitalization of Plaintiff; and the issuance of a restraining order against Plaintiff with respect to his girlfriend, who was also a Medical School student.

(Dkt.135 at 4).

UVA's summary judgment motion insisted that this is "a case about mental illness" and that Bhattacharya's expulsion resulted solely from his allegedly untreated bipolar disorder. At oral argument, the district court suggested that Bhattacharya was trying to prevent UVA from advancing this narrative. (JA1296) (28:6-11). To the contrary, Plaintiff's argument—then and now—was and is that ***the jury*** should be permitted to consider evidence showing that the ***content*** of Bhattacharya's speech was what UVA found objectionable and that other explanations

had been contrived to justify censoring allegedly "unprofessional" speech about microaggressions. In this regard, the "girlfriend" referenced in UVA's pleadings (actually an "ex-" in the midst of a break-up but still living with Bhattacharya at the time of the events in question) supplied the narrative upon which UVA now relies. In exchange, UVA helped her procure the preliminary protective order ("PPO") that UVA has since cited even though Peterson privately conceded that the evidence was "flimsy."[34] UVA relied upon the statements of this individual despite knowledge, on the part of Peterson in particular, of numerous "red flags" as to why she was not a credible witness and was prone to inappropriate acts of retaliation.[35] Credible or not, her claims were not the subject of any attempt to verify them, and they were not disclosed to Bhattacharya so he could address them at the November 28, 2018 ASAC suspension hearing and other critical events that were the career equivalent of a death sentence.

The evidence shows that Canterbury's battle cry against Bhattacharya quickly changed from "professionalism" to "mental health" after this non-party witness helped UVA claim that Bhattacharya's questions and comments on October 25, 2018 were attributable to the bipolar disorder with which he had been diagnosed in January 2017 (also with the involvement of this non-party[36]):

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34. (JA1015-1017).

35. (JA2749-2752, JA2778, JA2793); (JA2833-2835).

36. (JA2807).

- Initially, Peterson rejected efforts to link Bhattacharya's October 25, 2018 remarks with his January 2017 hospitalization—especially after she met with Bhattacharya on October 31, 2018.[37] The non-party witness who later helped supply the "missing link" was aware of the October 31, 2018 meeting and discussed it with Peterson in person the very next day[38]—saying nothing about an alleged relationship between the AMWA Microaggression Panel Discussion and mental illness until November 13, 2018.[39]

- By November 13, 2018, however, events in Bhattacharya's relationship made reconciliation with the non-party witness unlikely.[40] At that point, the witness approached Peterson and provided a new narrative that Peterson immediately passed on to Densmore.[41] Densmore used this narrative the very next day to procure the November 14, 2018 Forced Psychiatric Evaluation during a brief meeting with Bhattacharya that Densmore hastily arranged for the ostensible purpose of discussing a subpar exam grade.[42] Within an hour of the November 14, 2018 ASAC meeting in which Peterson participated, the non-party witness texted two other UVA Med School students, based on her communications with Peterson, that "Kieran's in

37. (JA1155); (JA2816).

38. (JA1430) (HSU00003398-3400).

39. (JA2309); (JA511) (155:19-23).

40. (JA2809-2814).

41. (JA2816); (JA1045) (155:19-23).

42. (JA2754, JA2761); (JA770).

the psych ward again" because "the deans decided to intervene and get him to the ED."[43]

- Information from this witness was cited in the ECO Petition that resulted in the November 14, 2018 Forced Psychiatric Evaluation.[44]

- The November 14, 2018 Forced Psychiatric Evaluation, however, found no medical basis for Bhattacharya's involuntary hospitalization, prompting Canterbury to lament: "It's a shame they released him." (JA1424).

- Before UVA Medical Center released Bhattacharya, the witness was "adamant that there were no safety concerns."[45] On November 19, 2018, however, she provided additional grist for UVA's mill, claiming to fear for her safety in two text messages asking Peterson to write a letter for use in court to obtain a PPO against Bhattacharya and obtain possession and custody of the couple's shared apartment and puppy.[46]

- That same day, November 19, 2018, Peterson agreed to write the requested letter, after the witness helped procure another forced psychiatric evaluation of Bhattacharya in a way that did not directly involve Peterson or Densmore as had been the original plan.[47]

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43. (JA2818).

44. (JA1425), (JA1426).

45. (JA2746); (JA2620); (JA1425); (JA1426).

46. (JA1048); (JA1087-1089); (JA1427-1428).

47. (JA2764-2772).

- On November 20, 2018, Canterbury agreed with Densmore and Peterson that it was a "good idea" to bring Bhattacharya to the attention of UVA's TAT,[48] the stated purpose of which is "prevention of violence on Grounds, including assessment of and intervention with individuals whose behavior poses a threat to the safety of the University community."[49] The evidence that Bhattacharya posed a "threat" cited in Peterson's November 20, 2018 email consisted of a podcast of the AMWA Microaggression Panel Discussion "sent by a concerned student," UVA Med School's Technical Standards, and quotes from two November 19, 2018 text messages sent by the non-party witness.[50]

- By November 20, 2018, UVA had already executed its scheme to have Bhattacharya undergo the November 19, 2018 Forced Psychiatric Evaluation at Poplar Springs Hospital in Petersburg because UVA Medical Center had, just a few days earlier, found no basis for his involuntary hospitalization. On November 20, 2018, UVA called Poplar Springs and requested that Bhattacharya not be released anytime soon, explaining that UVA Med School planned to suspend him while he was hospitalized and stating that he should not be released because of "threats"—not "physical threats" but because he "threatens litigation against his Dean." (JA504).

- While Bhattacharya was at Poplar Springs, Peterson used information from the non-party witness to write

48. (JA1424).

49. *See* https://threatassessment.virginia.edu/.

50. (JA1087-1089).

a November 23, 2018 "to whom it may concern" letter on UVA Med School letterhead. (JA1427-1428). The only statement in the letter about Bhattacharya of which Peterson had personal knowledge was as follows: "On October 25, I witnessed his inappropriate and aggressive questioning of a guest speaker on a panel for an extracurricular program." The efforts of the non-party witness, even with Peterson's help, were initially unsuccessful. After the magistrate denied her initial petition on November 23, 2018, UVA arranged for a law school faculty member to represent the witness, who—after falsely claiming that other cases involving these parties had not been filed in Virginia courts—managed to obtain a PPO from a different judge.[51]

- Like UVA Medical Center, Poplar Springs found no basis for Bhattacharya's involuntary hospitalization.[52] On November 27, 2018, the day after Bhattacharya's release, Canterbury—who had not seen or spoken to Bhattacharya in more than two years—declared that "he's still quite manic and likely psychotic."[53] Notwithstanding Bhattacharya's release from two recent hospitalizations with no requirement for ongoing medication or treatment,[54] Densmore and Canterbury insisted that Bhattacharya receive "medical clearance" from CAPS even though Bhattacharya told both of them that doing so would violate his First Amendment

51. (JA2764-2772).

52. (JA808).

53. (JA830).

54. (JA2764, JA2769); (JA1162-1164); (JA808-810).

rights,[55] UVA's Office of General Counsel told them Bhattacharya could not be required to go to CAPS,[56] UVA TAT Director Markowski testified it was improper for Canterbury to require the CAPS evaluation,[57] and UVA CAPS Director Ruzek was "[un]aware of any policy that requires a student to be cleared by CAPS to go back to class."[58] Canterbury nevertheless scheduled an "emergency" ASAC meeting for the following day and insisted upon the CAPS evaluation by invoking "emergency powers" that he has since admitted he did not have.[59]

- The November 28, 2018 ASAC meeting minutes do not disclose the fact, which came to light only at the end of discovery, that Peterson read her November 23, 2018 letter out loud during the meeting at which ASAC voted to suspend Bhattacharya.[60] Privately, she told Canterbury, "I think the evidence for actual risk is flimsy."[61]

- Peterson told the non-party witness about the November 28, 2018 ASAC meeting before Bhattacharya was notified that it had been scheduled. After the meeting,

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55. (JA467); (JA469-470); (JA472); (JA1471).

56. (JA1267-1268).

57. (JA1104-1106) (246:10-248:9).

58. (JA1114, JA1142) (31:3-5, 243:9-12).

59. (JA1249-1250) (322:24-323:2).

60. (JA1033-1034) (67:20-68:3).

61. (JA1015-1017).

which UVA policies required be kept confidential, Peterson told the non-party witnesses about the vote to suspend Bhattacharya before he received notice of the outcome. The non-party witness was not told to keep this information confidential and began disclosing the suspension to classmates as early as November 30, 2018.[62]

- On November 30, 2018, Peterson and others at UVA learned of additional reasons to question the reliability of this witness[63] in addition to "red flags" of which Peterson was aware dating back to January 2017.[64]

- Contemporaneously with UVA's issuance of the NTO, Peterson learned of additional grounds for doubting the credibility of this witness.[65]

By granting UVA's motion for summary judgment, the district court refused to let the jury consider the fact that Bhattacharya's questions and comments at the AMWA event are cited in every single alleged act of First Amendment retaliation—even the medical records that UVA dragged into this case.[66] Whether Bhattacharya's remarks about microaggression theory were the proximate cause of these acts was for the jury, not the court, to decide.

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62. (JA1408-1409) (¶176); (JA992); HSU 000033.

63. (JA2801-2805).

64. (JA2749-2752, JA2778, JA2793); (JA2833-2835).

65. (JA1153).

66. (JA2755-JA2793).

REASONS FOR GRANTING THE PETITION

A. The Dissent Alone Identified Sufficient Evidence to Support a Jury Verdict that UVA Disciplined Bhattacharya Based on the Content of His Protected Speech.

The Dissent provided a snapshot of the evidence that "genuine disputes of material fact exist as to whether [Bhattacharya] is right" that "UVA used concerns about professionalism as a pretext to retaliate against him for protected speech." (Dkt.73 at 47). Observing that "[t]he most relevant evidence comes from the audio recording of the microaggressions panel," the Dissent found "enough evidence in this record that a jury could conclude" that Mr. Bhattacharya's questions and comments were ***not*** "enough to issue a letter of reprimand calling his behavior 'unnecessarily antagonistic and disrespectful,' admonishing him to express his views 'in appropriate ways' and suggesting he get counseling."[67] Concluding that "[a] jury could reasonably conclude that that UVA disguised its contempt for the content of Bhattacharya's speech by critiquing his professionalism" and that "a reasonable jury could conclude that UVA used its guidelines on professionalism to quiet dissenting views," the Dissent cited authority warranting reversal of the district court's grant of summary judgment finding that the November 14, 2018 letter of reprimand was not an "adverse action" under *Constantine*. This authority—the

67. *Id.*at 53-54, citing *Porter v. Bd. of Trustees of N. Carolina State Univ.*, 72 F.4th 573, 595 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024), (Richardson, J., dissenting) ("dispute and disagreement are integral, not antithetical, to a university's mission").

Fourth Circuit's decisions in *Jacobs v. North Carolina Administrative Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015) and *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018)—relied upon the Court's *per curiam* decision in *Tolan v. Cotton*, 572 U.S. 650 (2014). In *Tolan*, the Court held that the Fifth Circuit erred because it "failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case" and "improperly 'weigh[ed] the evidence" and resolved disputed issues in favor of the moving party.'" *Id.* at 657 (citing *Liberty Lobby*, 477 U.S. at 249).

Other evidence cited by the Dissent was the November 29, 2018 suspension letter itself, which "identified Bhattacharya's conduct 'during a speaker's lecture' as one of the examples of the 'aggressive and inappropriate interactions' that led to his suspension." (Dkt.73 at 55) (citing JA871). "[O]nce again, the causation question is whether UVA's response to Bhattacharya's questions and comments at the microaggressions panel incident relates to what he said—content—or how he said it—conduct," and "there is a genuine dispute of material fact on that point if we construe the evidence in the light most favorable to Bhattacharya." (*Id.*). As the Dissent observed, UVA's claim that the suspension was based on mental health issues ignores the fact that "the letter of suspension mentions only Bhattacharya's conduct at the panel discussion, in public settings, during meetings with Dr. Densmore and before the Committee." (*Id.*).[68] This fact

68. UVA's "diagnosis" of Bhattacharya as bipolar is not material because he was not disciplined on that basis. In any event, the diagnosis is inextricably intertwined with Bhattacharya's protected speech. For example, the "medical records" all reference his October

would make it reasonable for the jury to conclude that the mental health narrative that UVA has since asserted and that the majority found persuasive[69] was pretextual under the Fourth Court's own precedents.[70]

The evidence cited by the Dissent that would support a jury verdict for Bhattacharya is just the tip of the proverbial iceberg. The record shows that objections to the content of his speech were the driving force for all of the adverse actions of which he complains, culminating in the January 2019 NTO that UVA hastily issued and then cited to cut off Bhattacharya's right to appeal his suspension—turning it into a permanent expulsion and preventing Bhattacharya from pursuing his medical education and career.

25, 2018 remarks or quote or paraphrase the PCC. (JA2787-2788). The CAPS "clinicians" who recommended his evaluation had no medical training whatsoever. (JA2746). Dr. Pamila Harrington, who performed the subsequent evaluation, found no basis for his hospitalization—although she did, as a member of ASAC, vote to suspend him after expressing a "medical opinion" that his remarks at the AWMA event were symptomatic of mental illness. (JA2752)

69. Peterson's November 23, 2018 letter that she read out loud to ASAC on November 28, 2018 was not cited in the suspension letter. Moreover, the only fact referenced in her letter of which Peterson had personal knowledge was: "On October 25, I witnessed his inappropriate and aggressive questioning of a guest speaker on a panel for an extracurricular program."

70. *Id.* at 55-56 (citing *E.E.O.C. v. Sears Roebuck & Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001); *Lashley v. Spartanburg Methodist Coll.*, 66 F.4th 168, 177 (4th Cir. 2023).

B. The Majority Ignored Voluminous Other Evidence that UVA Disciplined Bhattacharya Based on the Content of His Speech, Not Conduct or Behavior.

To affirm the district court's decision, the Majority had to overlook and disregard considerable record evidence that would have supported a jury verdict that Bhattacharya was disciplined for the content of his speech. This evidence includes complaints on the Listening Post and elsewhere that he "called the legitimacy of one panelist's research into question" and "questioned the validity of the information that [the speaker] had presented, all over the microphone for the entire audience to hear."[71] Upon learning of these complaints, Canterbury—who conflated disagreement with his political views and lack of professionalism[72]—confirmed that the complaints involved the same individual (Bhattacharya) who had expressed "unprofessional" views about the 2016 election results before insisting that Bhattacharya be hauled before ASAC for what Canterbury called "unprofessional" behavior.[73]

Shortly after the October 25, 2018 event, Peterson emailed one of the event's student organizers that she was "hoping to sit down with [Bhattacharya] and chat a bit about the challenges [Bhattacharya] raised. ***Words are important and semantics matter***. . . ."[74] That

71. (JA1018-1019); (JA1020-1021). The complaints asserted that Bhattacharya repeatedly interrupted the speaker, but the audio shows otherwise.

72. (JA1068-1069).

73. (JA1083-1085); (JA1065-1067).

74. UVA00002454 (JA1432) (emphasis added).

same day, while instructing Nora Kern how to submit a Professionalism Concern Card, Peterson referenced Bhattacharya's "semantic challenges."[75] Peterson's October 26, 2018 email to another faculty member said she hoped to meet with Bhattacharya the following week "to explore ***his thoughts about the topic of microaggressions***" but expressed concern whether he would "be able to get ***beyond the concrete semantics*** he seemed to be concerned about." (UVA00002471) (Dkt.251) (JA1440) (emphasis added). By the time Peterson was deposed, she claimed to have objected not to "what" Bhattacharya said but to "the way in which he said it."[76] Yet as part of the very same answer, Peterson complained that "it was clearly intended to discredit the speaker, to supplant her way of looking at things with a—a different take."[77] In other words, by her own admission, Peterson objected to the content of what Bhattacharya had to say.

To the extent there was a disputed issue of fact based on the testimony of Peterson and others as to why Bhattacharya was disciplined, Rule 56 entitled Bhattacharya to have a jury resolve it. Bhattacharya's Opening Brief, Reply Brief, and MSJ Opposition identify the evidence from which a jury could find that the content of Bhattacharya's speech was the basis for all of the "adverse actions" of which he complains[78]—culminating in the NTO.[79]

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75. UVA00002461-62 (JA755-757).

76. Peterson Dep. 45:13-21 (JA1027).

77. Peterson Dep. 45:15-17 (JA1027).

78. Dkt.47 at pp. 6-38; Dkt.46 at pp. 14-31; (JA2742-2792).

79. (JA2742-2792).

C. The Majority Justified the "No Trespass Order" on a Basis that UVA Never Claimed, that the District Court Never Found, and that is Contrary to the Record.

At no time before or after issuance of the NTO—including during discovery and in the briefing of UVA's summary judgment motion—did UVA ever identify exactly what alleged unprofessional and threatening behavior warranted UVA's issuance of the NTO and refusal to dissolve it before the deadline for Bhattacharya to complete his medical school education. UVA's only explanation was that "concerns were raised about comments [i]n a chat room that were perceived as threats." (JA502-503). UVA never identified the "comments" at issue, who made them, and why they were perceived as threats.[80] In fact, by the time it moved for summary judgment, UVA had abandoned this narrative altogether and contrived an alternate explanation.[81]On appeal, the Majority came up with its own explanation for the NTO that UVA never provided but that the Majority found to be satisfactory. The Majority justified the NTO based on an online posting—which it quoted three times—consisting of a caption below photographs of ASAC members stating: "These are the f[***]gots ruining my life." (Dkt.73 at 12, 36, 37) (citing JA1181). In the words of the Majority: "The message prompted posts from other users encouraging acts of violence against the ASAC members." (Dkt.73 at 12).

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80. MSJ Opposition (JA2774).

81. MSJ Opposition (JA2785).

Even assuming *arguendo* that this posting—however offensive—was not protected free speech and that UVA could discipline Bhattacharya for others' reactions to it,[82] it is an undisputed fact that Bhattacharya did not make this posting. On their face, some postings attributed to Bhattacharya were made by others. During discovery, UVA therefore focused on identifying exactly which online postings Bhattacharya made and which ones he did not. Bhattacharya's responses to UVA's written discovery stated that "some of these web sites have posted commentary regarding the foregoing topics by individuals who—under the cloak of anonymity—have claimed to be Mr. Bhattacharya but in fact were not."[83] Bhattacharya's discovery responses identify which threads Bhattacharya initiated and which identifiers he used to post comments on threads regardless of who initiated them. The comment that the Majority repeatedly quotes was not posted by Bhattacharya, according to his sworn interrogatory answers and the postings themselves. What Bhattacharya actually posted on /pol/—Politically Incorrect » Thread #198092263 (4plebs.org) using the ID "Ybnmcf2x" (Nos. 198092263, 198092590, 198092590) contained a copy of a letter from Senator Tim Kaine and made the following statements:

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82. This would be tantamount to holding those who exercised their First Amendment right to criticize the decision in *Dobbs v. Jackson Women's Health Organization* responsible for those who reacted to such criticism by advocating or in some cases attempting violence against Supreme Court Justices.

83. Bhattacharya's Answers to Interrogatory Nos. 15-19 at pp. 26-38 identify which postings he did and did not make. Appellant's Pet. for Rehearing, Ex. A (Dkt.80-2).

> i got suspended from UVA school of medicine for a micro aggression talk: more details on my twitter@kieranravib
>
> https://m.soundcloud.com/user-381804527/microagressions-presented-by-amwa
>
> i speak from 28:45 to 34:00
>
> https://m.soundcloud.com/user-381804527/asac
>
> here is audio of the hearing in which i was suspended

(JA1181). Bhattacharya's posting was a legitimate communication protected by the First Amendment for the purpose of drawing attention to and obtaining redress for his suspension.

The Majority incorrectly attributes to Bhattacharya a posting on /pol/—Politically Incorrect » Thread #198117428 (4plebs.org) by someone using the ID "Mq4qj1wX" who copied the foregoing post by Bhattacharya ***before adding*** a photo of ASAC and the caption, "These are the f[***] gots ruining my life." The copy of a later portion of this thread in the Joint Appendix (JA1201) omitted the verbiage highlighted in yellow below that was posted by the individual responsible for this second anonymous posting, who wrote on page 17:

> He didn't change his ID. I started this thread by copying and pasting his posts (minus f[***]gots) from his original thread. He is an

> autistic who does need to work on communication and interaction as well as professional decorum, but he shouldn't be kicked out because someone got upset when [he] questioned the validity of their research into microaggressions.

Appellant's Pet. for Rehearing, Ex. A, at 4 (Dkt.80-2). If UVA had identified this other individual's posting as the basis for the NTO, Bhattacharya could have disproved its attribution to him. It was not proper for the Fourth Circuit to resolve on appeal a disputed issue of fact that had never previously been cited as the basis for the NTO. The burden was on UVA, not the Fourth Circuit, to identify exactly what allegedly threatening statements supposedly warranted issuance of the NTO. In denying UVA's prior motion to dismiss this claim, the district court ruled:

> [O]nce UVA discloses the statements underlying the issuance of the NTO, UVA may [argue] then that the statements are 'true threats' that receive no First Amendment protection. . . . At this stage, however, the Court concludes that Bhattacharya has sufficiently alleged that his statements were protected speech.

(JA298-299) (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

By the time UVA moved for summary judgment, it ***still*** had not identified any online postings by Bhattacharya that were allegedly threatening. In contrast, Plaintiff's MSJ Opposition identified evidence sufficient to support a jury verdict that the NTO would not have been issued but for

Bhattacharya's protected speech. (JA2774-2783). Ignoring this evidence, the Fourth Circuit did ***not*** "view all facts, and reasonable inferences taken therefrom, in the light most favorable to the nonmoving party—here, Appellant." (Dkt.73 at 15) (citing *Davison v. Rose*, 19 F.4th 626, 633 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 106 (2022)). Instead, the Majority disregarded contemporaneous evidence that Bhattacharya's protected speech precipitated the NTO—including the observation that "it appears no one else is outspoken in support of Kieran's views or conduct" (JA1485)—while also overlooking the contemporaneous internal UVA communications that simply cannot be squared with the narrative that Bhattacharya's online postings somehow constituted a "threat." These include the statement from UVA Threat Assessment Team ("TAT") Director Markowski to Canterbury (JA2777-2786) that Bhattacharya "did not make any specific threats of violence towards the SOM or the ASAC committee members although some individuals in chat rooms encouraged Kieran to engage in this behavior." (JA1488-1492). These facts did not stop Canterbury from insisting upon the NTO and the UVA Police from issuing it at Canterbury's insistence.

The actual reasons for the NTO presented a question of material fact that the jury should have been permitted to decide. The Director of UVA's Threat Assessment Team concluded that the NTO could not be justified based on an alleged threat by Bhattacharya. Why would it have been unreasonable for a jury to reach the same conclusion?

D. UVA's Violations of Bhattacharya's Right to Due Process Should Not Be Excused by the Expedient of Characterizing the Discipline as an "Academic" Decision.

With respect to Bhattacharya's First Amendment claims, the Dissent expressed concern about allowing UVA to "couch[] Bhattacharya's suspension as a matter of professionalism, which might require us to defer to UVA's academic decisions," citing *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 462-63 (4th Cir. 2012):

> Is this really an academic decision? "[W]e must take care 'not to allow academic decisions to disguise truly discriminatory requirements.'" *Id.* at 463 (quoting *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1048 (9th Cir. 1999)).

(Dkt.73 at 56.) UVA's retaliation for Bhattacharya's protected speech is ***not*** "like the decision of an individual professor as to the proper grade for a student in his course." *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978). The erroneous characterization of UVA's discipline of Bhattacharya as "academic" had adverse consequences not only for his First Amendment retaliation claims but also for his due process claim. "Expulsion for misconduct triggers a panoply of safeguards designed to ensure the fairness of factfinding by the university." *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 112 (Minn. 1977) (citing *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)).

Courts have previously rejected similar efforts by colleges and universities to punish students' protected free

speech and deprive them of due process by raising safety concerns. *See*, *e.g.*, *Barnes v. Zaccari*, 669 F.3d 1295, 1307 (11th Cir. 2012) (expulsion of student environmental activist whose blogging and leafleting annoyed university president violated due process notwithstanding university's insistence that it was justified by safety concerns over speech indicating that student might be violent); *Byrnes v. Johnson Cty. Cmty. Coll.*, No. CIV.A. 10-2690-EFM, 2011 WL 166715 at *2 (D. Kan. Jan. 19, 2011) (rejected college's attempt to categorize as an "academic" decision its dismissal of four students from nursing program for unprofessional behavior on Facebook).

When the district court dismissed Bhattacharya's due process claims, it had not allowed any discovery even though the case had been pending for a year and a half.[84] The dismissal was therefore based on the allegations of the FAC, which set forth what Bhattacharya knew at the time without discovery about the alleged "Retaliatory Conduct," *i.e.*:

> issuing a Professionalism Concern Card, disciplining Mr. Bhattacharya for his Protected Free Speech, requiring Mr. Bhattacharya to undergo counseling and obtain "medical clearance" as a prerequisite for remaining enrolled at UVA Med School, suspending Mr. Bhattacharya from UVA Med School, and preventing Mr. Bhattacharya from appealing his suspension or applying for readmission to

84. Opening Brief at 30, citing Dkt.18, Dkt.25, JA203-258, Dkt.112, Dkt.113, Dkt.115, Dkt.116, JA278-316, JA317, Dkt.16, Dkt.134.

> UVA Med School by issuing and refusing to remove the No Trespass Order.

(JA250-252) (¶¶142, 150, 151). Other allegations of the FAC upon which Bhattacharya's due process claim was based at the time included:

1. failing to notify Bhattacharya of the PCC and affirmatively concealing its existence from him;

2. failing to have his "College Dean" discuss the PCC with him and document the discussion as required by UVA Med School's policies;

3. failing to provide Bhattacharya with the PCC in advance of the November 28, 2018 hearing or at any other time before his suspension;

4. allowing Kern to vote at the November 14, 2018 meeting;

5. failing to provide Mr. Bhattacharya with sufficient notice of the November 28, 2018 hearing or its basis so that he could adequately defend himself; and

6. using Bhattacharya's defense of himself at the November 28, 2018 hearing as a basis for his suspension.

(JA252-253) (¶151).

The district court's erroneous dismissal of Bhattacharya's due process claims was compounded by its subsequent refusal to allow amendment of Bhattacharya's

pleadings to conform them to the evidence (including the role of the non-party witness) that came to light during the discovery process or even consider them at all. Plaintiff's MSJ Opposition cited substantial evidence and legal authority establishing these due process violations, which were clearly relevant to Bhattacharya's remaining claims in light of authority that lack of due process can provide evidence of First Amendment retaliation.[85] The district court did not consider evidence of due process violations in dismissing Bhattacharya's First Amendment claims—much less in support of the due process claims that had previously been dismissed. Bhattacharya's claims of First Amendment retaliation and due process violations were buttressed by evidence obtained in discovery showing that—by November 2018—UVA Med School itself recognized that it had insufficient grounds to suspend Bhattacharya for violating "Technical Standards," for academic reasons, or pursuant to the Title IX investigation that UVA had begun but never informed Bhattacharya was underway (and concluded with Bhattacharya's expulsion).[86]

Even without this additional evidence, the evidence of lack of due process—much if not all of it undisputed—was more than sufficient to support a jury verdict for First Amendment retaliation and violation of the Due Process Clause. ASAC's November 28, 2018 "hearing"—which lasted all of 28 minutes, following little or no notice of its purpose and the nature and basis of the "charges" against him—deprived Bhattacharya of "[t]he fundamental

85. *See*, *e.g.*, *Constantine*, 411 F.3d at 500-01, *Roncales v. Cty. of Henrico*, 451 F. Supp. 3d 480, 498 (E.D. Va. 2020).

86. MSJ Opposition, JA2771.

requirement of due process," *i.e.*, "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). So did the NTO, of which Bhattacharya had no notice, and for which UVA provided no explanation until after the deadline for appeal. Each was a "mere sham"[87] in which UVA Med School "simply brushed aside" its own policies and procedures. *Escobar v. State Univ. of New York/Coll. at Old Westbury*, 427 F. Supp. 850, 858 (E.D.N.Y. 1977).

Bhattacharya was alerted to the November 28, 2018 hearing by email four hours before it was convened and was not notified as to its purpose or subject matter. He was finally told by a UVA Med School dean shortly beforehand that it had something to do with his statements at the AMWA event. He could not prepare for the discussion or present evidence in his defense. The November 28, 2018 recording shows that ASAC simply opened the floor to Bhattacharya without establishing the grounds for the disciplinary hearing or stating how his "enrollment status" would be decided. ASAC Chair Tucker specifically prevented Bhattacharya from presenting relevant evidence, including the recording of what Bhattacharya said on October 25, 2018—a recording that no one present (except Peterson and Kern), not even Tucker, had ever heard. The hearing would have ended even sooner had Bhattacharya not persisted in seeking information about the basis for the claims against him so that he could defend himself. Rather than providing specific information or evidence, one ASAC voting member, Barnett Nathan,

87. *Lightsey v. King*, 567 F. Supp. 645, 649-650 (E.D.N.Y. 1983).

repeatedly asked why ***Bhattacharya*** thought he was there. The hearing was perfunctory, and its outcome was preordained—as discovery has since confirmed.[88] The lack of due process on November 28, 2019 was certainly not cured by ASAC's letter the following day claiming that Bhattacharya had been "provided an opportunity to be heard and to respond to the concerns about your recent behavior." (JA492). To the contrary, ASAC cited Bhattacharya's effort to defend himself the previous day as additional grounds for suspension. (*Id.*)

With respect to the suspension and the NTO alike, UVA failed to state reasons for its decision sufficient to provide "a basis for objection before the next decisionmaker or in a subsequent . . . review." *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005); *see also Incumaa v. Stirling*, 791 F.3d 517, 535 (4th Cir. 2015). To the extent ASAC provided any such statement, discovery has since revealed that it was deliberately incomplete and misleading. The November 28, 2018 minutes omitted the fact that the only specific documentary evidence considered in the closed door session was Peterson's November 23, 2018 "to whom it may concern" letter—which Peterson read aloud—written for the purpose of helping Bhattacharya's former girlfriend obtain a preliminary protective order and possession of the couple's apartment and dog. The district court did not have access to this information when it dismissed the due process claim. But when Bhattacharya later tried to rely upon the November 23, 2018 letter in subsequent proceedings, including the motion for leave to amend,

88. For example, before ASAC met on November 28, 2018, Peterson wrote that Bhattacharya was "facing (likely) suspension for not being able to meet the SOM technical standards." (JA1171).

the District Court rejected the evidence and castigated Bhattacharya for not citing it earlier.[89]

As for the NTO, the district court's inability to decipher the unidentified "chat room" comments upon which UVA claimed to rely is, in and of itself, sufficient to show a deprivation of due process that is inconsistent with the Court's decision in *Wilkinson* and the Fourth Circuit's decision in *Incumaa*. The stated basis for the NTO continued to "morph" until the day that UVA moved for summary judgment, as documented in Plaintiff's MSJ Opposition.[90]

CONCLUSION

The Fourth Circuit's resolution of disputed issues of material fact on summary judgment is such a basic error that it could be reversed by a *per curiam* decision, as the Court did in *Tolan*. If allowed to stand, the Fourth Circuit's decision provides a handy roadmap for state universities to punish and suppress free speech with impunity. Bhattacharya therefore respectfully requests that the Court reverse the decisions below so that his First Amendment and Due Process Clause claims can finally be heard by a jury of his peers.

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89. Although Bhattacharya did not previously have the letter because it was not in his UVA Med School student file that he received in December 2018 when he tried to appeal his suspension, the Proposed SAC (JA1407-1408) (¶174) quoted a text message from the witness asking Peterson "to write a letter documenting all the distress Kieran has caused me and how I perceived him as a danger to me when I spoke with you." (JA1408).

90. (JA2777-2786).

Dated this 12th day of September, 2024.

Respectfully submitted,

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September 12, 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED FEBRUARY 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1999,
No. 22-2064

KIERAN RAVI BHATTACHARYA,

Plaintiff-Appellant,

v.

JAMES B. MURRAY, JR., IN HIS OFFICIAL CAPACITY AS RECTOR OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; WHITTINGTON W. CLEMENT, IN HIS OFFICIAL CAPACITY AS VICE RECTOR OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; ROBERT M. BLUE; MARK T. BOWLES; L. D. BRITT, M.D., M.P.H.; FRANK M. CONNER, III; ELIZABETH M. CRANWELL; THOMAS A. DEPASQUALE; BARBARA J. FRIED; JOHN A. GRIFFIN; LOUIS S. HADDAD; ROBERT D. HARDIE; MAURICE A. JONES; BABUR B. LATEEF, M.D.; ANGELA HUCLES MANGANO; C. EVANS POSTON, JR.; JAMES V. REYES, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; PETER C. BRUNJES, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE

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BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; MELISSA FIELDING, IN HER OFFICIAL CAPACITY AS DEPUTY CHIEF OF POLICE OF THE UNIVERSITY OF VIRGINIA; JOHN J. DENSMORE, M.D., PH.D., IN HIS OFFICIAL CAPACITY AS ASSOCIATE DEAN FOR ADMISSIONS AND STUDENT AFFAIRS OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; JIM B. TUCKER, M.D., IN HIS OFFICIAL CAPACITY AS CHAIR OF THE ACADEMIC STANDARDS AND ACHIEVEMENT COMMITTEE OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; CHRISTINE PETERSON, M.D., ASSISTANT DEAN FOR MEDICAL EDUCATION OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; EVELYN R. FLEMING; CARLOS M. BROWN; LEWIS FRANKLIN (L. F.) PAYNE, JR.,

Defendants-Appellees.

KIERAN RAVI BHATTACHARYA,

Plaintiff-Appellant,

v.

JAMES B. MURRAY, JR., IN HIS OFFICIAL CAPACITY AS RECTOR OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; WHITTINGTON WHITESIDE CLEMENT, IN HIS OFFICIAL CAPACITY AS VICE RECTOR OF THE

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BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; ROBERT M. BLUE; MARK T. BOWLES; L. D. BRITT, M.D., M.P.H.; FRANK M. CONNER, III; ELIZABETH M. CRANWELL; THOMAS A. DEPASQUALE; BARBARA J. FRIED; JOHN A. GRIFFIN; LOUIS S. HADDAD; ROBERT D. HARDIE; MAURICE A. JONES; BABUR B. LATEEF, M.D.; ANGELA HUCLES MANGANO; C. EVANS POSTON, JR.; JAMES V. REYES, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; PETER C. BRUNJES, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; MELISSA FIELDING, IN HER OFFICIAL CAPACITY AS DEPUTY CHIEF OF POLICE OF THE UNIVERSITY OF VIRGINIA; JOHN J. DENSMORE, M.D., PH.D., IN HIS OFFICIAL CAPACITY AS ASSOCIATE DEAN FOR ADMISSIONS AND STUDENT AFFAIRS OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; JIM B. TUCKER, M.D., IN HIS OFFICIAL CAPACITY AS CHAIR OF THE ACADEMIC STANDARDS AND ACHIEVEMENT COMMITTEE OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; CHRISTINE PETERSON, M.D., ASSISTANT DEAN FOR MEDICAL EDUCATION OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; EVELYN R. FLEMING; CARLOS M. BROWN; LEWIS FRANKLIN (L. F.) PAYNE, JR.,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville.
Norman K. Moon, Senior District Judge.
(3:19-cv-00054-NKM-JCH)

October 24, 2023, Argued;
February 26, 2024, Decided

Before THACKER and QUATTLEBAUM, Circuit Judges, and KEENAN, Senior Circuit Judge. Judge Thacker wrote the opinion, in which Judge Keenan concurred. Judge Quattlebaum wrote a separate opinion concurring in part and dissenting in part.

THACKER, Circuit Judge:

Kieran Bhattacharya ("Appellant") is a former medical student at the University of Virgnia School of Medicine ("UVA"). He claims that numerous UVA officials (collectively, "Appellees")[1] reprimanded, suspended, and then expelled him in violation of the First Amendment because of the views he expressed during a faculty panel—in other words, because of his protected speech. Appellees assert they took these actions against Appellant

1. The Appellees include James B. Murray, Jr., Whittington Whiteside Clement, Robert M. Blue, Mark T. Bowles, Dr. L.D. Britt, Frank M. Conner, III, Elizabeth M. Cranwell, Thomas A. DePasquale, Barbara J. Fried, John A. Griffin, Louis S. Haddad, Robert D. Hardie, Maurice A. Jones, Dr. Babur B. Lateef, Angela Hucles Mangano, C. Evans Poston, Jr., James V. Reyes, Peter C. Brunjes, Melissa Fielding, Dr. John J. Densmore, Dr. Jim B. Tucker, Dr. Christine Peterson, Evelyn R. Fleming, Carlos M. Brown, and Lewis Franklin (L.F.) Payne Jr.

not because of his speech, but as a result of Appellant's confrontational, threatening, behavior.

The district court sided with Appellees, holding at summary judgment that Appellant could point to no evidence that Appellees punished Appellant due to his speech.

We agree. Appellant has failed to present evidence sufficient to create a triable issue as to whether his speech caused the actions UVA took against him. A medical school's administrators have the authority to set the minimum standards of professionalism for conferral of a medical doctorate. Even more, they have the authority and obligation to ensure the safety of the school's faculty and staff. Appellees appropriately exercised that authority with due regard for the Constitution.

We affirm.

I.

A.

Appellant began medical school at UVA in the fall of 2016. By January 2017, Appellant checked himself into UVA Health System's emergency department with mental health symptoms. He reported that he was "feeling out of it in the head." J.A. at 2050.[2] While Appellant was

2. Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

in the hospital, his roommates contacted Appellee Dr. John Densmore, the Dean of Student Affairs, about Appellant's problems. Dean Densmore visited Appellant in the hospital. Following a two week hospitalization, during which Appellant had symptoms "consistent with a manic episode of psychosis," *id.* at 1313, Appellant was discharged and was diagnosed with "[b]ipolar disorder, current manic episode, with psychosis," *id.* Appellant took a voluntary leave from UVA starting on February 7, 2017. He returned to class in Spring 2018.

In September 2018, Appellant reported to Dr. Christine Peterson, a faculty member who was the dean on call at the time,[3] that a mental health episode was preventing him from sleeping or studying. He requested that he be able to delay taking an exam, and his request was granted. Dean Peterson informed other faculty members, including Dean Densmore, about Appellant's call.

B.

On October 25, 2018, the student chapter of the American Medical Women's Association hosted a faculty panel called "Microaggressions: Why Are 'They' So Sensitive?" Appellant attended that panel, and he claims to have been punished by UVA for certain statements

3. The dean on call is a UVA faculty member available to help with student crisis management and incident response.

he made, and questions he asked, on the topic of microaggressions.[4]

During the panel, several faculty members offered their views and research on microaggressions, and another faculty member moderated. At the end, the moderator opened the floor for questions from the audience. Appellant was the first student to address the panel. He had the following interaction:

> [Appellant]: Hello. Thank you for your presentation. I had a few questions just to clarify your definition of microaggressions. Is it a requirement, to be a victim of microaggression, that you are a member of a marginalized group?
>
> [Dr. Beverly] Adams[, a faculty panelist]: Very good question. And no. And no—
>
> [Appellant]: But in the definition, it just said you have to be a member of a marginalized group—in the definition you just provided

4. "A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination or prejudice against members of a marginalized group such as a racial minority." *Microaggression*, Oxford English Dictionary (July 2023), https://perma.cc/H9PW-9E9M.

> in the last slide. So that's contradictory.
>
> [Dr.] Adams: What I had there is kind of the generalized definition. In fact, I extend it beyond that. As you see, I extend it to any marginalized group, and sometimes it's not a marginalized group. There are examples that you would think maybe not fit, such as body size, height, [or] weight. And if that is how you would like to see me expand it, yes, indeed, that's how I do.
>
> [Appellant]: Yeah, follow-up question. Exactly how do you define marginalized and who is a marginalized group? Where does that go? I mean, it seems extremely nonspecific.
>
> [Dr.] Adams: And—that's intentional. That's intentional to make it more nonspecific. . . .

J.A. 1314-16.

After this exchange, Appellant continued to critique Dr. Adams' theory and impugn her research as anecdotal. Appellant asked a series of follow-up questions until UVA faculty panelist Dr. Sara Rasmussen intervened.

Dr. Rasmussen discussed her own understanding of microaggressions, offered an anecdote, and attempted to open the floor to other students for questions. But Appellant took the microphone again to contest Dr. Rasmussen's statements, and the two briefly argued until Dr. Rasmussen called on another student to ask a question.

One of the faculty panelists, Dr. Nora Kern, later emailed Dean Peterson about Appellant's interaction with the panel. Drs. Kern and Peterson were the only members of the UVA faculty present during the microaggressions panel. Dr. Kern initiated the email exchange by asking if Dean Peterson knew who the "extremely unprofessional" student during the panel discussion was, and she suggested his behavior should be discussed by the School of Medicine's Academic Standards and Achievement Committee ("ASAC"). J.A. 1316. Dr. Kern expressed concern about how Appellant's professionalism would affect his rotations. Dean Peterson told Dr. Kern that, if she wished, she could submit a "Concern Card," a tool used by UVA to monitor students' professional behavior, which "may prompt review by ASAC but contains no punitive effect." *Id.* Thereafter, Dr. Kern submitted a Professionalism Concern Card to memorialize her concerns with Appellant's colloquy.

On November 1, Dean Densmore, who was Appellant's dean, submitted the Concern Card to the ASAC for review. The ASAC considered the Concern Card in a November 14 meeting and voted unanimously to send Appellant a

letter the following day (the "ASAC Letter").[5] The letter was sent by Dr. Jim B. Tucker, a member of the ASAC. It read in its entirety as follows:

> The [ASAC] has received notice of a concern about your behavior at a recent AMWA panel. It was thought to be unnecessarily antagonistic and disrespectful. Certainly, people may have different opinions on various issues, but they need to express them in appropriate ways.
>
> It is always important in medicine to show mutual respect to all: colleagues, other staff, and patients and their families. We would suggest that you consider getting counseling in order to work on your skills of being able to express yourself appropriately.

J.A. 765.

C.

On November 14, the same day the ASAC met and voted to send the ASAC Letter to Appellant, Dean Densmore met with Appellant in person to discuss his failing grade in his hematology course. Appellant's behavior during this meeting gave Dean Densmore cause for concern, so Dean Densmore asked Appellant either to consult with his private psychiatrist or seek evaluation

5. Dean Densmore was not at the ASAC meeting and did not vote on whether to send the letter.

at UVA Student Health's Counsel and Psychological Services ("CAPS"). After the meeting, Appellant and Dean Densmore walked together to CAPS. A clinician evaluated Appellant, and, based on Appellant's behavior during the evaluation, petitioned for an emergency custody order. University police then escorted Appellant to the UVA Medical Center where he was hospitalized until November 16, 2018.

Two days after Appellant's discharge from emergency custody, police officers responded to a domestic incident at Appellant's apartment between Appellant and his mother. The next day, November 19, Appellant's mother filed a petition to have Appellant involuntarily committed. She alleged Appellant "got inches from [her] face screaming and pounding fists toward me so that I felt I was in imminent harm." J.A. 1317. A magistrate issued an emergency custody order for Appellant that day based upon "probable cause" that Appellant "ha[d] a mental illness and [wa]s in need of hospitalization or treatment, and . . . a substantial likelihood that, as a result of mental illness, [Appellant would] . . . cause serious physical harm to self or others, as evidenced by recent behavior." J.A. 986.

The same day this second emergency custody order was issued, Appellant's ex-girlfriend, also a medical student at UVA, sought Dean Peterson's help obtaining a protective order against Appellant. Dean Peterson helped

Appellant's ex-girlfriend obtain the protective order by writing a letter in support of the ex-girlfriend's petition.[6]

Also on November 19, Appellant met again with Dean Densmore. And once again, Appellant's behavior caused Dean Densmore concern. As a result, University Police were contacted. The police intercepted Appellant as he was leaving the building. Because an emergency custody order had been entered in response to Appellant's mother's petition, Appellant was taken into custody and transported to the emergency department at UVA Medical Center. Based upon clinicians' diagnosis of Appellant, a municipal court issued a temporary detention order for Appellant to be transported to Poplar Springs Hospital in Petersburg, Virginia.

Upon Appellant's release from the hospital on November 26, 2018, Dean Densmore emailed Appellant to tell him he would need to be cleared by CAPS before returning to class because the UVA medical school attendance policy required students to be medically evaluated if they missed two or more consecutive days due to illness.

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6. On November 26, 2018, a municipal court in Charlottesville awarded Appellant's ex-girlfriend a protective order based upon a preliminary finding that she was "in immediate and present danger of family abuse or there [wa]s sufficient evidence to establish probable cause that family abuse ha[d] recently occurred so as to justify an *ex parte* proceeding." J.A. 2703.

D.

On November 28, 2018, the ASAC held a meeting with Appellant to discuss his enrollment status. At the beginning of the meeting, Appellant photographed the ASAC members collectively. Appellant made an audio recording of the meeting on his cell phone, and the meeting was videoed on the body camera of a police officer who attended the meeting.

The district court described the meeting as follows:

> ASAC held a meeting on November 28, 2018 to discuss [Appellant]'s enrollment status and invited [Appellant] to attend. In the prior weeks, administrators at the medical school had discussed various avenues to suspend [Appellant] from the medical school, determining that he could not be suspended on academic or Title IX grounds. At the November 28 meeting, [Appellant] repeatedly attempted to bring up the microaggression panel, but [was] told that "[had been] addressed last month," and that "the reason we're having this meeting tonight is that there's concern about your interactions and behaviors most recently." Dr. Bart Nathan similarly explained: "We are having this discussion because we are concerned about your professionalism and professional behavior in medical school."

J.A. 1318-19 (citations omitted). At the end of the meeting, while still recording, Appellant asked the ASAC members each of their names individually.

After the meeting, the ASAC decided that Appellant failed to meet the school's requirements for continued enrollment and voted unanimously to suspend him. The next day, November 29, 2018, the ASAC sent Appellant a letter informing him he was suspended for one year. In relevant part, the letter stated as follows:

> [ASAC] has determined that your aggressive and inappropriate interactions in multiple situations, including in public settings, during a speaker's lecture, with your Dean, and during the committee meeting yesterday, constitute a violation of the School of Medicine's Technical Standards that are found at: [link].
>
> Those Standards, in relevant part and as related to professionalism, state that each student is responsible for: Demonstrating self-awareness and self-analysis of one's emotional state and reactions; Modulating affect under adverse and stressful conditions and fatigue; Establishing effective working relationships with faculty, other professionals and students in a variety of environments; and Communicating in a non-judgmental way with persons whose beliefs and understandings differ from one's own.

J.A. 871. The letter further stated that Appellant could appeal the suspension, which he did, though the suspension process was put on hold and eventually derailed by the events that followed.

E.

In December 2018, UVA became aware that Appellant was posting about his suspension online. This included the photographs he took of the ASAC members, which Appellant posted to the message board 4chan[7] with the caption, "These are the f[***]gots ruining my life." J.A. 1181. The message prompted posts from other users encouraging acts of violence against the ASAC members.

On December 30, 2018, UVA police met with UVA's Threat Assessment Team to address Appellant's behavior. They discussed the protective order Appellant's ex-girlfriend obtained against Appellant; his multiple involuntary commitments; his threats against faculty members at UVA; and his "pattern of retaliatory behavior." J.A. 1320. The police decided to issue a no trespass order ("NTO") against Appellant which was delivered to Appellant orally on a telephone call. The police followed up and mailed a written version of the NTO to Appellant's parents' house on January 2, 2019. The written

7. 4chan is "a simple image-based bulletin board where anyone can post comments and share images. There are boards dedicated to a variety of topics, from Japanese animation and culture to videogames, music, and photography. Users do not need to register an account before participating in the community." 4chan, https:/perma.cc/XN5N-XTF7 (last visited Dec. 21, 2023).

NTO prohibited Appellant from entering UVA grounds for four years except as a patient of the medical center and explained the process for appealing the order. The deadline for appealing the NTO was five days from the date of service. Appellant did not appeal the NTO until July 21, 2019. UVA considered and denied Appellant's appeal of the NTO as untimely because it was filed more than six months after the order was issued.

F.

On September 16, 2019, Appellant filed a pro se Complaint against Appellees alleging two claims, a First Amendment claim and a Fifth Amendment procedural due process claim. He retained counsel and filed an Amended Complaint in February 2020, alleging four claims: (1) a First Amendment retaliation claim; (2) a Fourteenth Amendment due process claim; (3) a claim for conspiracy to interfere with civil rights in violation of 42 U.S.C. § 1985; and (4) a common law conspiracy claim. Appellees moved to dismiss the First Amended Complaint, and on March 31, 2021, the district court dismissed all claims except Appellant's First Amendment retaliation claim. Appellant then sought leave to file a Second Amended Complaint with additional facts regarding his First Amendment claim, a new conspiracy claim, and additional defendants, including his ex-girlfriend. On March 16, 2022, the district court denied Appellant's request to amend his complaint to add a civil conspiracy claim and to add his ex-girlfriend as a defendant. Appellant accordingly filed a Second Amended Complaint, alleging only First Amendment retaliation.

Appellees moved for summary judgment. They argued Appellant could not show that Appellees took adverse action against him because of his protected speech and that Appellees Densmore and Peterson were shielded by qualified immunity. The district court granted the motion. The court held Appellant had failed to show that several of the actions of which he complained, including the Concern Card, the ASAC Letter, and the requirement of CAPS clearance, were adverse actions under the First Amendment. The court also held that Appellant had failed to present evidence of a causal connection between his speech and any of Appellees' actions.

The evidence indicated Appellees took action against Appellant for each of the following reasons:

- Multiple involuntary hospitalizations for psychiatric treatment
- Threats against his mother, which resulted in an emergency custody order
- Intimidating behavior toward his girlfriend, which resulted in an emergency protective order
- Confrontational conduct directed at his dean
- Abrasive, interruptive exchanges with faculty, including at the faculty panel and in the ASAC meeting

- Disclosing the identities and likenesses of UVA administrators with an accompanying slur in an online forum

Appellant timely appealed.

II.

We review a district court's grant of summary judgment de novo. *Guthrie v. PHH Mortg. Corp.*, 79 F.4th 328, 342 (4th Cir. 2023) (citing *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021)). Summary judgment is appropriate only when there are "no genuine disputes as to any material fact." *Id.* A dispute is "genuine" if the evidence presented would allow a reasonable factfinder to find for the nonmovant. *Id.* A fact is "material" if it may influence the outcome of the suit under governing law. *Jones v. Chandrasuwan*, 820 F.3d 685, 691 (4th Cir. 2016).

A court cannot substitute its judgment for that of the factfinder and award summary judgment based on its prediction of the result at trial. *Guthrie*, 79 F.4th at 342. But a court *must* award summary judgment when "the evidence could not permit a reasonable jury to return a favorable verdict" for the nonmoving party. *Id.* In making that determination, a court must view all facts, and reasonable inferences taken therefrom, in the light most favorable to the nonmoving party—here, Appellant. *Davison v. Rose*, 19 F.4th 626, 633 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 106, 214 L. Ed. 2d 25 (2022).

Ordinarily, when a district court denies leave to amend, we review the district court's denial for abuse of discretion. *Mowery v. Nat'l Geospatial-Intel. Agency*, 42 F.4th 428, 442 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 783, 215 L. Ed. 2d 50 (2023); *United States ex rel. Nicholson v. MedCom Carolinas, Inc.*, 42 F.4th 185, 197 (4th Cir. 2022). But when a district court denies leave to amend based upon the futility of the proposed amendment, as the court did here, that denial amounts to a dismissal of the proposed claims as legally insufficient, and we review the court's judgment de novo. *See Cannon v. Peck*, 36 F.4th 547, 575 (4th Cir. 2022). Similarly, when, as here, a district court dismisses a count for failure to state a claim, we review the dismissal de novo, taking as true all plausible, well pled allegations in the complaint. *United States ex rel. Taylor v. Boyko*, 39 F.4th 177, 189 (4th Cir. 2022) (citing Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

III.

Appellant raises three issues on appeal. First, he argues the district court resolved genuine disputes of fact in favor of Appellees at summary judgment, discrediting evidence that he was punished for protected speech. Second, he argues the district court erroneously denied him leave to add a conspiracy claim on the basis that his proposed amendment was futile. And third, he argues the district court erred in dismissing his due process claim because his dismissal from UVA was disciplinary, not academic, and he argues he received inadequate process for a disciplinary dismissal.

Appendix A

A.

Summary Judgment: First Amendment Claim

The district court determined that Appellant presented no evidence at summary judgment from which a reasonable factfinder could decide he was retaliated against because of his protected speech. The court observed, "[Appellant] still has nothing more than speculation to support his claim—he has not unearthed even a scintilla of evidence that would demonstrate that Defendants took any adverse action against him because of his protected speech." J.A. 1330. Instead, the court held, UVA took action because of Appellant's conduct, which included his being "repeatedly involuntarily committed to mental health institutions for threatening others." *Id.* at 1331. As a result, the district court awarded summary judgment against Appellant. We agree with the district court's assessment.

A review of the record in this case yields but one conclusion: Appellant was suspended, and later banned, from UVA because of his confrontational and threatening behavior, not his speech.

1.

First Amendment Framework

The First Amendment's Free Speech Clause provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The parties do not dispute

that, as a general matter, the First Amendment constrains UVA's actions, as UVA is an arm of the Commonwealth of Virginia. *See*, *e.g.*, *Porter v. Bd. of Trustees of N.C. State Univ.*, 72 F.4th 573, 582 (4th Cir. 2023); *Cuccinelli v. Rector, Visitors of Univ. of Va.*, 283 Va. 420, 722 S.E.2d 626, 630 (Va. 2012).

Here, Appellant has sued Appellees under a theory of First Amendment retaliation. The First Amendment's Free Speech Clause guarantees both "the affirmative right to speak" and the concomitant "right to be free from retaliation by a public official for the exercise of that right." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005) (quoting *Suarez Corp. Indus. V. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000)). "A plaintiff claiming First Amendment retaliation must demonstrate that: '(1) [he] engaged in protected First Amendment activity, (2) the defendants took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and the defendants' conduct.'" *Davison v. Rose*, 19 F.4th 626, 636 (4th Cir. 2021) (alteration in original) (quoting *Constantine*, 411 F.3d at 499), *cert. denied*, 143 S. Ct. 106, 214 L. Ed. 2d 25 (2022).

The district court rested its summary judgment order upon adverse action and causation, granting Appellant the benefit of the doubt regarding his "protected speech"—i.e., the views and criticisms he offered regarding microaggressions during the microaggressions panel. Appellant contends the district court erred as to both the adverse action and causation elements, first by

discounting several of his asserted adverse actions and then by determining that Appellant could not point to "any evidence in the record that could reasonably support a jury verdict in his favor on the causation prong." J.A. 1327.

Like the district court, we assume without holding that Appellant engaged in protected speech at the microaggressions panel.

2.

Adverse Actions and Causation

The district court held that Appellant "put forward no direct evidence that [the Appellees] considered the content of his speech in undertaking any of the adverse actions in question." J.A. 1328. The court held this was true for *all* actions taken against Appellant, including those the court deemed "adverse actions" and those it did not.

The district court placed particular emphasis on the fact that any references to the microaggressions panel that cropped up in later actions—the Concern Card, the ASAC Letter, Appellant's suspension, Appellant's psychiatric evaluations, and the NTO—referred to the tone and demeanor of Appellant's speech during the panel, *not* the content. And the district court held, citing this court, "[I]t is not a Constitutional violation for government officials to take protective or preventative action based on the manner or context in which an individual speaks, especially where the speech is aggressive or threatening." J.A. 1328 (citing

Davison, 19 F.4th at 637; *Wood v. Arnold*, 321 F. Supp. 3d 565, 581 (D. Md. 2018), *aff'd*, 915 F.3d 308 (4th Cir. 2019)).

But Appellant contends he did present evidence that UVA took adverse actions against him because of the contested speech. To make that case, Appellant must explain how the district court erred in linking the actions taken against him to his *conduct*, as opposed to his *speech*. *See Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir. 2015) ("[I]t is not enough that the protected expression played a role or was a motivating factor in the retaliation; claimant must show that '*but for*' the protected expression the [state actor] would not have taken the alleged retaliatory action.") (alterations in original) (quoting *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990)). He must demonstrate that the court ignored material evidence that would allow a factfinder to determine UVA punished him for his speech, or that the court sided with UVA when material facts pointed both ways, creating a genuine issue for a factfinder to resolve. *Guthrie v. PHH Mortg. Corp.*, 79 F.4th 328, 342 (4th Cir. 2023) (noting a court may not "base a grant of summary judgment merely on the belief 'that the movant will prevail if the action is tried on the merits'") (quoting *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021)).

Contrary to Appellant's assertion, the record is replete with evidence that Appellees took the actions they did against Appellant based upon his conduct, which rendered him unfit, in their view, for the professional practice of medicine. On the other hand, the evidence

they took these steps because of the content of his speech is slim to none, and no reasonable factfinder could agree with Appellant's theory of the case.

a.

Professionalism Concern Card and the ASAC Letter

The first actions Appellant contends were adverse actions taken because of his speech at the microaggressions panel were the Professionalism Concern Card submitted by Dr. Kern and the ASAC Letter following up on the Concern Card. The district court determined that neither action was an "adverse action" for First Amendment purposes and that, regardless, Appellant could not show that UVA took either of these actions because of Appellant's protected speech.

i.

The district court determined that the Concern Card and the ASAC Letter were not adverse actions. An adverse action for First Amendment purposes is one that "may tend to chill individuals' exercise of constitutional rights." *Constantine*, 411 F.3d at 500 (quoting *ACLU of Md., Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993)). A plaintiff asserting adverse action must show more than "*de minimis* inconvenience." *Id.* (citing *ACLU of Md.*, 999 F.2d at 786 n.6). An action chills speech if it "would likely deter 'a person of ordinary firmness' from the exercise of Fourth Amendment rights." *Id.* (citations omitted). Whether an action chills speech is an "objective" analysis

we conduct "in light of the circumstances presented in [a] particular case." *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006).

As to the Concern Card, the district court held it was not an adverse action because it had no punitive effect on its own, independent of the ASAC's review, and because Appellant was not even aware of the Concern Card until after he had been banned from UVA. The district court held the Concern Card was "a referral for another party to consider discipline that [Appellant] did not know about." *Bhattacharya v. Murray*, No. 3:19-cv-00054, 2022 U.S. Dist. LEXIS 129588 (W.D. Va. July 21, 2022), ECF No. 487, at 11-12. And the district court held that the ASAC Letter did not impose or threaten consequences of sufficient severity to qualify as an adverse action.

We agree that the Concern Card was not an adverse action. The Concern Card was a routine documentation that had no punitive effect on its own. We have held that even more severe actions than the Concern Card were insufficient for First Amendment purposes. *See Suarez Corp. Indus.*, 202 F.3d at 686 ("[C]ourts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticisms, false accusations, or verbal reprimands.") (citations omitted).

We also agree that the ASAC Letter was not an adverse action. "[W]here a public official's alleged retaliation is in the nature of speech, in the absence

of threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will immediately follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." *Suarez Corp. Indus.*, 202 F.3d at 687. We do not regard the ASAC Letter as threatening, coercing, or intimidating Appellant, or as holding punishment over him. The ASAC Letter merely observed that Appellant was unnecessarily antagonistic, reminded him that people may have different opinions as long as they express them appropriately, and encouraged him to develop the skills of showing mutual respect to his colleagues. Thus, the ASAC Letter was not an action which would chill the speech of a person of ordinary firmness and did not violate Appellant's First Amendment rights.[8]

ii.

The district court also determined that Appellant could not make the causal link as to the Concern Card because it said "nothing about the content of [Appellant's] speech—only that he was 'antagonistic'—and that Dr. Kern was worried about how [he] would do on wards." J.A. 1328 (internal alterations and quotation marks omitted).

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8. The same is true of the November 14 vote to reprimand Appellant, which was the basis for the November 15 ASAC Letter. *See Suarez Corp. Indus.*, 202 F.3d at 686 ("[C]ourts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticisms, false accusations, or verbal reprimands.") (citations omitted).

For context, Concern Cards are forms for faculty to document observed professionalism issues with a UVA medical student. *See* J.A. 641 ("Praise/Concern Cards and written narratives are assessment tools used to describe behaviors in areas of altruism; honesty and integrity; caring, compassion and communication; respect for others; respect for differences; responsibility and accountability; excellence and scholarship; leadership and knowledge and other skills related to professionalism."); *id.* ("Any breach of professionalism resulting in a recorded observation, e.g., Professionalism Concern Card . . . must be addressed with the student by his/her college dean and documentation of the discussion must be recorded."); *see also Bhattacharya v. Murray*, No. 3:19-cv-00054, 2022 U.S. Dist. LEXIS 129588 (W.D. Va. July 21, 2022), ECF No. 487, at 11 ("[T]he professionalism concern card had no punitive effect in itself; it was simply a referral to a committee to consider further punitive action. . . .").

But in any case, as the district court properly noted, Dr. Kern's Concern Card did not target the content of Appellant's expression, only the manner of his delivery. *See* J.A. 753 ("I am shocked that a med student would show so little respect toward faculty members. It worries me how he will do on wards."). Indeed, Dr. Kern's emails with Dean Peterson make quite clear that the concern was not with Appellant's expressed views but, instead, with his tone and demeanor:

> I more was curious where this anger/frustration was coming from; he was talking so fast, I wasn't even sure what he was saying exactly or

> asking. But if he handles himself in that kind of manner on the wards, that is not acceptable *behavior*.

J.A. 756 (emphasis supplied). It was these thoughts that found their way into the Concern Card, which manifestly deals with Appellant's unprofessional behavior, not the content of his speech.

The same is true of the ASAC Letter. This letter grew out of the Concern Card because Dean Densmore asked the ASAC to consider the Concern Card as evidence of Appellant's "extreme professionalism lapse." J.A. 759. The ASAC did consider that lapse which culminated in the ASAC Letter being sent to Appellant:

> The [ASAC] has received notice of a concern about your *behavior* at a recent AMWA panel. It was thought to be unnecessarily antagonistic and disrespectful. **Certainly, people may have different opinions on various issues, but they need to express them in appropriate ways**.
>
> It is always important in medicine to show mutual respect to all: colleagues, other staff, and patients and their families. We would suggest that you consider getting counseling in order to work on your skills of being able to express yourself appropriately.

J.A. 765 (emphases supplied). Plainly this letter dealt with Appellant's "behavior," not with the content of his

speech, the validity of which the ASAC expressly granted: "Certainly, people may have different opinions on various issues, but they need to express them in appropriate ways." *Id.*; *see also Davison*, 19 F.4th at 637 (affirming summary judgment when a no trespass order was instituted not because "of a causal relationship [with] his protected speech" but because of "threats and antagonistic behavior").

Accordingly, we agree with the district court that neither the ASAC Letter, nor the Concern Card that prompted it, were adverse actions *caused* by Appellant's speech.

b.

Psychiatric Evaluations

As discussed above, Appellant had two psychiatric evaluations, one on November 14, 2018, and another on November 19, 2018. The district court found no material evidence indicating Appellant was subjected to these evaluations because of his protected speech. Appellant contends this was error. He argues that his views led to the evaluations because Dr. Kern's description of Appellant's "antagonis[m] toward the panel" "found its way into . . . the November 14, 2018 [evaluation] . . . [and] the November 19 [evaluation]." Opening Br. at 42-43. This contention is belied by the record.

Appendix A

i.

November 14 Psychiatric Evaluation

The November 14 evaluation took place after Appellant met with Dean Densmore to discuss Appellant's failing grade in hematology. The district court determined that Appellant's "behavior during the meeting caused Dean Densmore to become concerned about [Appellant's] mental health," so Dean Densmore asked Appellant either to "consult with his private psychiatrist or go to [CAPS] for evaluation." J.A. 1317. The clinicians at CAPS evaluated Appellant, and based upon his behavior, they "petitioned for an emergency custody order, which was granted, and University Police escorted [Appellant] to the UVA Medical Center," where he was admitted and held until November 16, 2018. *Id.*

The record indicates that when Dean Densmore insisted that Appellant seek evaluation on November 14, it was out of concern for "[Appellant's] health" and his "behavior," not his speech. S.J.A. 40. More specifically, according to the CAPS notes at intake, Dean Densmore had taken Appellant to CAPS for the following reasons: "[Appellant] failed 2 of his last 3 exams; [he] attended a panel regarding microaggressions and many concerns were raised by the panelists and others in attendance that [Appellant] was confrontational; his girlfriend recently broke up with him because of his behavior, describing him as paranoid (she was adamant that there were no safety

concerns);"[9] "he has not been sleeping; and he is smoking an increased amount of marijuana." J.A. 2620. Dean Densmore gave Appellant the choice whether to consult with a private psychiatrist or walk with him to CAPS, and Appellant walked to CAPS with Densmore. *Id.*

The clinicians at CAPS who evaluated Appellant agreed with Dean Densmore's insistence that Appellant seek treatment, so much so that they concluded he might be "experiencing a manic episode" with "delusions and paranoia," that he did not seem "connected to reality or able to function currently in daily activities," and that he was "at risk of decompensating." J.A. 2621-22. And the CAPS clinicians recommended that Appellant be committed

> [d]ue to [his] refusal to comply with treatment recommendation or allow for his treating provider to be notified, risk that his symptoms are worsening and could further decompensate, evidence of potential delusions or paranoia, and concern that he is not connected to reality or able to function currently in daily activities based on symptoms.

Id. at 2622. Appellant was thus referred to the emergency department at UVA Medical Center for inpatient psychiatric hospitalization where he was diagnosed with

9. The November 14 evaluation took place *before* Appellant's ex-girlfriend expressed her safety concerns which led to the order of protection.

"Bipolar I disorder, manic, with psychotic features, with cannabis use disorder." *Id.* at 665.

Given all of this, no reasonable factfinder would conclude that Dean Densmore asked Appellant to seek treatment on November 14, 2018, because of his views on microaggressions, as opposed to his manic episode and escalating string of worrying behavior.

ii.

November 19 Psychiatric Evaluation

The November 19 evaluation occurred after Appellant returned to meet with Dean Densmore again following his November 16 discharge from hospitalization. Appellant's behavior again caused Dean Densmore concern, so he contacted a colleague who, in turn, contacted police. The police intercepted Appellant as he was leaving the building. At that time, there was already an emergency custody order for Appellant based on his mother's petition filed the same day, November 19. As a result, police took Appellant into custody, and transported him to the emergency department at UVA Medical Center. And the municipal court issued a temporary detention order for Appellant. He was released on November 26, 2018.

Again, the record makes clear that Appellant was treated and eventually hospitalized not because of protected speech, but because his *behavior* gave Dean Densmore and the physicians who treated Appellant cause for concern. Dean Densmore testified in his deposition

that during the meeting Appellant paced back and forth in front of Dean Densmore's desk, spoke to him in an accusatory manner, demanded to see his medical license, and told him he needed to watch himself. Once Appellant had been taken by police to the emergency department at UVA Medical Center, clinicians again agreed with Dean Densmore regarding Appellant's behavior. The treating physician stated:

> I recall him and—and recall my observations to be such that he was, indeed, anxious, had a labile mood and affect, was angry that he was in the emergency department. His speech was rapid and pressured. He did appear to be agitated and was acting aggressive and hyperactive. We were concerned about him potentially becoming combative due to his anger and aggression. We thought his thought content to be paranoid at times. We did not find his thought content to have any delusional components to that. We did think his—his cognition and—and memory were normal at the time insofar that he was not, at the time, having any sort of clear evidence of memory loss. He was acting impulsive with inappropriate judgment and did not necessarily endorse homicidal and suicidal ideation.

J.A. 796. The notes from Appellant's admission to the emergency department reflect that involuntary commitment was recommended due to Appellant's "presentation of mania symptoms, poor judgment, lack

of insight into situation, irritability, and inability to care for self." S.J.A. 108.

Thus, while there is strong evidence, both from Dean Densmore and from the practitioners who treated Appellant on November 19, that Appellant's condition was such that he needed psychiatric treatment, there is no evidence that he was compelled to seek such treatment because of the views he expressed during the microaggressions panel.

Significantly, November 19 was the same day that Appellant's mother sought an order to have him involuntarily committed, in part because he "got inches from [her] face screaming and pounding fists toward [her] so that [she] felt . . . in imminent harm." J.A. 785-790. And it was also the same day Appellant's ex-girlfriend, also a medical student at UVA, sought Dean Peterson's help obtaining a protective order against Appellant.

Accordingly, no reasonable factfinder would conclude that Appellant was compelled to undergo psychiatric evaluation on because of his speech, as opposed to his behavior and mental condition.

c.

Clearance Requirement After Hospitalization

Next, Appellant contends that when Appellees required him to undergo a psychiatric evaluation before

returning to campus after his second involuntary committal, they were retaliating against him for the views he expressed during the microaggressions panel. The district court rejected this proposition, noting that (1) "the required health evaluation was pursuant to a neutral policy," J.A. at 1327, which applied to anyone returning from a health-related absence for two days or more; and (2) the requirement was "minimally invasive" and understandable within the context given Appellant's history, *id.* (citing *Couch v. Bd. of Trustees of Mem'l Hosp.*, 587 F.3d 1223, 1240 (10th Cir. 2009)).

Appellant notes that both Dr. R.J. Canterbury, a UVA faculty member not named in this case, and Dean Densmore emailed him to tell him he was required to meet with CAPS before returning to campus. While Dr. Canterbury and Dean Densmore purported to require as much pursuant to the UVA policy, there is no evidence whatsoever that they did so in order to retaliate against Appellant for his views on microaggressions. Indeed, the emails Appellant points to wherein Dr. Canterbury and Dean Densmore advise him of the UVA policy say nothing about Appellant's speech. Rather, the only evidence is from Dr. Canterbury's internal email to others, including Dean Densmore, in which Dr. Canterbury noted that *Appellant* claimed he was being retaliated against for First Amendment expression.

Thus, Appellant has provided no evidence that he was required to get medical clearance before returning to class because of his views expressed during the

microaggressions panel, as opposed to his having been hospitalized with mania, psychosis, etc.[10]

d.

The ASAC Suspension

Next, Appellant contends the district court erred in holding there was not a triable question whether he was suspended because of his protected speech during the microaggressions panel. On appeal, Appellant theorizes that the ASAC voted to hold a meeting regarding Appellant's conduct—and ultimately suspend him—at the request of Drs. Canterbury and Peterson, who, Appellant contends, had it out for him because of his expressed views on microaggressions. *See* Opening Br. at 39 (asserting the ASAC "apparently relied on what individuals like Canterbury [and] Peterson were telling them they should do"). We turn back to the record to determine whether any material evidence supports Appellant's position. Again, it does not.

As to Dr. Canterbury, who is not a named defendant in this case, Appellant apparently believes Dr. Canterbury

10. As with the Professionalism Concern Card and the ASAC Letter, the district court determined that requiring Appellant to be medically cleared before returning to campus was not an "adverse action" for First Amendment purposes. We do not address whether medical clearance was or was not an "adverse action" for First Amendment purposes, confining our analysis to whether Appellant's speech during the microaggressions panel *caused* this requirement. It did not.

was motivated to retaliate against Appellant because he disagreed with what Appellant said during the microaggressions panel. Appellant attempts to make this connection by pointing to communications Dr. Canterbury received from students who were complaining about Appellant's conduct during the panel. Specifically, these students submitted reports via "Listening Post," an online portal for UVA students to submit reports about mistreatment or unprofessional conduct. The students took issue with Appellant's tone and behavior, which they called "extremely disrespectful, unprofessional and condescending," J.A. 1067, and "very disrespectful to the panelists in his tone and manner of questioning," *id.* at 1085. On their face, these posts do not address Appellant's views, but even if they did, they were merely forwarded to Dr. Canterbury, prompting general observations on his part. *See id.* at 1066 ("Has he been the subject of an ASAC discussion?"); *id.* at 1084 ("I have heard about this in general from students and will follow up."). The district court held these student complaints could not have caused adverse actions against Appellant, because there is no evidence Appellees relied upon these complaints in their decision making, and the other students are not defendants.

Appellant submits on appeal that the student complaints caused adverse action against him because Dr. Canterbury "hauled him in" before the ASAC based on the complaints. *See* Opening Br. 43-44 ("Canterbury, Peterson, Reed, and others all acted upon and relied upon such student complaints. Reed even directed a student to submit a complaint to the 'Listening Post[.]'"). In fact,

at oral argument, when Appellant's counsel was asked repeatedly to point to any record evidence that Appellant's views caused adverse action, counsel could point only to these student complaints, arguing that Dr. Canterbury "adopted" them. Oral Argument at 4:30, *Bhattacharya v. Murray*, No. 22-1999(L), 22-2065 (4th Cir. Oct. 24, 2023), https://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (hereinafter "Oral Argument").

However, there is simply no evidence that Dr. Canterbury orchestrated retaliation against Appellant because he agreed with students who took issue with Appellant's views at the faculty panel. Dr. Canterbury did not even attend the panel. And Appellant admits that "[Dr.] Canterbury never listened to what [Appellant] actually said on October 25, 2015," a fact that gravely undermines the argument that Dr. Canterbury struck out against Appellant because of his views. Opening Br. at 10. At best, Appellant has cited a single email where, in response to a description primarily of Appellant's *behavior* at the microaggressions panel, Dr. Canterbury asked if Appellant "[h]as been the subject of an ASAC discussion[.]" J.A. 1066-67. In another email, responding to a student portal post objecting to Appellant's "very disrespectful . . . tone and manner of questioning," Dr. Canterbury said, "I have heard about this in general from students and will follow up." *Id.* at 1084.

Most tenuous of all, Appellant attempts to link Dr. Canterbury to alleged adverse actions through a Twitter (now known as X) post in which Dr. Canterbury complained about the lack of professionalism demonstrated by United

States Senator Mitch McConnell during Justice Brett Kavanaugh's confirmation hearings. Curiously, this tweet was one of the only places in the record Appellant's counsel could point to during oral argument in attempt to support the assertion that Dr. Canterbury violated Appellant's First Amendment rights. Oral Argument at 2:50, 4:10. But, critically, the tweet does not even mention Appellant.[11]

Appellant also cites an email from Dr. Canterbury to Dr. Jim Tucker ostensibly to indicate retaliation against Appellant in violation of the First Amendment. The email indicates nothing of the sort. In entirety, it states:

> Can you call an emergency meeting of the ASAC to discuss a student, Kieran Bhattacharya, who has been hospitalized for psychotic mania twice in the past two weeks and was released yesterday. He is still manic and has been intimidating John Densmore-to the point that John had to have him taken from his office by police a week ago. John has all the details. I have used my emergency authority to tell him that he cannot return to the learning environment until he has been cleared by CAPS but that authority has time limits, of course. He

11. The dissent notes that Dr. Canterbury emailed a colleague about Appellant's "unprofessional behavior" during 2016 post-election town halls. *Post* at 47-48. And Appellant submits that Dean Peterson brought up Appellant's views about the 2016 election during a meeting. *Id.* at 47. But there is no evidence that this behavior, or anything having to do with the 2016 election, contributed to UVA's decisions related to Appellant.

> is insisting on returning to class today-which is what I have forbidden. He's still quite manic and likely psychotic.

J.A. 828. All Dr. Canterbury said in this email was what Appellees have said all along—they took action against Appellant because of his *conduct*, not his speech.

Appellant also argues that Dean Peterson initiated the ASAC meeting or compelled its members to vote to suspend him. But yet again, Appellant has provided no evidence to support his assertion. Dean Peterson's emails with Dr. Kern following the microaggressions panel clearly reflect that they were not at all concerned with the *content* of Appellant's colloquy with the panel, but, rather, with his delivery. *See* J.A. 757 (initiating chain with email referencing "the student who asked the first questions and was extremely unprofessional"; "that kind of behavior should be brought up at ASAC"); *id.* at 756 ("[H]e was talking so fast, I wasn't even sure what he was saying exactly or asking. But if he handles himself in that kind of manner on the wards, that is not acceptable behavior.").

Appellant cites other evidence in the record ostensibly to demonstrate that Dean Peterson retaliated against him for his views during the microaggressions panel. However, the record supports the opposite conclusion. It was not about his *views*. It was about his *delivery*. For example, during her deposition, Dean Peterson consistently testified her intention to communicate to Appellant "that he needs to learn the skills how to bring up . . . even opposing ideas, in many different settings, without being rude and

disrespectful to the—to the speaker whose ideas he is challenging." J.A. 1042.

All told, contrary to Appellant's arguments, the substance of the ASAC meeting to discuss Appellant's enrollment status, which led to his suspension, was not about his speech during the microaggressions panel. Despite Appellant's repeated efforts to raise that speech during the ASAC meeting, Dr. Tucker, the administrator who led the meeting, repeatedly noted the meeting was about Appellant's *behavior*. The minutes from the ASAC meeting reflect that the committee was "convened to discuss concerning *behavior* exhibited by" Appellant. S.J.A. 80 (emphasis supplied). Following the meeting, the committee resolved that Appellant failed the school's technical standards, "especially the Emotional, Attitudinal and Behavioral Skills." *Id.* And the declarations of the voting ASAC members confirm Appellant's views were not considered. J.A. 939, 944, 949, 955, 962, 968, 973.

Finally, the suspension letter that the ASAC sent Appellant the day after the ASAC meeting cited as grounds for his suspension "aggressive and inappropriate interactions in multiple situations, including in public settings, during a speaker's lecture, with [Dean Densmore], and during the committee meeting [on November 28]"; this conduct "constituted a violation of the School of Medicine's technical standards." J.A. 1319.

At bottom, the evidence points overwhelmingly to Appellant's *conduct*, not his expression as the basis for his suspension.

e.

No Trespass Order

As with the suspension, the district court determined that Appellant had failed to identify a triable issue as to whether Appellees procured a No Trespass Order from the university police department to retaliate against him for views he expressed during the panel discussion which occurred two months earlier. Appellant contends that the link between that speech and the NTO is "[Dr.] Canterbury," who, Appellant contends, was biased against Appellant because of his views, and who also insisted "upon the NTO and the UVA Police . . . issuing it based on the alleged online threats made by [Appellant]." Opening Br. at 13.

The evidence is emphatically contrary to Appellant's theory. The university police possessed sole authority to issue the No Trespass Order, and they issued it for several well founded reasons. First, Appellant's girlfriend had taken out a protective order against him for fear of her own safety, citing texts in which he said, "i dont love you and sincerely hope that you kill yourself in the near future," J.A. 2692, and because he had surreptitiously moved a shovel into his bedroom.[12] Second, Appellant had

12. The officer who issued the No Trespass Order testified she issued it primarily to protect Appellant's girlfriend, a student at the medical school. As discussed further below, Appellant disputes the credibility of his ex-girlfriend, arguing that she conspired with UVA administrators to have Appellant expelled because she was bitter that he broke up with her. That matters little for purposes of the First

told Dean Densmore to "watch himself," which the dean perceived as a threat. And third, Appellant had posted photos of the ASAC members to 4chan, claiming they were punishing him for his views of microaggressions—"These are the f[***]ots ruining my life," *id.* 1181—and the post provoked several threatening responses, *see* S.J.A. 31 ("We really need someone like you to snap and take these white traitors out."); *id.* at 32 ("OP, march in there with a gun and shoot the biggest f[***]ts in the room. make sure to shoot dead every single bastard that is out to ruin your life and save others from going through the same.").

In attempt to support his position, Appellant points to the NTO itself, arguing Dr. Canterbury was instrumental in procuring it. But the NTO does not so much as mention Dr. Canterbury. However, a related incident report does mention Appellant's post to "an alt-right web site/ chat room." J.A. 1177. Appellant posits that this reference must mean Dr. Canterbury was operating behind the scenes because in a separate email, Dr. Canterbury mentioned to a faculty member that Appellant had wandered into an Alt-Right chatroom (which he had). That is no connection at all.

Appellant further notes Dr. Canterbury emailed UVA medical students about "disturbing online posts" "that Canterbury attributed to [Appellant]." Opening Br. at 13. None of this provides support for Appellant's theory that Dr. Canterbury was retaliating against Appellant

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Amendment claim; the point is that UVA Police issued the NTO against Appellant for reasons unrelated to protected speech.

for the views he expressed on microaggressions. First of all, Dr. Canterbury was correct. The online posts are disturbing. Second, the university police were well within their authority to issue the NTO based on Appellant's disturbing posts and the threats that ensued as a result.

The record indicates conclusively that police issued the NTO to protect UVA's students and faculty based upon multiple reports of Appellant's threatening conduct toward his mother and girlfriend; after multiple psychiatric evaluations precipitating involuntary hospitalizations; and after Appellant posted on 4chan a photo of faculty members with the caption, "These are the f[***]ots ruining my life," which post prompted a thread of responses, some antisemitic, many racist, and some explicitly violent.

"The right to communicate is not limitless." *Lovern v. Edwards*, 190 F.3d 648, 656 (4th Cir. 1999). In *Lovern*, we held, "School officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property." *Id.* at 655 (citing *Carey v. Brown*, 447 U.S. 455, 470-71, 100 S. Ct. 2286, 65 L. Ed. 2d 263(1980); *Goss v. Lopez*, 419 U.S. 565, 582-83, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)). This concept applies equally to public universities like UVA. Where, as here, administrators take steps to protect their faculty and students based upon a pattern of conduct unrelated to protected speech, we see no First Amendment violation. *See Davison*, 19 F.4th at 637 ("Davison has not sufficiently

provided evidence to prove that the no-trespass ban was issued because of his protected speech, as opposed to his threats and antagonistic behavior.").

While the First Amendment surely empowers Appellant to offer his views in appropriate ways, it is not unfettered. The evidence here overwhelmingly points to the conclusion that UVA administrators, through reasoned judgment, determined that Appellant should be disqualified from maintaining his status as a UVA medical student due to his pattern of confrontational and threatening behavior. The district court rightly held that no reasonable jury could find otherwise.

We agree and affirm.[13]

B.

Denial of Leave to Amend: Conspiracy Claims

The district court denied Appellant leave to amend his complaint to add a claim of civil conspiracy because the proposed amendment would have been futile for two reasons. First, though Appellant sought to add his ex-girlfriend to the lawsuit, a medical student at UVA, he had no plausible claim that she shared with UVA administrators an "illegal objective," nor that she committed any tortious conduct that would sustain a claim against her. And

13. Because Appellant has failed to create a genuine issue that any constitutional violation occurred, we do not reach the question of qualified immunity.

second, the district court held Appellant could not bring a conspiracy claim against UVA administrators because, pursuant to Virginia's intracorporate conspiracy doctrine, school officials cannot conspire with each other.

Appellant contends on appeal that these holdings were erroneous. He contends that his ex-girlfriend and Appellees collaborated, and that he adequately alleged that individual administrators had an independent personal stake in retaliating against him such as would undermine the intracorporate conspiracy doctrine. We agree with the district court.

1.

First, the court correctly rejected Appellant's proposed amendment to add his ex-girlfriend as a defendant. Conspiracy claims under both federal and Virginia common law require Appellant to allege joint action in furtherance of some wrongful scheme. *The Country Vintner, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 634 S.E.2d 745, 751 (Va. 2006) ("A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means."); *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996) ("To establish a civil conspiracy under § 1983, Appellants must present evidence that the Appellees acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in Appellants' deprivation of a constitutional right."). And Virginia courts have long required of conspiracy

allegations "that there was a common understanding and a common design." *Ratcliffe v. Walker*, 117 Va. 569, 85 S.E. 575, 579 (Va. 1915).

But, here, Appellant failed to allege "that [his girlfriend] did anything wrongful or tortious, as is required to state a claim for civil conspiracy." J.A. at 373-74 (citing *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 754 S.E.2d 313, 317 (Va. 2015)); *see also Almy v. Grisham*, 273 Va. 68, 639 S.E.2d 182 (Va. 2007) ("[A] common law claim of civil conspiracy generally requires proof that the underlying tort was committed."); *Blevins v. Mills*, 106 Va. Cir. 297 (2020) ("Where there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong.").

In any event, since we hold Appellees did not violate the First Amendment, even if Appellant's ex-girlfriend had committed some tort to that end, the conspiracy count would still fail inasmuch as there was no underlying deprivation of rights to sustain the conspiracy. *See Dunlap*, 754 S.E.2d at 317 ("[C]onspiracy allegations do not set forth an independent cause of action; instead, such allegations are sustainable only after an underlying tort claim has been established.").

2.

Appellant also sought to add a claim that several UVA faculty members had conspired to have him kicked out of UVA for exercising his First Amendment rights. The district court rejected Appellant's proposed amendment.

Under the intracorporate conspiracy doctrine, "an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy." *Ziglar v. Abbasi*, 582 U.S. 120, 137 S. Ct. 1843, 1867, 198 L. Ed. 2d 290 (2017); *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 352 (4th Cir. 2013) ("The intracorporate conspiracy doctrine recognizes that a corporation cannot conspire with its agents because the agents' acts are the corporation's own."). There is an exception to this rule when an "officer has an independent personal stake in achieving the corporation's illegal objective." *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); *see also ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179 (4th Cir. 2002) (holding the exception "applies only where a co-conspirator possesses a personal stake independent of his relationship to the corporation").[14]

Appellant attempts to skirt the intracorporate conspiracy doctrine by invoking the exception for an independent personal stake on the part of Dean Peterson. Appellant argues that Dean Peterson acted outside the scope of her official duties in signing a letter to support Appellant's girlfriend's application for an emergency protective order against Appellant. As the district court noted, however, Appellant "failed to allege in his proposed [complaint] that [Dr.] Peterson's letter was outside of [her] duties, or make any allegation regarding the letter at all."

14. Virginia has not yet recognized the independent personal stake exception. Because we hold Appellant has not carried his burden to show an independent personal stake, we assume without deciding that Virginia might apply such an exception.

J.A. 374. Regardless of Appellant's failure to make this allegation in his proposed complaint, the evidence shows Dean Peterson acted well within the scope of her duties in helping a UVA medical student obtain a protective order against Appellant. As the dean on call, Dean Peterson had a responsibility to handle crisis management. This court and the Supreme Court of Virginia have observed that administrators "have obligations . . . to protect their students." *Abbott v. Pastides*, 900 F.3d 160, 173 (4th Cir. 2018); *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634, 643 (Va. 2012). Dean Peterson performed that obligation within the scope of her duties.

Additionally, we find neither error nor abuse of discretion in the district court's refusal to reopen this issue pursuant to 28 U.S.C. § 636(b)(1) to consider evidence uncovered during discovery. Appellant asserts that, when the district court was considering the magistrate judge's recommendation to deny leave to amend, the district court should have considered the letter Dean Peterson wrote on Appellant's ex-girlfriend's behalf to help obtain a restraining order. This letter, Appellant contends, was produced during discovery but before the district court ruled on the motion for leave to amend.

We reject this contention. If anything, the evidence only contradicted Appellant's theory of a conspiracy to violate his constitutional rights and of an independent personal stake on the part of Dean Peterson. The evidence indicated no causal link between Appellant's protected speech and Appellees' actions. Rather, it proved Appellees sanctioned Appellant due to his unprofessional *conduct*,

not his speech. And the evidence indicated Dean Peterson carried out her duties as dean on call to protect a UVA student.

The district court was accordingly correct in rejecting Appellant's proposed amendment to add a conspiracy claim.

C.

Dismissal: Due Process Claim

Finally, we turn to the third and final issue in this appeal, the district court's dismissal of Appellant's due process claim. Appellant alleged that his due process rights were violated because he was subject to a disciplinary removal from UVA, and a disciplinary removal requires more process than he received. The district court disagreed, holding Appellant was subject to discipline for failing to meet the essential academic criterion of "professionalism." Given this, the court held Appellant received adequate process.

The Fourteenth Amendment's Due Process Clause provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV § 1. To succeed on his due process claim, Appellant must prove (1) a cognizable "liberty" or "property" interest; (2) the deprivation of that interest by "some form of state action"; and (3) that the procedures employed were constitutionally inadequate. *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d

138, 145 (4th Cir. 2009) (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 (4th Cir. 1988)). While it is arguable whether Appellant has a property interest in continued enrollment at UVA, the Supreme Court as well as this court have assumed without deciding that such a property interest exists. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985); *Tigrett v. Rector & Visitors of the Univ. of Va.*, 290 F.3d 620, 627 (4th Cir. 2002). Therefore, we will assume without deciding that Appellant had such an interest. Even so, Appellant was afforded adequate process.

Appellant argues the district court erred in determining his suspension and eventual ban from UVA were academic, as opposed to disciplinary. And because Appellant received only four hours' notice of the ASAC hearing resulting in his suspension, and because that hearing lasted only 28 minutes, he argues that he did not receive adequate process. Appellant argues the same was true of the No Trespass Order banning him from campus because he had no notice of it and no explanation of it until after the appeal deadline.

The Due Process Clause does not require a "formal hearing" or "stringent procedural protections" for academic dismissals as opposed to disciplinary action. *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983). We agree with the district court that Appellant's dismissal was not disciplinary, but academic, because the professionalism concerns that the ASAC raised dealt with core competencies of UVA's curriculum

for medical students. This court and the Supreme Court have held that expulsions of medical students for lack of the professional competence required to practice medicine are academic dismissals. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978) (holding student's dismissal was academic in nature when school determined she lacked "necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal"); *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 462 (4th Cir. 2012) (noting that "[i] n the context of due-process challenges, the Supreme Court has held that a court should defer to a school's professional judgment regarding a student's academic or professional qualifications") (citing *Horowitz*, 435 U.S. at 92; *Ewing*, 474 U.S. at 225). And the Supreme Court has emphasized, "When judges are asked to review the substance of a genuinely academic decision, . . . they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate the person or committee responsible did not actually exercise professional judgment." *Ewing*, 474 U.S. at 225.

The dissent questions whether UVA's decision to suspend Appellant was "really an academic decision," or "perhaps [a decision] couched . . . as a matter of professionalism" to avoid the complexities of addressing Appellant's "obvious signs of mental illness . . . head-on." *Post* at 56. But UVA acted well within its authority in treating Appellant's behavior as a matter of professionalism, even if that behavior flowed from mental health issues.

In *Halpern*, we approved a medical school's dismissal of a student whose behavioral issues prevented him from interacting professionally with patients and staff. 669 F.3d at 462-64. We emphasized that "we accord great respect to [the medical school's] professional judgments on these issues." *Id.* at 463. We equated the deference owed to the medical school as to a student's professionalism and qualifications with the deference owed "'to evaluate academic performance.'" *Id.* (quoting *Davis v. Univ. of N.C.*, 263 F.3d 95, 101-02 (4th Cir. 2001)). We observed that the medical school maintained "professionalism []as an essential requirement." *Id.*; *see also id.* ("[T]he Medical School identified professionalism as a fundamental goal of its educational program, and it required that students demonstrate professional behavior and attitudes prior to graduating."). Thus, the student's dismissal was appropriate in view of his "treatment of staff both before and after his medical leave," "his behavior towards faculty," and "instances of unprofessional conduct reflected in his clinical evaluations." *Id.* at 463-64. "Although, in isolation, these may not have warranted [the student's] evaluators giving him failing grades in professionalism, the school reasonably considered them as part of an ongoing pattern of unprofessional behavior." *Id.* at 464. And all of this behavior flowed from a plaintiff who concededly had mental health disabilities. *Id.* at 462 ("His ADHD and anxiety disorder constitute disabilities giving rise to protection.").

Here, like the medical school in *Halpern*, UVA had academic criteria of professionalism specifically designed

to ensure medical students could work effectively as doctors. *See* J.A. 640 ("Professional attitudes and behaviors are components of the 12 Competencies Required of the Contemporary Physician that enable the independent performance of the responsibilities of a physician and therefore are a requirement for the successful award of the degree of Doctor of Medicine."). It is thus clear that Appellant's suspension, and effective expulsion, for failure to meet the requirements of professionalism was an academic dismissal. *See Halpern*, 669 F.3d at 463-64 (taking this view in the disability accommodation context). And as in *Halpern*, we "accord great respect" to the UVA's professional judgments in that regard, even if Appellant's behavior stemmed from underlying mental health concerns. *Id.* at 463.

Given the academic nature of Appellant's discipline, and affording appropriate deference to the judgment of UVA administrators, the process Appellant received was sufficient. Appellant had a hearing in which he was allowed to air his grievances at length, and during which Appellees repeatedly explained to Appellant they were considering taking action against him because of his behavior. To the extent Appellant complains the grounds for discipline were not more thoroughly described during the hearing, or that the hearing was too short, the reasons for both those issues are clear from the recording Appellant himself took of the meeting: namely, that Appellant seized the floor at the outset of the hearing and held it as long as he pleased.

As to the NTO, Appellant was afforded appropriate process given the dangers to students and faculty perceived by university police. We have observed that students posing "'a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school' without a pre-deprivation hearing." *See Davison*, 19 F.4th at 642 (quoting *Goss v. Lopez*, 419 U.S. 565, 582, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)). As in *Davison*, Appellant had notice by phone and in writing of the NTO, and he had the opportunity to contest the NTO by appeal. *Id.* Given the risk of his disrupting academic life at UVA, Appellant was afforded adequate process through the issuance of the NTO.

Therefore, we hold the district court properly dismissed Appellant's due process claim.

IV.

For all the above reasons, the district court's award of summary judgment to Appellees, denial of leave to amend, and dismissal of Appellant's due process claim are

AFFIRMED.

QUATTLEBAUM, Circuit Judge, concurring in part and dissenting in part:

Courts rightly defer to the academic judgments of schools. And for good reason. We are hardly equipped to micro-manage academic decisions outside our area of expertise. But that general principle should not immunize actions cloaked in academic garb that are really something else. Kieran Bhattacharya—a former University of Virginia Medical School student—claims UVA used concerns about professionalism as a pretext to retaliate against him for protected speech. And in my view, genuine disputes of material fact exist as to whether he is right. So, I respectfully dissent in part.[1]

I.

UVA's chapter of the American Medical Women's Association sponsored a panel discussion about microaggressions. During the event, a panel expressed their views on microaggressions, generally describing unintentional or unconscious insults and statements reflecting prejudice or stereotypes against a marginalized group. After the speakers concluded their remarks, they invited questions and comments. Bhattacharya was the first to speak. He asked four to five questions back-to-back. He also commented on the panelists' answers. His

1. I take no issue with the district court's order granting summary judgment as to UVA's decisions after the vote to suspend Bhattacharya and as to his due process claim. I likewise see no reversible error in denying Bhattacharya's motion to amend.

questions and comments reflected disagreement with the speakers. He described one answer as "contradictory" to a slide used in the presentation. He labeled one answer "extremely non-specific." And he remarked that only a single "anecdotal case" supported one presenter's position. Even so, Bhattacharya did not violate any written or stated guidelines about the question and comment session. Nor did he yell or make personal attacks.

After the panel discussion, Dr. Nora Kern, who was a presenter at the panel and a UVA medical school faculty member, emailed Dr. Christine Peterson, Assistant Dean of Medical Education. After discussing Bhattacharya's comments and behavior with Dr. Peterson, who also attended the panel discussion, Dr. Kern filled out a Professionalism Concern Card ("PCC") and submitted it to Bhattacharya's dean, Dr. John Densmore. Dr. Kern described Bhattacharya's questions as "quite antagonistic." J.A. 459. She added that he "pressed on and stated one faculty member was being contradictory" and that "[h]is level of frustration/anger seemed to escalate." J.A. 459. Dr. Kern concluded, "I am shocked that a med student would show so little respect toward faculty members." J.A. 459.

Dr. Densmore passed the PCC on to the Academic Standards and Achievement Committee. But neither he nor Dr. Kern told Bhattacharya anything about the PCC.

After hearing from Dr. Kern, Dr. Peterson also emailed Bhattacharya. In that email, she said that she "observed [his] discomfort with the speaker's perspective

on the topic" of microaggressions. J.A. 165. In offering to meet with Bhattacharya, Dr. Peterson further stated, "I think I can provide some perspective that will reassure you about what you are and are not responsible for in interactions that could be uncomfortable even when that's not intended." J.A. 165. Then, at their meeting, Bhattacharya claims that Dr. Peterson brought up his prior comments about the 2016 election. And, after a colleague emailed concerns raised by students about Bhattacharya's criticism of the presenters at the microaggressions panel, Dr. R.J. Canterbury, Senior Associate Dean for Education at the medical school, responded that Bhattacharya "exhibited unprofessional behavior twice in the [2016] post-election town halls." J.A. 1066. He added, "Now this." J.A. 1066.

Just after the microaggressions panel discussion, Dr. Densmore also emailed Bhattacharya "to check in and see how [he was] doing." J.A. 168. They met a few days later, but, like Dr. Peterson, Dr. Densmore did not tell Bhattacharya that a PCC had been issued as a result of his questions and comments at the microaggressions discussion or that he had sent the PCC to the Academic Standards and Achievement Committee.

Within a couple of weeks of Bhattacharya's meetings with Dr. Peterson and Dr. Densmore, the Academic Standards and Achievement Committee met to, among other things, consider Bhattacharya's PCC. No one

told Bhattacharya about the meeting or gave him an opportunity to be heard. Even so, the Committee voted to issue a letter of reprimand. The letter stated, "The Academic Standards and Achievement Committee has received notice of a concern about your behavior at a recent . . . panel. It was thought to be unnecessarily antagonistic and disrespectful. Certainly, people may have different opinions on various issues, but they need to express them in appropriate ways." J.A. 465. The letter continued, "We would suggest that you consider getting counseling in order to work on your skills of being able to express yourself appropriately." J.A. 465.

After the letter of reprimand, Bhattacharya's mental health situation seemed to deteriorate. His conduct became more erratic and aggressive. In fact, as the majority notes, both UVA and Bhattacharya's mother sought and obtained orders from local magistrate judges requiring that Bhattacharya be taken into custody and hospitalized for emergency treatment. What's more, his ex-girlfriend obtained a protective order based on comments he had made to her. And after he was released from the hospital, Bhattacharya was aggressive in his interactions with Dr. Densmore.

The Academic Standards and Achievement Committee held another meeting, this time to decide whether Bhattacharya should be suspended from school. While he received no notice of the Committee's earlier meeting, he

got a little this time. The day of the meeting, the medical school's registrar emailed Bhattacharya advising him that the Committee would meet that same day "to discuss [his] current enrollment status." J.A. 481. The email informed Bhattacharya, "You are invited to attend to share your insights with the committee." J.A. 481.

Despite the late and vague notice, Bhattacharya attended the meeting. During it, his behavior was erratic. He was combative, even walking around the meeting room, questioning the school officials and recording the events on his phone.

The Committee voted to suspend Bhattacharya. The next day, it sent Bhattacharya a letter stating, "The Academic Standards and Achievement Committee has determined that your aggressive and inappropriate interactions in multiple situations, including in public settings, during a speaker's lecture, with your Dean, and during the committee meeting yesterday, constitute a violation of the School of Medicine's [professionalism standards]." J.A. 871. The letter advised Bhattacharya that the Committee "voted to suspend [him] from school, effective immediately." J.A. 871.

II.

Bhattacharya claims that, in retaliation for his comments at the microaggressions panel, UVA violated

his First Amendment rights by issuing the letter of reprimand and then by suspending him. A plaintiff seeking to recover for First Amendment retaliation must allege that (1) he engaged in protected First Amendment activity, (2) the defendants took some action that adversely affected his First Amendment rights, and (3) there was a causal relationship between the protected activity and the defendants' conduct. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005). I will first consider Bhattacharya's claim as to the letter of reprimand before turning to his suspension.

A.

The district court held that Bhattacharya's speech at the panel discussion was protected First Amendment activity. But it held that the Committee's vote and resulting letter of reprimand were not adverse actions—the second element of a First Amendment retaliation claim—because they simply reminded Bhattacharya of the school's professional standards without threatening or imposing any "concrete consequences." J.A. 1326. In support of this conclusion, the court relied on our decision in *Suarez Corporation Industries v. McGraw*, 202 F.3d 676 (4th Cir. 2000). And it is true that in that decision, we held that a response by government officials that did not threaten, impose punishment or sanctions, or intimidate did not adversely affect First Amendment rights for

purposes of a First Amendment retaliation claim. *Id.* at 690. But neither *Suarez* nor subsequent decisions of the Supreme Court or our Court require an express threat in order to satisfy the adverse action requirement. Indeed, after *Suarez*, we explained that "a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine*, 411 F.3d at 500. In my view, there is, at a minimum, a genuine dispute of material fact as to whether a student of ordinary firmness would be chilled from exercising his free speech rights if immediately after doing so, he received a letter of reprimand from a faculty academic standards committee calling his behavior "unnecessarily antagonistic and disrespectful," admonishing him to express his views "in appropriate ways" and suggesting he get counseling. J.A. 465.

As to the third element—causation—the district court held that Bhattacharya had "not unearthed even a scintilla of evidence that would demonstrate that Defendants took any adverse action against him because of his protected speech." J.A. 1330. I disagree. There is no question that UVA reprimanded Bhattacharya because of what happened at the microaggressions panel. The only question is whether there is a causal connection between the content of his comments, the First Amendment activity,

and UVA's response, the adverse action.[2] *Constantine*, 411 F.3d at 501.

UVA argues it reprimanded Bhattacharya based on the way he conducted himself. And no doubt, the letter of reprimand describes Bhattacharya's "behavior" as "unnecessarily antagonistic and disrespectful." J.A. 465. But the way a school labels its discipline cannot be dispositive. Otherwise, professionalism criticisms become fail-safe tools to tamp down debate. No, a jury would reasonably look beyond labels to the actual conduct of the parties when assessing an adverse action.

The most relevant evidence comes from the audio recording of the microaggressions panel. Keep in mind that Bhattacharya's behavior that led to the involuntary custody orders and restraining order had not yet occurred. So, supposedly, the only behavior at issue to his letter of reprimand is his conduct at the microaggressions panel. There, after being invited to participate in open discussion, he expressed critical views on microaggressions and the panel's recommendations about them. He also questioned some of the panelists' methodology. True, Bhattacharya's questions and comments reflect passion and even some frustration. But is that—especially during

2. Generally, such a plaintiff must show that, "but for" his protected speech, he would not have suffered the adverse action. *See Nieves v. Bartlett*, 587 U.S. 391, 139 S. Ct. 1715, 1722, 204 L. Ed. 2d 1 (2019).

a Q & A session about a controversial topic on a university campus—enough to issue a letter of reprimand calling his behavior "unnecessarily antagonistic and disrespectful," admonishing him to express his views "in appropriate ways" and suggesting he get counseling? To me, there is enough evidence in this record that a jury could conclude no. *See Porter v. Bd. of Trustees of N. Carolina State Univ.*, 72 F.4th 573, 595 (4th Cir. 2023) (Richardson, J., dissenting) ("dispute and disagreement are integral, not antithetical, to a university's mission"). A jury could reasonably conclude that that UVA disguised its contempt for the content of Bhattacharya's speech by critiquing his professionalism.

Bhattacharya may not be able to convince a jury that he is right. But that is not our standard. "Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 568 (4th Cir. 2015) (quoting 10A Charles Alan Wright et al., Federal Practice and Procedure § 2728 (3d ed. 1998)). The court may grant summary judgment only if it concludes that the evidence could not permit a reasonable jury to return a favorable verdict for the nonmoving party. "Therefore, courts must view the evidence in the light most favorable to the nonmoving party and refrain from weighing the evidence or making credibility determinations." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (cleaned up). A

court improperly weighs the evidence if it fails to credit evidence that contradicts its factual conclusions or fails to draw reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 659-60. Construing the evidence in the light most favorable to Bhattacharya, as we must, there is a genuine dispute of material fact as to whether the letter of reprimand was an adverse action triggered by the content of Bhattacharya's speech. In my view, a reasonable jury could conclude that UVA used its guidelines on professionalism to quiet dissenting views. I would let the jury decide.

B.

Bhattacharya also alleges UVA suspended him in retaliation for his comments about microaggressions at the panel discussion. The district court, noting the defendants' concession on this point, held that the suspension was an adverse action. But it reiterated that the record contained no evidence that Bhattacharya was suspended because of the content of his speech.

Considering causation, the letter of suspension identified Bhattacharya's conduct "during a speaker's lecture" as one of the examples of the "aggressive and inappropriate interactions" that led to his suspension. J.A. 871. So, once again, the causation question is whether UVA's response to Bhattacharya's questions and comments at the microaggressions panel incident relates

to what he said—content—or how he said it—conduct. And, as already explained, there is a genuine dispute of material fact on that point if we construe the evidence in the light most favorable to Bhattacharya.

But in fairness, despite those concerns, I might go along with my colleagues in the majority on the suspension were it not for what seems so odd—and sad—about this case. Bhattacharya suffered from mental illness even before the microaggressions panel. And by the time of his suspension, the record indicates that—due to his mental illness—Bhattacharya seemed to pose a potential threat to himself or others. At a minimum, by the time of the suspension, he appeared to be in no position to continue as a medical school student. Had UVA suspended Bhattacharya or taken other action based on his conduct that led to the protective custody orders or protective orders, it would be hard to question such decisions. The majority relies heavily on those decisions, and at oral argument, counsel for UVA argued that this escalating and troubling conduct was the reason for the school's decisions. The problem in referring to this conduct, however, is that the school didn't rely on it in suspending Bhattacharya. In fact, the letter of suspension mentions only Bhattacharya's conduct at the panel discussion, in public settings, during meetings with Dr. Densmore and before the Committee. *See generally E.E.O.C. v. Sears Roebuck & Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001) ("the fact that Sears has offered different justifications at different times for its failure to

hire Santana is, in and of itself, probative of pretext"); *Lashley v. Spartanburg Methodist Coll.*, 66 F.4th 168, 177 (4th Cir. 2023) ("A straight and consistent line of explanation is more persuasive than one which wanders here, there, and yonder.")

Why radio silence on Bhattacharya's obvious signs of mental illness? Professionalism in medical schools and in the medical profession is, of course, important. But is that really the issue here? It seems like UVA's concerns were, or at least should have been, about Bhattacharya's mental health and his potential danger to himself or others. But rather than identifying the real issues, UVA relied on professionalism. I realize that addressing the real issues head-on might have been complicated. Doing so might have implicated state or federal disability and discrimination laws. But if the real problems were mental health—and all signals point that way—shouldn't the school have addressed Bhattacharya's situation accordingly? Instead, perhaps coincidentally or perhaps conveniently, it couched Bhattacharya's suspension as a matter of professionalism, which might require us to defer to UVA's academic decisions. *See Halpern v. Wake Forest Univ. Health Sciences*, 669 F. 3d 454, 462-63 (4th Cir. 2012).

Is this really an academic decision? "[W]e must take care 'not to allow academic decisions to disguise truly discriminatory requirements.'" *Id.* at 463 (quoting *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1048 (9th

Cir. 1999)). I worry that UVA and its officials are trying to cloak the resolution of a situation involving serious issues of mental health as a purely academic decision, perhaps to gain the advantage of the deferential standard by which we review academic decisions.

III.

Applying the well-settled summary judgment standard, there are genuine disputes of material fact as to Bhattacharya's First Amendment claims regarding UVA's letter of reprimand and suspension decision. As a result, I would vacate the district court's order granting summary judgment on those issues and remand the case for a jury trial.

APPENDIX B — MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION, FILED AUGUST 19, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Case No. 3:19-cv-54

KIERAN RAVI BHATTACHARYA,

Plaintiff,

v.

JAMES B. MURRAY, JR., *et al.*,

Defendants.

Filed August 19, 2022

MEMORANDUM OPINION

I. Introduction

This matter comes before the Court on Defendants' motion for summary judgment, Dkt. 444. This case is a First Amendment retaliation claim brought by Plaintiff Kieran Ravi Bhattacharya against the Rector, Vice Rector, and Members of the University of Virginia Board of Visitors; Melissa Fielding, UVA's Former Deputy Chief of Police; Dr. Jim B. Tucker, the Chair of the Academic

Standards and Achievements Committee at UVA School of Medicine; Dr. John Densmore, Associate Dean for Admissions and Student Affairs at the UVA School of Medicine; and Dr. Christine Peterson, former Assistant Dean for Medical Education at the UVA School of Medicine. Plaintiff sues Dr. Densmore and Dr. Peterson in their individual and official capacities; all other claims are against Defendants in their official capacities.

The Court will award summary judgment to all Defendants. There are three basic elements to a First Amendment retaliation claim: protected speech, an adverse action, and causation. That Plaintiff engaged in protected speech is uncontested. Although it is contested what specific adverse actions Defendants took, it is also uncontested that Defendants undertook *some* adverse action against Plaintiff. But there is no genuine dispute whether any adverse action undertaken by Defendants was causally connected to Plaintiff's protected speech. Simply put, discovery has failed to produce a single piece of evidence indicating that Defendants retaliated against Plaintiff because of his protected speech.

II. Facts

The pleadings on this motion paint two competing narratives about the circumstances that led to Plaintiff Kieran Ravi Bhattacharya's dismissal from the University of Virginia School of Medicine.[1] Bhattacharya contends

1. The facts described are either uncontested or viewed in the light most favorable to Plaintiff, as the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)

that Defendants—various administrators at the University of Virginia—retaliated against him for his speech at a faculty panel on microaggressions held in October 2018. Defendants contend that the School of Medicine dismissed Bhattacharya because of his threatening behavior and history of dangerous mental health episodes.

Bhattacharya began medical school at the University of Virginia School of Medicine in fall 2016. In January 2017, he voluntarily presented to the UVA Health System's emergency department, complaining of mental health symptoms. (DX8, 9; Dkt. 466 at 12).[2] He was subsequently hospitalized for about two weeks with symptoms "consistent with a manic episode of psychosis." (DX9; *see also* DX 8; Dkt. 466 at 12). He was discharged with a diagnosis of "[b]ipolar disorder, current manic episode, with psychosis." (DX8). Around the same time, Bhattacharya's roommates contacted Defendant Dr. John D. Densmore about Bhattacharya's alarming behavior, and Dr. Densmore spoke directly to Bhattacharya about his difficulties. (DX10 at 37:25-38:13). Bhattacharya then took a voluntary leave of absence from the School of Medicine beginning on February 7, 2017. (DX11). He returned to classes for the spring semester of 2018. (DX14).

On the evening of September 1, 2018, Bhattacharya contacted the Dean-on-Call, Dr. Christine Peterson, explaining that he had been experiencing mental health symptoms for a few days, had been unable to sleep or

2. For the citations in this opinion, the Court has adopted the parties' titles for their exhibits, which are docketed at Dkt. 460 (Defendants' exhibits) and Dkt. 464 (Plaintiff 's exhibits).

study, and sought to delay a summative exam. (DX15, 16 at ¶ 5). Dr. Peterson granted the request and passed along information about Bhattacharya's situation to other faculty members, including Dr. Densmore. (DX15, 17).

Then, on October 25, 2018, the faculty panel on microaggressions at the heart of this case occurred. The panel was hosted by the School of Medicine's student chapter of the American Medical Women's Association and was titled "Microaggressions: Why Are 'They' So Sensitive." Three faculty members spoke at the event: Dr. Beverly Adams from UVA's Department of Psychology, and Dr. Nora Kern and Dr. Sara Rasmussen from the School of Medicine. During the question-and-answer portion of the panel, Bhattacharya asked Dr. Adams several questions challenging her ideas about microaggressions. The exchange proceeded:

> Bhattacharya: Hello. Thank you for your presentation. I had a few questions just to clarify your definition of microaggressions. Is it a requirement, to be a victim of microaggression, that you are a member of a marginalized group?
>
> Adams: Very good question. And no. And no—
>
> Bhattacharya: But in the definition, it just said you have to be a member of a marginalized group—in the definition you just provided in the last slide. So that's contradictory.
>
> Adams: What I had there is kind of the generalized definition. In fact, I extend it

> beyond that. As you see, I extend it to any marginalized group, and sometimes it's not a marginalized group. There are examples that you would think maybe not fit, such as body size, height, [or] weight. And if that is how you would like to see me expand it, yes, indeed, that's how I do.
>
> Bhattacharya: Yeah, follow-up question. Exactly how do you define marginalized and who is a marginalized group? Where does that go? I mean, it seems extremely nonspecific.
>
> Adams: And—that's intentional. That's intentional to make it more nonspecific. . . .

(DX18 at 28:44, *et seq.* (audio recording of Q&A section of panel)).

After the initial exchange, Bhattacharya challenged Adams's definition of microaggressions. (*Id.*). He argued against the idea that "the person who is receiving the microaggressions somehow knows the intention of the person who made it," and he expressed that "a microaggression is entirely dependent on how the person who's receiving it is reacting." (*Id.*). He continued his critique of Adams's work, saying: "The evidence that you provided—and you said you've studied this for years—which is just one anecdotal case—I mean do you have, did you study anything else about microaggressions that you know in the last few years?" (*Id.*). After Adams responded to Bhattacharya's third question, he asked an additional

series of questions: "So, again, what is the basis for which you're going to tell someone that they've committed a microaggression? . . . Where are you getting this basis from? How are you studying this, and collecting evidence on this, and making presentations on it?" (*Id.*).

At that point, Dr. Rasmussen responded, "OK, I'll take that. And I think that we should make sure to open up the floor to lots of people for questions." (*Id.*). Bhattacharya agreed, "Of course, yeah." (*Id.*). Rasmussen then told a story about how her former peers and colleagues had subjected her to "harmless jokes" and microaggressions related to stereotypes about those who come from rural states, as she did. (*Id.*). She concluded:

> You have to learn to uncouple the intent of what you're saying and the impact it has on the audience. And you have to have a responsibility for the impact of your actions. And if you make a statement that someone considers insensitive, the first thing you can say is, "Oh my gosh, that was not my intent." But don't get frustrated with that person for bringing it to your attention.

(*Id.*). Bhattacharya responded to Rasmussen, saying:

> Bhattacharya: I have to respond to that because I never talked about getting frustrated at a person for making a statement. I never condoned any statements that you are making like that. But what I am saying is that what you're providing is anecdotal evidence. That's what you provided. That's what she provided—

> Rasmussen: No, I think she's provided a lot of citations in the literature. And I'm sorry—I was just reading your body language.

(*Id.*). Bhattacharya then began to speak over Rasmussen, who called on someone else to ask a question. (*Id.*). Bhattacharya's dialogue with Adams and Rasmussen lasted approximately five minutes and fifteen seconds. (*Id.*).

Later that afternoon, Dr. Kern emailed Dr. Peterson to ask if she knew the "extremely unprofessional" student from the panel and suggested that his behavior "should be brought up at ASAC" (the School of Medicine's Academic Standards and Achievement Committee) because she would "definitely have concerns on having someone like that in rotations." (DX21). Dr. Peterson responded by suggesting that Dr. Kern submit a "concern card" if she thought she needed to. (*Id.*). A "concern card" is a tool used by the School of Medicine to monitor the professional behavior of students; a concern card may prompt review by ASAC but contains no punitive effect itself. (DX5 at 6). Dr. Kern submitted a concern card later that evening. (DX20-A). A few days later, on November 1, 2018, after receiving the concern card, Dr. Densmore submitted the card to ASAC for review. (DX22).

ASAC considered the card at a meeting on November 14, 2018. (DX23). The committee unanimously voted to send Bhattacharya a letter "reminding him of the importance in medicine to show respect to all." (*Id.*). Dr. Jim Tucker then sent such a letter to Bhattacharya on behalf of ASAC on November 15, 2018. (DX24).

Also on November 14, 2018, Dr. Densmore (who did not attend the ASAC meeting) called a meeting with Bhattacharya to discuss his failing grade on a summative exam in hematology. (DX25, 26; Dkt. 466 at 17). Bhattacharya's behavior during the meeting caused Dr. Densmore to become concerned about his mental health, so Dr. Densmore asked Bhattacharya to either consult with his private psychiatrist or go to UVA Student Health's Counsel and Psychological Services (CAPS) for evaluation. (PX22; DX27). After the meeting, Dr. Densmore walked with Bhattacharya to CAPS, where a clinician evaluated him. (PX22; DX27). Due to his behavior during the evaluation, CAPS petitioned for an emergency custody order, which was granted, and University Police escorted Bhattacharya to the UVA Medical Center for further treatment. (DX29, 30). He was hospitalized there until his discharge on November 16, 2018. (Dkt. 466 at 20; PX27).

Just a few days later, on November 18, 2018, Charlottesville police officers responded to a reported domestic incident at Bhattacharya's home involving Bhattacharya and his mother. (DX32). The next day, his mother filed a Petition for Involuntary Admission for Treatment in the General District Court for the City of Charlottesville, in which she alleged that Bhattacharya was "[getting] inches from [her] face" while "screeming [sic] and pounding [his] fists toward [her]" and "exhibiting paranoid behavior saying that UVA medical school was 'out to get him.'" (DX33). A magistrate judge issued the Emergency Custody Order the same day, November 19. (DX93).

Also on November 19, Bhattacharya's ex-girlfriend, who was also a medical student at UVA, contacted Dr. Peterson to seek help obtaining a protective order against Bhattacharya. (DX34-C). The Juvenile and Domestic Relations District Court for the City of Charlottesville later awarded Plaintiff 's ex-girlfriend a preliminary protective order on November 26, 2018. (DX 34-D).

That same day, November 19, Bhattacharya entered the Dean of Medicine's office to meet with Dr. Densmore. (DX35; Dkt. 466 at 21-22). Bhattacharya asked Dr. Densmore during that meeting, "Do you think you have power over me?" and stated "You better watch yourself." (DX35; DX10). Concerned, Dr. Densmore contacted a colleague who contacted the police. (DX46). Officers from the Charlottesville Police Department intercepted Bhattacharya as he was leaving the building. (DX36). The police took him into custody and transported him to the emergency department at UVA Medical Center. (*Id.*). The Charlottesville General District Court later issued a temporary detention order for Bhattacharya, who was transported to Poplar Springs Hospital in Petersburg, VA. (DX38, 39).

On November 21, while Bhattacharya was still held at Poplar Springs, the Petersburg General District Court ordered that he continue to be involuntarily committed. (DX40). He was released from Poplar Springs on November 26. (DX41).

Upon learning of Bhattacharya's discharge from Poplar Springs Hospital on November 26, 2018, Dr.

Densmore emailed Bhattacharya to inform him that he would need to be evaluated by CAPS before returning to class because the medical school's attendance policy requires that students receive a medical evaluation if they miss two or more consecutive days due to illness. Bhattacharya refused to comply. (DX42, 44). On November 27, 2018, Dr. Randolph Canterbury, Senior Associate Dean for Education and Professor of Psychiatry and Internal Medicine, reiterated the requirement to Plaintiff, instructing him not to attend class but to instead make an appointment with CAPS to begin the clearance process. (DX47).

ASAC held a meeting on November 28, 2018 to discuss Bhattacharya's enrollment status and invited Bhattacharya to attend. (DX51, 52). In the prior weeks, administrators at the medical school had discussed various avenues to suspend Bhattacharya from the medical school, determining that he could not be suspended on academic or Title IX grounds. (PX33). At the November 28 meeting, Bhattacharya repeatedly attempted to bring up the microaggression panel, but Dr. Tucker told him that "we addressed that last month," and that "the reason we're having this meeting tonight is that there's concern about your interactions and behaviors most recently." (DX52). Dr. Bart Nathan similarly explained: "We are having this discussion because we are concerned about your professionalism and professional behavior in medical school." (DX52).

After Bhattacharya left the meeting, the ASAC committee decided that Bhattacharya had failed to meet

the school's requirements for continued enrollment, and therefore voted unanimously to suspend him from the medical school. (DX54). Neither Dr. Peterson nor Dr. Densmore participated in the vote because they were not voting members of ASAC. (*Id.*).

The following day, November 29, 2018, Dr. Tucker sent Plaintiff a letter from ASAC explaining that he was suspended from the School of Medicine for one year. (DX56). The letter communicating the suspension explained that ASAC had voted to suspend Plaintiff due to his "aggressive and inappropriate interactions in multiple situations, including in public settings, during a speaker's lecture, with [his] Dean, and during the committee meeting yesterday" and concluded that Plaintiff 's conduct on the whole "constitute[s] a violation of the School of Medicine's technical standards." (*Id.*).

Approximately a month later, in late December 2018, Medical School faculty members learned from concerned students and individuals outside the UVA community that Bhattacharya was posting information relating to his suspension online, including the photograph of the ASAC members that he took at the beginning of the November 28, 2018, ASAC meeting. (DX57, 58). Faculty members learned that Bhattacharya had posted about his suspension on the message board 4Chan, which had provoked messages from other users encouraging violence against the school. (DX57, 58-B, 59, 60).

On about December 30, 2018, Captain Melissa Fielding of the University Police Department conferred with UVA's

"Threat Assessment Team" to discuss concerns regarding Bhattacharya's behavior. (DX1 at 28:6-30:21). The Threat Assessment Team discussed the protective order that his ex-girlfriend had obtained, his involuntary commitments, his threats against faculty members at the School of Medicine, and his pattern of retaliatory behavior. (*Id.* at 148:21-149:1). Captain Fielding ultimately decided to issue a no trespass order (NTO) against Bhattacharya; she issued a verbal NTO against Bhattacharya that same day, December 30. (*Id.* at 28:2-5). She followed with a mailed physical copy a few days later. (DX63). The NTO stated that Bhattacharya could not enter the University's grounds or facilities for four years except as a patient of the medical center and notified him of the process by which he could appeal the order. (*Id.*).

On January 3, Dr. Densmore emailed Plaintiff to explain that the School of Medicine would "not be able to proceed with an appeal of [his] suspension" because of the NTO. (DX64).

Several months later, on July 12, after Bhattacharya petitioned for readmission to the School of Medicine, Dr. Densmore told him by email that "[The School of Medicine] cannot address your request for readmission while a no trespass order is in effect. Should you have questions about that order, you will need to contact [the University Police Department] directly." (DX68). Bhattacharya then appealed the NTO on July 21, 2019. (DX72). UVA considered and denied his appeal of the NTO as untimely because it was filed outside of the appeal period. (DX73).

Bhattacharya filed a *pro se* complaint (Dkt. 1) in September 2019, and, after retaining counsel, filed a First Amended Complaint (Dkt. 33) in February 2020. The First Amended Complaint alleged four causes of action. (Dkt. 33). In a March 2021 order, this Court dismissed all claims stated in the First Amendment Complaint except for a First Amendment Retaliation claim under 42 U.S.C. § 1983. (Dkt. 129). This Court subsequently granted Bhattacharya leave to file a Second Amended Complaint (Dkt. 324), which restated the First Amendment Retaliation claim. (Dkt. 335). This Court's subsequent order on Defendants' motion to dismiss portions of the Second Amended Complaint dismissed certain Defendants from the case but kept intact the core First Amendment Retaliation claim against various UVA administrators. (Dkt. 487).

III. Legal Standard

A. Summary Judgment

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party," and "[a] fact is material if it might affect the outcome of the suit under the governing law." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018). The nonmoving party must "show that there is a genuine dispute of material fact . . . by offering sufficient proof in the form of admissible evidence." *Id.* (quoting *Guessous v. Fairview Prop. Invs.*,

LLC, 828 F.3d 208, 216 (4th Cir. 2016)). The district court must "view the evidence in the light most favorable to the nonmoving party" and "refrain from weighing the evidence or making credibility determinations." *Id.* "Although the court must draw all justifiable inferences in favor of the nonmoving party, the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence." *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013).

The moving party bears the burden of establishing that summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If the moving party meets this burden, then the nonmoving party must set forth specific, admissible facts to demonstrate a genuine issue of fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The non-movant may not rest on allegations in the pleadings; rather, it must present sufficient evidence such that reasonable jurors could find by a preponderance of the evidence for the non-movant. *Celotex Corp.*, 477 U.S. at 322-24; *Sylvia Dev. Corp. v. Calvert Cnty, Md.*, 48 F.3d 810, 818 (4th Cir. 1995).

B. First Amendment Retaliation

The First Amendment protects not only the affirmative right to speak, but also the "right to be free from retaliation by a public official for the exercise of that right." *Adams v. Trs. Of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000)). To

prove his First Amendment retaliation claim at trial, Bhattacharya must prove that (1) he "engaged in protected First Amendment activity," (2) "the defendants took some action that adversely affected [his] First Amendment rights," and (3) "there was a causal relationship between [his] protected activity and the defendants' conduct." *Buxton v. Kurtinitis*, 862 F.3d 423, 427 (4th Cir. 2017). There is no dispute in this case whether Bhattacharya engaged in protected speech; there are only disputes about what adverse action or actions Defendants undertook against Bhattacharya and whether there was a causal relationship between Bhattacharya's protected speech and some adverse action.

To prove that Defendants took an action that adversely affected Bhattacharya's First Amendment rights at trial, Bhattacharya must demonstrate that Defendants engaged in some conduct that "would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). This test "focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts." 202 F.3d at 686.

To prove causation at trial, Bhattacharya must show that Defendants desired to retaliate against him for his speech and that this desire was the but-for cause of their actions. *Nieves v. Bartlett*, 587 U.S. ___; 139 S. Ct. 1715, 1722 (2019); *see also Hartman v. Moore*, 547 U.S. 250, 257 (2006).

IV. Discussion

There are three overarching questions before the Court at this stage. First is whether there is a genuine dispute that Defendants took an adverse action that affected Plaintiff's First Amendment rights. Second is whether there is a genuine dispute that there was a causal connection between Plaintiff's protected speech and some adverse action by Defendants. Third is whether the Defendants sued in their individual capacities for money damages are entitled to qualified immunity.

A. Adverse Action

Plaintiff alleges that Defendants took ten adverse actions against him. (Dkt. 466 at 46-52). They are as follows:

(1) The October 25, 2018 Professionalism Concern Card

(2) The November 14, 2018 Psychiatric Evaluation

(3) The November 14, 2018 ASAC Vote to Reprimand

(4) The November 15, 2018 ASAC Letter of Reprimand

(5) The November 19, 2018 Psychiatric Evaluation

(6) The November 27, 2018 CAPS Evaluation Requirement

(7) The November 28, 2018 ASAC Suspension Hearing

(8) The November 29, 2018 ASAC Suspension Letter

(9) The "Refusal to Allow Appeal"

(10) The No Trespass Order, Denial of Appeal, and Refusal to Dissolve

Some of these are just different ways of splitting the same alleged adverse action—it is unclear whether there is a distinction between, for instance, the meeting to consider whether to suspend Bhattacharya and the actual decision to suspend him. The same is true for the NTO and the follow-up to the NTO. Regardless, Defendants concede that suspending Bhattacharya from the medical school and the NTO would chill the speech of an ordinary person. (Dkt. 445 at 26). They only argue that there was no causal connection between those adverse actions and Bhattacharya's speech at the microaggression panel. (*Id.*). In addition, this Court has already held that the Professionalism Concern Card was not an adverse action as a matter of law. (Dkt. 487 at 11). Thus, the Court will determine here whether there is a genuine dispute that the other alleged adverse actions are in fact cognizable as adverse actions as a matter of law.

Appendix B

1. The Psychiatric Evaluations and Holds

The Court holds that the November 14, 2018 psychiatric evaluation was an adverse action because being forced into psychiatric care as a result of one's protected speech "would likely deter 'a person of ordinary fitness' from the exercise of First Amendment rights." *Constantine*, 411 F.3d at 500.

The Court does not credit Defendants' argument that the psychiatric evaluations were not adverse actions as a matter of law because they were "treatment." (*See* Dkt. 445 at 31). Being forced into a psychiatric evaluation on account of one's protected speech would chill an ordinary person's speech regardless of whether some benefit might come of it.

Defendants argue that Dean Densmore did not "force" Bhattacharya to receive psychiatric treatment, but rather suggested that he do so and then walked with him to CAPS. (*Id.* at 31-32). But that is a disputed fact—Bhattacharya has put some evidence into the record indicating that the trip to CAPS was non-optional. *See* PX29 ("John Densmore (SOM) met with [Bhattacharya] on Wednesday 11/14 regarding an exam he failed and his behavior during micro aggression panel. John had him walk to CAPS."); DX28 ("Dr. Densmore walked [Bhattacharya] in today because there has been concern expressed about a number of recent events[.]").

The November 19 psychiatric evaluation was also an adverse action in the sense that a psychiatric evaluation

and hold would deter a person of ordinary fitness from the exercise of his First Amendment rights, but it is unclear from the evidence in the record whether any action undertaken by the Defendants in this case led to the November 19 psychiatric hold. Two events that led to Bhattacharya's evaluation and hold occurred within about half an hour of one another on November 19. First, his mother procured the emergency protective order; that occurrence is obviously not reasonably attributable to Defendants. Second, Bhattacharya presented at Dr. Densmore's office and Dr. Densmore contacted a colleague who called the police after Bhattacharya threatened him. There is no evidence in the record that Dr. Densmore discussed the contents of Bhattacharya's protected speech at the microaggression panel with Bhattacharya at the November 19 meeting. After the police engaged Bhattacharya following his meeting with Dr. Densmore, a local magistrate issued a Temporary Detention Order, after which Bhattacharya was transferred to Poplar Springs Hospital in Petersburg.

There are disputed facts about the extent to which Dr. Densmore's actions on November 19 led to Bhattacharya's psychiatric hold—i.e., whether or not the hold would have happened regardless of whether Densmore contacted a colleague who called the police—so the Court will not grant summary judgment on the adverse action prong for the November 19 evaluation and hold.

2. The November 14 ASAC Vote to Reprimand and the November 15 ASAC Letter of Reprimand

The Court holds that the November 14 ASAC vote and the November 15 letter were not adverse actions as a matter of law because they carried no concrete consequences nor did they threaten concrete consequences. The Fourth Circuit has held that "where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen's First Amendment rights." *Suarez*, 202 F.3d at 687; *see also Scheffler v. Molin*, 743 F.3d 619, 622 (8th Cir. 2019) (To deter the exercise of speech, a defendant's actions generally must have some kind of "concrete consequences.").

Here, there is no genuine dispute whether the November 14 vote and the November 15 letter imposed concrete consequences on Bhattacharya—they did not. The letter reminded Bhattacharya of the school's professional standards; it neither imposed nor threatened any consequences. (DX24). It suggested that the Bhattacharya seek counseling (*see id.*), but even he acknowledges that this was not a "necessary requirement." (DX2 at 126:8-14). And the mere fact that the vote and letter preceded ASAC's later concrete actions—namely, suspending Bhattacharya on November 28—does not render the vote and letter themselves adverse actions.

3. The November 27 CAPS Evaluation Requirement

The Court holds that the School of Medicine neutrally applying its attendance policy by requiring Bhattacharya to receive medical clearance pursuant to the school's time and attendance policy after missing more than two days of class was not an adverse action as a matter of law. The Court finds instructive the Tenth Circuit's opinion in *Couch v. Board of Trustees of Memorial Hospital of Carbon County*, 587 F.3d 1223, 1240 (10th Cir. 2009), which held that requiring a hospital employee to submit to a psychiatric evaluation before returning to work would not support a First Amendment retaliation claim where the employee had a documented history of difficulties with other hospital staff because the "minimally invasive" "one-time consultation" had an "understandable context." The case here bears significant similarity to *Couch*, with the difference that the psychiatric evaluation in that case was imposed *ad hoc*, where here the required health evaluation was pursuant to a neutral policy—which makes Bhattacharya's argument that the health evaluation was an adverse action even weaker than the plaintiff's argument in that case.

Bhattacharya cites no case law supporting the proposition that the application of a generally applicable policy can constitute an adverse action, nor has he put any evidence into the record that the time and attendance policy was not neutrally applied.

4. Conclusion

In sum, there are genuine disputes with respect to four alleged adverse actions—the November 14 and 19 psychiatric evaluations and holds, the suspension, and the no trespass order. The jury would have a sufficient evidentiary basis to find that those actions would chill the speech of a person of ordinary fitness.

B. Causal Connection

Although there are disputes of material fact with respect to some alleged adverse actions, there is no genuine dispute of that Defendants undertook any adverse action because of Plaintiff's protected speech. Even viewing the evidence in the light most favorable to Plaintiff, and drawing every reasonable inference in his favor, the Court cannot identify any evidence in the record that could reasonably support a jury verdict in his favor on the causation prong of his First Amendment Claim. This applies to both the set of alleged adverse actions that the Court has held are actionable and those that the Court has held are not actionable.

First, the Court notes that it is not a Constitutional violation for government officials to take protective or preventative action based on the manner or context in which an individual speaks, especially where the speech is aggressive or threatening. *See Davison v. Rose*, 19 F.4th 626, 637 (4th Cir. 2021) ("Davison has not sufficiently provided evidence to prove that the no-trespass ban was issued because of his protected speech, as opposed to his

threats and antagonistic behavior."); *Wood v. Arnold*, 321 F. Supp. 3d 565, 581 (D. Md. 2018), *aff'd*, 915 F.3d 308 (4th Cir. 2019) ("[T]he record is clear that Defendants issued the No Trespass Order in response to perceived threats of a disruption on school grounds, not in retaliation against Mr. Wood's protected speech."). Thus, Bhattacharya must provide evidence that goes to the content of his speech, not just its tone or demeanor.

Bhattacharya has put forward no direct evidence that Defendants considered the content of his speech in undertaking any of the adverse actions in question. At oral argument on this motion, when this Court repeatedly asked Plaintiff's counsel which pieces of evidence in the record indicate that Defendants considered the content—rather than just the tone or demeanor—of Bhattacharya's speech, Plaintiff's counsel put forward a handful of pieces of evidence that plainly do not indicate that Defendants considered the content of Bhattacharya's speech. First, Plaintiff's counsel put forward the professionalism concern card, but the professionalism concern card says nothing about the content of Bhattacharya's speech—only that he was "antagonistic"—and that Dr. Kern was "worrie[d]" about how Bhattacharya would "do on wards." (DX 20-A). Second, Plaintiff's counsel put forward other medical students' complaints about Bhattacharya's behavior at the microaggression panel, but there is no evidence that Defendants relied on or in any way incorporated those complaints into their decision making, and, needless to say, those other students are not defendants in this case. Third, Plaintiff's counsel put forward a set of exchanges between ASAC members considering whether Bhattacharya should

be suspended, and, if so, how. The record indicates that Defendants considered multiple options for grounds on which to suspend Bhattacharya—including academic and Title IX grounds—before suspending him for failing to sustain the medical school's "technical standards". *See* PX33 (emails between School of Medicine administrators stating that "I don't believe we can defend an interim suspension on Standards or Title IX grounds," and that "KB has not yet had enough academic failures to remove him from the program academically[.]"). But the fact that Defendants considered multiple options for how to suspend Plaintiff is of no consequence when there is no evidence that any of the options were predicated on Plaintiff's protected speech.

Apparently recognizing the absence of any direct evidence that Defendants considered the content of his speech in undertaking an adverse action, Bhattacharya attempts to rely in the alternative on a "pretext" theory—that all of Defendants' stated reasons for suspending him were just pretext for retaliating against his protected speech. (Dkt. 466 at 44-45). He offers the cases *Jiminez v. Mary Washington Coll.*, 57 F.3d 369 (4th Cir. 1995) and *Warren v. Halstead Indus., Inc.*, 802 F.2d 746 (4th Cir. 1986) for the proposition that "[s]ufficient evidence that proffered justifications for discrimination are pretextual creates a genuine issue of material fact and will preclude summary judgment." (Dkt. 466 at 44). But neither of those cases stands for the proposition that he can advance to trial on a First Amendment retaliation claim without any evidence in the record that Defendants retaliated against him because of his protected speech. *Jiminez* was a Title

VII race and national origin discrimination case arising from a professor's denial of tenure. The Fourth Circuit reversed the district court's judgment following a bench trial; the district court rendered judgment in favor of the Plaintiff, and the Fourth Circuit reversed on fact-specific grounds. *Warren* was a § 1981 and Title VII retaliation case in which the Fourth Circuit similarly reversed the district court after a bench trial for fact-specific reasons. Neither case has any bearing on the legal issues presented here.

The bottom line is that Plaintiff has put into the record neither direct evidence of a causal connection between his protected speech and any adverse action nor any evidence that Defendants' stated reasons for undertaking those adverse actions were pretextual. Having been afforded the benefit of substantial discovery, Bhattacharya still has nothing more than speculation to support his claim—he has not unearthed even a scintilla of evidence that would demonstrate that Defendants took any adverse action against him because of his protected speech. Without more, the Court must grant Defendants' summary judgment motion.

C. Qualified Immunity

Although the causation issue settles the case, the Court holds that Dr. Densmore and Dr. Peterson are entitled to qualified immunity for the claims against them in their individual capacities for money damages.

Appendix B

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether a right is "clearly established," the Supreme Court and the Fourth Circuit both "have admonished that 'courts must not define clearly established law at a high level of generality.'" *Doe ex rel. Watson v. Russell Cnty. Sch. Bd.*, 292 F. Supp. 3d 690, 713 (W.D. Va. 2018) (quoting *E.W. v. Dolgos*, 884 F.3d 172, 185 (4th Cir. 2018)). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (emphasis in original) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

Bhattacharya argues that the Court should consider the claim at the high level of generality—a "right to be free from viewpoint discrimination in public institutions," a "right to be free from First Amendment retaliation," and a "right to record government officials performing their duties." (Dkt. 466 at 54). But those highly generalized rights do not cut to the "violative nature of [the] particular conduct" here. *Mullenix*, 577 U.S. at 12.

Simply put, there is no clearly established First Amendment retaliation claim for taking action against a student who, in the same time period that he is repeatedly involuntarily committed to mental health institutions for threatening others, makes protected speech in an

aggressive and unprofessional manner, especially where there is no evidence whatsoever that the content of his speech, rather than his tone or demeanor, was the cause of the adverse action. It does not matter which of the alleged adverse actions the Court considers here; there is no glimmer of a clearly established claim.

V. Conclusion

In an order that will accompany this memorandum opinion, the Court will grant Defendants' summary judgment motion, Dkt. 444, in full.

The Clerk of Court is directed to send this opinion to all counsel of record.

Entered this 19th day of August 2022.

/s/
NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION, FILED JULY 21, 2022

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA,
CHARLOTTESVILLE DIVISION

Case No. 3:19-cv-54

KIERAN RAVI BHATTACHARYA,

Plaintiff,

v.

JAMES B. MURRAY, JR., *et al.*,

Defendants.

July 21, 2022, Decided
July 21, 2022, Filed

MEMORANDUM OPINION

Judge Norman K. Moon

I. Introduction

This memorandum opinion provides the Court's reasoning on four pretrial motions argued by the parties at a hearing on June 15, 2022—two appeals of Magistrate

Judge Hoppe's decisions on Plaintiff's motions alleging that Defendants spoliated evidence (both of which Judge Hoppe denied) (Dkt. 347, 418), one motion to dismiss under Rule 12(b)(6) filed by Defendant Sara K. Rasmussen (Dkt. 345), and one motion for judgment on the pleadings filed by the UVA Defendants under Rule 12(c) (Dkt. 350).

II. Appeals of Judge Hoppe's Decisions on Plaintiff's Spoliation Motions

Plaintiff has filed two appeals of Judge Hoppe's decisions on Plaintiff's motions for spoliation sanctions, one (Dkt. 347) relating to alleged spoliation occurring primarily before Plaintiff filed his *pro se* complaint, and one (Dkt. 418) relating to alleged spoliation occurring after Plaintiff filed his complaint.

The standard for a district judge reviewing a magistrate judge's order in a non-dispositive matter, as here, is whether the magistrate judge's decision was "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a).

"Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). Spoliation of electronically stored information (ESI) is governed by Federal Rule of Civil Procedure 37(e) and the inherent authority of the federal courts. The basic questions in deciding whether spoliation has occurred are (1) whether there was a duty to

preserve and (2) whether evidence was destroyed. *Steves & Sons*, 327 F.R.D. at 105. In determining whether a party had a duty to preserve ESI, "a court must consider two questions: (1) whether the defendants should have reasonably anticipated litigation; and (2) whether the defendants reasonably should have known that the lost ESI . . . might be relevant to that litigation." *Id.*

A. Alleged Pre-Filing Spoliation

Plaintiff's first spoliation motion (Dkt. 275) relates to certain ESI that Plaintiff alleges Defendants failed to preserve prior to the time Plaintiff filed his *pro se* complaint. Namely, Plaintiff alleges that Defendants failed to preserve Plaintiff's UVA email accounts, some emails sent by Defendant John Densmore, and video recordings of Plaintiff's interactions with UVA staff from November 14, 2018, through December 4, 2018. (Dkt. 276). Plaintiff argues that Defendants had a duty to preserve that evidence because they reasonably should have anticipated litigation after he made "implicit and explicit threats of litigation" around the time he was dismissed from UVA's medical school. (Dkt. 276 at 18)

Defendants concede that they deleted the evidence in question pursuant to UVA's policies on email retention and retention of video recordings but argue that they had no duty to preserve the evidence because they could not have reasonably anticipated this litigation until Plaintiff filed his *pro se* complaint on September 16, 2019. (Dkt. 383 at 6-7).

Appendix C

In his motion before Judge Hoppe, Plaintiff alleged that there were seven "incidents and communications" between November 19, 2018, and December 4, 2018, where Plaintiff purportedly made "implicit and explicit threats of litigation" sufficient to trigger Defendants' duty to preserve ESI. (Dkt. 276 at 17-18). He has since expanded that number to twelve in his appeal. (Dkt. 347 at 4). These alleged triggering events included Plainitff's disciplinary meetings with UVA medical school administrators, his psychiatric evaluations, various telephone calls and email exchanges with UVA administrators and faculty, his contact with the UVA police department, and his FOIA requests relating to his disciplinary proceedings. (*Id.* at 4-7).

In a thorough and well-reasoned opinion, Judge Hoppe held that none of these events triggered Defendants' duty to preserve evidence. (Dkt. 333). Judge Hoppe's opinion was neither clearly erroneous nor contrary to law. Indeed, the duty to preserve evidence only arises when there have been "direct, specific threats of litigation." *Steves & Sons*, 327 F.R.D. at 106 (quoting *Huggins v. Prince George's Cty.*, 750 F. Supp. 2d 549, 560 (D. Md. 2010)). "Vague" and "ambiguous statements" alluding to possible or "hypothetical" litigation, on the other hand, are "insufficient to trigger the duty to preserve" information. *Id.* There were no such direct, specific threats of litigation here, much less reasonable ones, given that Plaintiff widely and vaguely threatened to sue many individuals during the period in question. (*See* Dkt. 347 at 4-7). Although Plaintiff might have made isolated comments about "hiring lawyers" and that UVA was "violating his rights"

(Dkt. 276 at 3), those statements were too ambiguous to trigger Defendants' duty to preserve when considering the totality of the circumstances.

B. Alleged Post-Filing Spoliation

Plaintiff also alleges that Defendants failed to preserve ESI after he filed his *pro se* complaint, which triggered Defendants' duty to preserve. (Dkt. 418). Plaintiff alleges that Defendants deleted certain emails relevant to this case after that triggering event. In another thorough opinion, Judge Hoppe rejected Plaintiff's arguments and found that Plaintiff failed to make a threshold showing that Defendants failed to preserve ESI under Rule 37(e) because the ESI was not "lost." (Dkt. 410). The gist of Judge Hoppe's opinion was that it was unclear in the record whether Defendants had deleted certain email accounts as part of UVA's routine retention policy for departing employees, but even if they had (1) the emails in question were still retrievable from other email accounts, and (2) it was not clear whether any other emails unretrievable from other email accounts even existed. (Dkt. 333 at 8-18). Judge Hoppe naturally concluded, then, that Plaintiff had not met his burden to show that ESI was "lost" within the meaning of Rule 37(e). (*Id.*). Judge Hoppe granted Plaintiff a limited remedy by permitting Plaintiff to question certain fact witnesses about the alleged spoliation in their depositions. (*Id.* at 15, 17). But Judge Hoppe declined to allow Plaintiff to depose extra fact witnesses, holding that the request would exceed the bounds of permissible discovery under Rule 26(b). (*Id.* at 17).

There is no clear error in Judge Hoppe's decision.

Plaintiff also requests discovery on certain materials that Judge Hoppe as ruled covered by attorney-client privilege as part of the motion (*see* Dkt. 333 at 12-13), including unredacted versions the preservation notices that UVA sent to the individual Defendants (*see* Dkt. 418 at 12), and there is no clear error with respect to that decision either.

III. Defendant Rasmussen's Motion to Dismiss

The third motion at this hearing is a motion to dismiss under Rule 12(b)(6) by Defendant Sara K. Rasmussen (Dkt. 345) who is the only defendant represented by her own counsel, independent of the defendants represented collectively (the UVA Defendants). Rasmussen argues that the Court should dismiss the claims against her because the Second Amended Complaint does not plausibly allege that she engaged in First Amendment retaliation against Plaintiff. (Dkt. 346).

The Court will indeed dismiss the claims against Rasmussen because the Second Amended Complaint alleges no facts that plausibly establish that Rasmussen was part of the alleged retaliation against Bhattacharya—specifically, the Complaint does not allege that Rasmussen was involved in any of the events leading to Bhattacharya's dismissal from UVA after the microaggression panel itself.

Appendix C

After the Court's previous order granting Defendants' motion to dismiss, one claim remains in this case—a First Amendment retaliation claim. (*See* Dkt. 129). A plaintiff claiming First Amendment retaliation must demonstrate that: "(1) he engaged in protected First Amendment activity, (2) the defendants took some action that adversely affected his First Amendment rights, and (3) there was a causal relationship between his protected activity and the defendants' conduct." *Davison v. Rose*, 19 F.4th 626, 636 (4th Cir. 2021) (cleaned up).

First, Rasmussen's alleged actions during the microaggression panel itself could not form the basis of a First Amendment retaliation claim. The microaggression panel was a limited public forum, i.e., one "which the government has opened for expressive activity to the public, or some segment of the public" through "purposeful public action" that is "intend[ed] to make the property generally available." *Goulart v. Meadows*, 345 F.3d 239, 249 (4th Cir. 2003) (noting that "[u]niversity meeting facilities" which are "open for use for student groups" qualify as limited public fora) (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998)). The Second Amended Complaint alleges that Bhattacharya asked four questions over about three minutes to the panel before Rasmussen attempted to allow another attendee to ask a question. (Dkt. 335 at ¶¶ 67-73). An official overseeing a limited public forum "is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve civility and decorum necessary to further the forum's purpose of conducting public business." *Steinburg v. Chesterfield*

City Planning Comm'n, 527 F.3d 377, 385 (4th Cir. 2008). The official "may 'cut off speech which they reasonably perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner. . . ." *Liggins v. Clarke Cnty. School Bd.*, No. 5:09-cv--77, 2010 WL 3664054 at *7 (W.D. Va. Sept. 17, 2010) (Conrad, J.) (quoting *Steinburg*, 527 F.3d at 385) (other citations omitted). Rasmussen's actions alleged in the Second Amended Complaint easily satisfy that standard; as alleged, she did not cut Bhattacharya off until he had asked four questions over three minutes, at which point she asked if another student wanted to ask a question.

Further, the Second Amended Complaint alleges no identifiable "retaliation" at the microaggression panel. In the Fourth Circuit, the test for whether there has been actionable retaliation under the First Amendment is whether "a similarly situated person of ordinary firmness reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case." *Blankenship v. Manchin*, 471 F.3d 523, 530 (4th Cir. 2006). Only certain actions are actionable retaliation because "[n]ot every . . . restriction . . . is sufficient to chill the exercise of First Amendment rights." *The Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) (citation omitted). Rasmussen allowing Bhattacharya to speak for several minutes before moving on to another attendee's question could not possibly constitute retaliatory action under that standard.

Therefore, Bhattacharya cannot make out a First Amendment retaliation claim against Rasmussen for her actions taken at the microaggression panel itself.

Nor can he make out a retaliation claim against Rasmussen for any events that occurred after the microaggression panel, because the Second Amended Complaint contains no factual allegations relating to Rasmussen following the panel. The Second Amended Complaint fails to allege any non-speculative facts suggesting that Rasmussen had any role in the proceedings that led to Bhattacharya's dismissal from UVA. The fact that Rasmussen played some role in the event in which Bhattacharya claims protected speech does not make her liable for the later allegedly retaliatory conduct of other defendants. A plaintiff alleging First Amendment retaliation under § 1983 cannot simply make general allegations that a group of defendants violated his constitutional rights. Rather, he must "affirmatively show[ ] that the [defendant] acted personally in the deprivation of plaintiff's rights." *Roncales v. Cnty. of Henrico*, 451 F. Supp. 3d 480, 500 (E.D. Va. 2020) (quoting *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985)). He has not done that with Rasmussen.

Therefore, the Court will grant Rasmussen's motion to dismiss.

IV. UVA Defendants' Motion for Judgment on the Pleadings

The fourth and final motion the Court heard argument on at this hearing was the UVA Defendants

(i.e., all Defendants other than Rasmussen's) motion for judgment on the pleadings under Rule 12(c). (Dkt. 350). The motion argues that three issues can be settled on the pleadings. (Dkt. 351). First, the UVA Defendants argue that Plaintiff improperly seeks money damages from state officials and that any such claims are barred by the Eleventh Amendment. Second, they argue that the Plaintiff has failed to make any allegations relating to Defendant Timothy Longo. Third, they argue that the Second Amended Complaint fails to plead that Defendant Nora Kern engaged in an adverse action against Plaintiff in her individual capacity.

"Rule 12(c) motions are governed by the same standard as motions brought under Rule 12(b)(6)." *Massey v. Ojaniit*, 759 F.3d 343, 347 (4th Cir. 2014). Thus, Plaintiff's claims should be dismissed if "accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). In other words, "the complaint will survive only if it 'states a plausible claim for relief.'" *Massey*, 759 F.3d at 353 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

A. Money Damages and Sovereign Immunity Issue

Defendants correctly note that Plaintiff's improperly seeks money damages from state Defendants sued in their official capacity. (Dkt. 351 at 2). The Second Amended

Complaint notes that the state employee Defendants in this case are each "sued in his or her official capacity for injunctive and declaratory relief and for damages resulting from the acts and omissions alleged in this Complaint." (Dkt. 335 at ¶¶ 21, 36). This claim for money damages against the official capacity Defendants is repeated in Plaintiff's recitation of his claim and in his prayer for relief. (*Id.* at p. 71).

The Eleventh Amendment grants sovereign immunity to states against suits for money damages. *See Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). That immunity is shared with state officials who, when "sued in their official capacities for retrospective money damages have the same sovereign immunity accorded to the State." *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 549 (4th Cir. 2014). Official capacity defendants may therefore only be sued for money damages if Congress has explicitly abrogated Eleventh Amendment immunity, or the state has voluntarily waived it. *See McConnell v. Adams*, 829 F.2d 1319, 1328 (4th Cir. 1987). Neither has happened here.

The Second Amended Complaint requests that the Court award Plaintiff compensatory damages against defendants sued only in their official capacities. The Complaint identifies two categories of defendants: the "University Defendants," and the "UVA Med School Defendants." (Dkt. 335 at pp. 1, 14-17). It employs these designations to identify the parties against whom claims are brought and from whom relief is sought. (*Id.* at 68, 70-71). The category of "University Defendants" is made

up exclusively of state employees sued only in their official capacities. (*Id.* at 1, 14). Namely, it is composed of the Rector, Board of Visitors, Timothy Longo, and Melissa Fielding. (*Id.*). Plaintiff's complaint expressly seeks compensatory damages from these "University Defendants." (*Id.* at 70). The complaint therefore seeks monetary damages from state officials sued only in their official capacity. Additionally, the Second Amended Complaint seeks compensatory damages from the "UVA Med School Defendants," a category that includes Dr. Jim Tucker, who is sued only in his official capacity. (*Id.* at 1, 15, 70).

The Court will therefore grant the UVA Defendants' motion on this issue and dismiss all claims for money damages against the official capacity Defendants in this case.

B. Claims Against Defendant Longo

The UVA Defendants argue that the Second Amended Complaint alleges no facts whatsoever relating to Defendant Longo, the Chief of Police and Associate Vice President for Safety and Security at UVA, and therefore argue that the Court should dismiss the claim as against him. (Dkt. 351 at 3-5). Plaintiff argues in response that the Court should not dismiss Longo because of the UVA Police Department's involvement in issuing the No Trespass Order against Plaintiff, and because "Longo would appear to be the proper party against whom [] an injunction [lifting the No Trespass Order] would properly issue." (Dkt. 384 at 5).

The Court will dismiss the claims against Longo because the Second Amended Complaint alleges no facts relating to him and because he is not a necessary party. The fact that there are no facts in the Complaint against him speaks for itself. He is not a necessary party because the party that would be enjoined were Plaintiff successful in obtaining an injunction would be the UVA Rector and Board of Visitors, not its chief law enforcement officer. *See* Federal Rule of Civil Procedure 65(d) (noting that an order granting an injunction binds "the parties' officers, agents, servants, employees, and attorneys"); Va. Code § 23.1-809 (establishing that the Chief of UVA Police is an employee of UVA and is bound by the instructions of the Rector and Board).

C. Alleged Retaliation by Defendant Kern

The final argument in the UVA Defendants' motion for judgment on the pleadings is that Plaintiff fails to allege sufficient facts that Defendant Kern engaged in retaliation against Plaintiff. (Dkt. 351 at 6-12). The issue is essentially the same as with the above-discussed issue with Defendant Rasmussen. As noted above, in the Fourth Circuit, the test for whether there has been actionable retaliation under the First Amendment is whether "a similarly situated person of ordinary firmness reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case." *Blankenship*, 471 F.3d at 530.

Dr. Kern was, at the time of the events underlying this suit, an Associate Professor of Urology at the UVA

School of Medicine. (Dkt. 335 at ¶ 28). She was also a member of the School of Medicine's Academic Standards and Achievement Committee ("ASAC"). (*Id.*). She attended the microaggression panel at the heart of this suit as a panelist. (*Id.* at ¶¶ 4). The only adverse action that Plaintiff alleges that Kern undertook was to file a "professionalism concern card" relating to Plaintiff's actions at the microaggression panel, in which she stated that she believed Plaintiff was "quite antagonistic toward the panel," that she was "shocked that a med student would show so little respect toward faculty members," and concluded that his conduct "worrie[d] [her] how he will do on wards." (*Id.* at ¶¶ 8, 86; Ex. 13 to Dkt. 335 at 2). The Second Amended Complaint alleges that ASAC addressed the concern card at a meeting on November 14, 2018, where ASAC voted to send Plaintiff a letter "reminding him of the importance in medicine to show respect to all: colleagues, other staff, and patients and families." (Dkt. 335 at ¶ 107). The Second Amended Complaint alleges no further facts relating to Defendant Kern.

The question for the Court, then, is the same as in the motion to dismiss for Defendant Rasmussen: whether Kern took some action that adversely affected Plaintiff's First Amendment rights. *Davison v. Rose*, 19 F.4th 626, 636 (4th Cir. 2021) (cleaned up). Again, the government only undertakes an adverse action under this doctrine where "a similarly situated person of ordinary firmness [relative to the plaintiff] reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case." *Blankenship*, 471 F.3d at 530. The nature of the retaliatory act must be "more

than *de minimis* or trivial." *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000).

The Court holds that Kern filing the "professionalism concern card" was not an adverse action as a matter of law under facts alleged in the Second Amended Complaint, so the Court will dismiss Kern from the case. First, the Court notes that the Second Amended Complaint states that Bhattacharya did not know about the card until after he had been terminated from the medical school. (Dkt. 335 at ¶¶ 88, 92). It is not clear that an alleged adverse action could reasonably chill a person's speech if the person does not know about it and if it has no direct consequences. *See Icenhour v. Town of Abingdon*, No. 1:19-cv-33, 2021 U.S. Dist. LEXIS 170104, 2021 WL 4099618, at *12 (W.D. Va. Sept. 8, 2021) (Jones, J.) (denying ADA retaliation claim in part because the plaintiff "was not aware of the negative evaluations written by [employers] until after she resigned, when she requested her personnel file."). Second, and especially critically, the Court notes that the professionalism concern card had no punitive effect in itself; it was simply a referral to a committee to consider further punitive action, so there was an attenuated connection between Kern's action (filing the card) and any actual harm suffered by Plaintiff (e.g., being dismissed from UVA). If an action carries no concrete consequences in itself, but merely represents "criticism" or a "verbal reprimand," then it is not an adverse action for First Amendment retaliation purposes. *Suarez Corp.*, 202 F.3d at 687. The professionalism concern card was a "verbal reprimand" at most—it was an internal document that raised concerns with Plaintiff's behavior but did not carry adverse consequences in itself.

There is no question that Plaintiff has sufficiently alleged that some Defendants undertook some adverse action—most obviously, his dismissal from the medical school. But he has not sufficiently alleged that Kern undertook an adverse action, so the Court will dismiss the claim against her.

The Court further holds that even if the professionalism concern card was an "adverse action" for First Amendment Retaliation purposes, Kern would be entitled to qualified immunity for the claim against her for money damages, because it was not clearly established that the filing of a professionalism concern card—what was in essence a referral for another party to consider discipline that the Plaintiff did not know about—was an adverse action for First Amendment Retaliation purposes. *See Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

V. Conclusion

In an accompanying order, the Court will DENY Plaintiff's appeals of Judge Hoppe's discovery orders, Dkt. 347 and 418, GRANT Defendant Rasmussen's motion to dismiss, Dkt. 345, and GRANT in full the UVA Defendants' motion for judgment on the pleadings, Dkt. 350.

Appendix C

The Clerk of Court is directed to deliver a copy of this opinion to all counsel of record.

Entered this 21st day of July 2022.

/s/ Norman K. Moon
NORMAN K. MOON
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D — OPINION AND ORDER OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION, FILED MARCH 16, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Case No. 3:19-cv-54

KIERAN RAVI BHATTACHARYA,

Plaintiff,

v.

JAMES B. MURRAY, JR., *et al.*,

Defendants.

Filed March 16, 2022

OPINION AND ORDER ON PLAINTIFF'S MOTION FOR LEA VE TO FILE SECOND AMENDED COMPLAINT

I. Introduction

This case relates to Plaintiff Kieran Bhattacharya's dismissal from the University of Virginia School of Medicine in fall 2018. He filed his original complaint, Dkt. 1, *pro se*, then obtained counsel, and his new counsel filed the Amended Complaint, Dkt. 3. The Amended Complaint

sought injunctive relief against UVA, its medical school, and several employees for "retaliation in violation of his First Amendment right of free speech" (Count I) and for "deprivation of his Fourteenth Amendment right of due process" (Count II), 42 U.S.C. § 1983, as well as damages against three Medical School faculty (Defendants Nora Kern, Christine Peterson, and Sara K. Rasmussen) in their official and individual capacities "for conspiracy to interfere with civil rights" in violation of 42 U.S.C. § 1985(3) (Count III) and conspiracy to injure him in his trade, business, and profession under Virginia Code § 18.2-499 (Count IV). Dkt. 33 at ¶¶ 139-46 (Count I), 147-52 (Count II), 153-58 (Count III), 159-65 (Count IV).

Upon Defendants' motion, this Court then dismissed Counts II, III, and IV, leaving only Count I—the First Amendment retaliation claim. Dkt. 130. Bhattacharya then filed a Motion for Leave to File a Second Amended Complaint, Dkt. 149. The motion proposes several modifications to the Amended Complaint. First, Bhattacharya would delete the counts that this Court dismissed with prejudice, as well as the facts relating only to those counts. Dkt. 149 at 2-3. Second, he would add additional facts relating to the First Amendment Retaliation claim. *Id.* at 3. Third, he would add Dr. Angel Hsu (his ex-girlfriend) as a new Defendant and add a state-law defamation claim against her. Dkt. 149-1 at ¶¶ 40-42, 209-16. Fourth, he would add a new claim for civil conspiracy under Virginia common law against some of the Defendants. *Id.* at 28-42, 205-08. Fifth, he would add Lesley Thomas ("Dean Thomas") and Dr. Randolph Canterbury ("Dean Canterbury"), in their

official capacities as Deans at the School of Medicine, as Defendants in Count I. *Id.* at ¶¶ 24, 27, 196-204. Finally, also in Count I, he would "su[e] Dean Densmore in his individual capacity in addition to his official capacity." *Id.* at 38-39.

Defendants oppose the motion "primarily because the proposed amendments fail to state a claim" upon which relief can be granted and, as such, allowing leave to amend would be futile." Dkt. 154 at 1. They argue that Bhattacharya's proposed conspiracy claim fails to cure pleading defects that this Court identified in dismissing the prior conspiracy claims under Rule 12(b)(6), *see id.* at 6-8, and that the proposed claims against Dr. Hsu, Dean Canterbury, and Dean Thomas are time barred, *see id.* at 4-5. Defendants do not specifically address Bhattacharya's proposal to add Defendant Densmore as an individual-capacity defendant to the § 1983 damages claim in Count I. *See id.* at 2-8. Defendants also argue that allowing Bhattacharya "to add a host of new allegations to support" his First Amendment retaliation claim (Count I) "would serve no apparent purpose" because this Court already held that the facts alleged in the operative complaint were sufficient to survive under Rule 12(b)(6). *Id.* at 1-2.

The motion was referred to Judge Hoppe for a Report and Recommendation. Judge Hoppe recommended that the motion be granted only to the extent that Bhattacharya proposes to delete the three Counts that have been dismissed with prejudice and to add one new individual-capacity defendant and two new official-capacity defendants to the existing § 1983 claim in Count I.

Dkt. 230 at 1. Judge Hoppe recommended that the motion be denied in all other respects. *Id.*

Both parties filed objections to Judge Hoppe's R&R. *See* Dkt. 247 (Defendants' objections), Dkt. 248 (Plaintiff 's objections). Because Judge Hoppe's primary reason for recommending denying most of Bhattacharya's proposed amendments was based in their futility, Bhattacharya objects by claiming that the proposed amendments would not be futile. Dkt. 247 at 2. Defendants agree with most of Judge Hoppe's recommendations, but object to Bhattacharya's attempt to add a claim against Defendant Dinsmore in his personal capacity (because, they say, it would be futile) and to add claims against Defendants Canterbury and Thomas in their official capacities (again, because they would be both redundant and futile). Dkt. 248.

II. Legal Framework

Rule 15(a) of the Federal Rules of Civil Procedure allows a party to amend its pleading before trial once as a matter of course and then "only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(1)-(2). "This liberal [leave] rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006).

The Fourth Circuit has held that "such leave should be denied only when the amendment would be prejudicial to

the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002) (emphasis omitted). "[P]rejudice can result where a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party," but the "basis for a finding of prejudice" under such circumstances "essentially applies [only] where the amendment is offered shortly before or during trial." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986). "Bad faith includes seeking to amend a complaint for an improper purpose," *Wilkins v. Wells Fargo Bank, N.A.*, 320 F.R.D. 124, 127 (E.D. Va. 2017) (citing *Peamon v. Verizon Corp.*, 581 F. App'x 291, 292 (4th Cir. 2014) (holding that it was bad faith to seek to amend complaint to "artificially inflate . . . damages in order to obtain subject matter jurisdiction")), or seeking leave despite "repeated failure[s] to cure deficiencies by amendments previously allowed," *Foman v. Davis*, 371 U.S. 178, 182 (1962). *See Wilkins*, 320 F.R.D. at 127 (citing *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 461 (4th Cir. 2013)). An amendment to a complaint is futile if the proposed change "fails to satisfy the requirements of the federal rules" and applicable standards of review, *Katyle v. Penn. Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011), including those governing a motion to dismiss under Rule 12(b)(6), *see Wilkins*, 320 F.R.D. at 127 (E.D. Va. 2017) (citing *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995)).

A party has the right to file objections to a report and recommendation of a magistrate judge. 28 U.S.C. § 636(b)

(1)(C); Fed. R. Civ. P. 72(b)(2). The district judge reviews the objections de novo. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2).

III. Discussion

A. First Proposed Addition: Adding New Defendants & Allegations to Count I

Bhattacharya seeks to add Defendant Densmore as an individual-capacity defendant and to add Dean Canterbury and Dean Thomas as defendants, in their official capacities only, to the First Amendment retaliation claim in Count I. As currently pled in the Amended Complaint, Dkt. 33, that Count states a claim for relief under 42 U.S.C. § 1983 against Defendants Board of Visitors, Longo, Fielding, Densmore, and Tucker in their official capacities, against Defendant Densmore in his personal capacity, and against Defendants Kern, Peterson, and Rasmussen in their individual and official capacities.

The proposed Second Amended Complaint also adds several facts relating to Bhattacharya's new claim against Densmore in his personal capacity, including that Densmore "coerced" Bhattacharya "to undergo a psychiatric 'evaluation'" at the University's student health center and that Bhattacharya acquiesced "out of fear of retaliation if he did not comply" with Densmore's demand. Dkt. 149-1 at ¶¶ 6-9, 43, 89-91, 94, 109, 166.

Appendix D

1. New Claim Against Densmore in his Personal Capacity

Judge Hoppe recommends that the Court allow Bhattacharya to amend his complaint to add a claim against Densmore in his personal capacity. Dkt. 230 at 9. Judge Hoppe notes that the allegations in Bhattacharya's proposed Second Amended Complaint describing Densmore's personal involvement are similar to his allegations relating to other Defendants' personal involvements, which this Court has already permitted to go forward in its prior opinion on Defendants' Motion to Dismiss. *See* Dkt. 130. Judge Hoppe also notes that Densmore would not be prejudiced by the proposed amendment (because he is already a party to the case in his official capacity, represented by counsel, and the claims relating to his personal involvement are substantially similar to the claims relating to his official involvement), that the proposed amendment was not filed in bad faith, and that the new claim is not time-barred by the statute of limitations because it "relates back" to the Amended Complaint. Dkt. 230 at 9-11. *See also* Fed. R. Civ. P. 15(c)(1)(C) (allowing relation back only "if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment" received adequate notice).

Defendants object to this recommendation, arguing still that the proposed amendment to the Amended Complaint would be futile and time barred. Their argument is that the proposed amendment does not "relate back" to the Amended Complaint within the meaning

of Rule 15(c)(3). Defendants argue that adding a claim against a party in their personal capacity after the first complaint alleges a cause of action only against the party's official capacity is the same as adding a new party, which does not "relate back" within the meaning of Rule 15. Dkt. 247 at 4-5. But Defendants do not cite any controlling case law on this point—that adding a new claim against a Defendant in their personal capacity after already having a claim against the Defendant is their official capacity is the same as adding a "new party" for Rule 15.

Therefore, the Court will adopt Judge Hoppe's finding that Bhattacharya may amend his complaint to add a claim against Densmore in his personal capacity. The new claim would not prejudice Densmore, was not filed in bad faith, and is not time-barred because it "relates back: to the Amended Complaint.

2. New Claims Against Canterbury and Thomas in their Official Capacities

Judge Hoppe also recommends that the Court grant Bhattacharya's motion with respect to his proposed additional claims against Canterbury and Thomas in their official capacities, finding that the new claims are not time-barred because they "relate back" to the Amended Complaint. Dkt. 230 at 10-12. Bhattacharya's motion to file a second amended complaint clearly came after the statute of limitations had run, so the only issue is whether the claims "relate back" to the Amended Complaint under Rule 15.

Appendix D

Judge Hoppe found that Rule 15(c)(1)(C) allows relation back with respect to these claims because the Amended Complaint named the "Rector and Visitors of the University of Virginia" as a Defendant, and Bhattacharya's proposal to name Dean Canterbury and Dean Thomas as additional official-capacity defendants to Count I will not alter the fundamental nature of his cause of action against UVA, which remains the "real party in interest" under § 1983. Dkt. 230 at 11-13 (citing *Graham*, 473 U.S. at 166.)

Defendants' objection here is just that the addition of Canterbury and Thomas would be redundant for the same reason that Judge Hoppe noted—that adding a cause of action against them in their personal capacities is no different than suing UVA, which Bhattacharya has already done. Dkt. 247 at 11-12. Indeed, where a plaintiff seeks to add claims against a government officer in the officer's official capacity, having already named the relevant governmental entity, the claims are duplicative and must be dismissed. *See Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004) ("The district court correctly held that the § 1983 claim against Martin in his official capacity as Superintendent is essentially a claim against the Board and thus should be dismissed as duplicative.").

The Court will sustain Defendants' objections to the R&R here—under Fourth Circuit case law, as held in *Love-Lane*, where a Plaintiff seeks to add cause of action under § 1983 against a party in their official capacity after already having a cause of action against the relevant governmental entity, the proposed amendment is

redundant and thus should be denied. Bhattacharya has already sued UVA. Therefore, Bhattacharya may not add claims against Canterbury and Thomas in their official capacities.

B. Second Proposed Addition: New Conspiracy Claims

Bhattacharya also seeks leave to add a new claim for common law civil conspiracy against Dr. Hsu and Defendants Densmore, Kern, Peterson, and Rasmussen. Dkt. 149 at 2, 4-5. Judge Hoppe found that the amendment would be futile for two reasons. First, with respect to Bhattacharya's claims against Dr. Hsu (his ex-girlfriend), there is no allegation that Hsu shared an illegal objective with any of the other defendants, so she could not have entered into a conspiracy with them. Dkt. 230 at 15. Second, with respect to the proposed claims against Densmore, Kern, Peterson, and Rasmussen, the claims would fail under Virginia's intracorporate conspiracy doctrine. *Id.* at 16-17. Judge Hoppe noted that his finding on the intracorporate conspiracy doctrine would be on the same grounds that this Court dismissed Bhattacharya's original conspiracy claims. *Id.* at 16 (citing Dkt. 130, Order on Motion to Dismiss).

Bhattacharya argues that the possibility that Dr. Hsu had different motives from the UVA-affiliated defendants (Densmore, Kern, Peterson, and Rasmussed) does not defeat the conspiracy claim. Dkt. 248 at 10. He argues that the Fourth Circuit has held that "a conspiracy may be established if the conduct of the parties and the inferences to be drawn from such conduct indicate, at least, a tacit

understanding to accomplish the object of the alleged conspiracy." *Id.* at 10 (citing *Wallace v. United States*, 281 F.2d 656, 663 (4th Cir. 1960)). But here there are no non-speculative allegations that Hsu and the UVA defendants shared a common objective at all, let alone an illegal one. Bhattacharya argues that their "illegal objective" was "having Mr. Bhattacharya 'kicked out of school' for engaging in speech protected by the first amendment." Dkt. 248 at 10. But he has offered no facts whatsoever that support the allegation that Hsu wanted him "kicked out of school" for engaging in protected speech. The suggestion in the proposed Second Amended Complaint is that Hsu collaborated with Dean Densmore and Dean Peterson to "obtain vengeance" on Bhattacharya because Bhattacharya had broken up with her, not because he had engaged in protected speech. Ex. 1 to Dkt. 149 at ¶ 95. In addition, Bhattacharya has not alleged that Dr. Hsu did anything wrongful or tortious, as is required to state a claim for civil conspiracy under Virginia law. *Dunlap v. Cottman Transmission Sys., Inc.*, 754 S.E.2d 313, 317 (Va. 2015) ("Because there can be no conspiracy to do an act that the law allows, . . . actions for common law civil conspiracy and statutory business conspiracy lie only if a plaintiff sustains damages as a result of an act that is itself wrongful or tortious.") (cleaned up). As discussed further below with respect to Bhattacharya's proposed defamation claim against Dr. Hsu, he has not adequately stated a defamation claim, and he has not alleged that Dr. Hsu engaged in any other wrongful or tortious conduct.

In short, Bhattacharya has failed to state a claim for civil conspiracy among Dr. Hsu and the UVA-affiliated

defendants because he has not alleged that they shared a common objective within the meaning of civil conspiracy law, and because he has not alleged that Dr. Hsu committed wrongful or tortious conduct that would authorize a civil conspiracy claim.

With respect to Judge Hoppe's finding on the intracorporate conspiracy doctrine, Bhattacharya argues that the doctrine does not apply because one of the Defendants, Dean Peterson, acted outside the scope of her duties as a UVA administrator. Dkt. 248 at 8-9. The intracorporate conspiracy doctrine does not apply when one of the alleged co-conspirators acts beyond "the normal course of their corporate duties" sufficient to establish "an independent personal stake in achieving the corporation's illegal objective." *Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974). Bhattacharya argues that Peterson acted outside the scope of her official duties when she submitted a letter in support of Hsu in Hsu's application for an emergency protective order against Bhattacharya. Dkt. 248 at 8.

However, as Judge Hoppe noted, Bhattacharya failed to allege in his proposed Second Amended Complaint that Peterson's letter was outside of Dean Peterson's duties, or make any allegation regarding the letter at all. Dkt. 230 at 16-17. Bhattacharya cannot retroactively attempt to amend his Second Amended Complaint through his objections to the Magistrate Judge's R&R.

Therefore, the Court will adopt Judge Hoppe's R&R with respect to the new civil conspiracy claims. Bhattacharya may not amend his complaint to add them.

C. Third Proposed Addition: Defamation Claim Against Dr. Hsu

Finally, Bhattacharya proposes to sue Dr. Hsu for defamation. Dkt. 140-1 at ¶¶ 209-16. Judge Hoppe finds that this claim would be futile under Virginia defamation law because Bhattacharya failed to plead a statement that could possibly constitute defamation. Dkt. 230 at 17-18. Bhattacharya claims that Hsu defamed him by texting Defendant Peterson a request that Peterson write a letter "documenting all the distress Kieran has caused me and how I perceived him as a danger to me when I spoke to you." *Id.* at 18. Bhattacharya also alleges that Dr. Hsu told Peterson that Bhattacharya had "a giant shovel in his room," and that her friend's key was missing and that Bhattacharya might have taken it. *Id.* at 18-19.

These statements cannot possibly constitute defamation. The first is an expression of Hsu's subjective opinion. *See Fuste v. Riverside Healthcare Assoc., Inc.*, 575 S.E.2d 858, 861 (Va. 2003) (holding that statements that "do[ ] not contain a provably false factual connotation, [and] statements which cannot reasonably be interpreted as stating actual facts about a person," cannot be characterized as true or false). The second comment, regarding the shovel, Bhattacharya admits as true (Ex. 1 to Dkt. 149 at ¶ 174), so it cannot constitute defamation. *See id.* The third statement, about the key, is so benign that it could not reasonably impact Bhattacharya's reputation, and a defamation claim is only actionable when the alleged statement would harm the plaintiff 's "reputation . . . [so] as to lower him in the estimation of the community or

to deter [others] from associating or dealing with him." *Schaefer v. Bouffault*, 772 S.E.2d 589, 596-97 (Va. 2015). An alleged statement only so injures the reputation of the plaintiff when it "engender[s] disgrace, shame, scorn, or contempt." *Id.* at 599. Even if it is taken as true that Hsu falsely accused Bhattacharya of taking her friend's key, the statement could not reasonably affect Bhattacharya's reputation to the extent that it would "engender disgrace, shame, scorn, or contempt." And it is not even clearly alleged that Hsu made such an accusation—her alleged statement was merely that she believed Bhattacharya had taken the key, not that he had actually done so. *See* Ex. 1 to Dkt. 149 at ¶ 174.

Therefore, the Court will adopt Judge Hoppe's recommendation. Bhattacharya may not amend his complaint to add a defamation claim against Dr. Hsu.

IV. Conclusion

For the reasons stated, the Court will ADOPT Judge Hoppe's R&R in part. The Court will GRANT in part and DENY in part Plaintiff 's motion for leave to file a second amended complaint, Dkt. 149. The motion is GRANTED to the extent that it seeks (1) to delete Counts II, III, and IV from the Amended Complaint, and (2) to add Dr. John Densmore, in his individual capacity, as a Defendant to the § 1983 claim in Count I. The motion is DENIED in all other respects.

Plaintiff is ORDERED to strike from his proposed pleading all allegations concerning non-party Dr. Hsu

and is FURTHER ORDERED to file a Second Amended Complaint containing only Count I, as amended, and the factual allegations relevant thereto. *See* Fed. R. Civ. P. 12(f)(1).

The Clerk of Court is directed to send the Opinion and Order to all counsel of record.

Entered this 16th day of March 2022.

/s/
NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E — MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION, FILED MARCH 31, 2021

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Case No. 3:19-cv-00054

KIERAN RAVI BHATTACHARYA,

Plaintiff,

v.

JAMES B. MURRAY, JR., *et al.*,

Defendants.

Filed March 31, 2021

MEMORANDUM OPINION

Plaintiff Kieran Ravi Bhattacharya filed an amended four-count complaint against various individuals at the University of Virginia in relation to his suspension and dismissal from the University of Virginia School of Medicine.

Bhattacharya seeks injunctive relief and damages pursuant to 42 U.S.C. § 1983 for retaliation in violation

of his First Amendment right of free speech (Count I) and for deprivation of his Fourteenth Amendment right of due process (Count II) from various individuals at the University of Virginia and its medical school.[1] Bhattacharya also seeks damages for conspiracy to interfere with civil rights in violation of 42 U.S.C. § 1985(3) (Count III) and conspiracy to injure him in his trade, business, and profession under Virginia Code § 18.2-499 (Count IV) from the Individual Defendants in their official and individual capacities.

Defendants[2] filed a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. 112. The Court will grant Defendants' motion to dismiss Counts II, III, and IV, but will deny Defendants' motion to dismiss Count I.

---

1. The following defendants are sued in their official capacities only: Rector, Vice Rector, and Members of the Board of Visitors of the University of Virginia ("Board of Visitors Defendants"); Timothy Longo, Sr., Interim Chief of Police, and Melissa Fielding, Deputy Chief of Police of the University of Virginia ("UVA Defendants"); John J. Densmore, M.D., Ph.D., Associate Dean for Admissions and Student Affairs, and Jim B. Tucker, M.D., Chair of the Academic Standards and Achievement Committee of the University of Virginia School of Medicine ("UVA Medical School Defendants"). The following defendants are sued in both their official and individual capacities: Christine Peterson, M.D., Assistant Dean for Medical Education, Nora Kern, M.D., Assistant Professor of Urology, and Sara K. Rasmussen, M.D., Ph.D., Assistant Professor ("Individual Defendants").

2. Defendants are all represented by the Attorney General of Virginia and have filed a joint motion to dismiss.

Appendix E

I. ALLEGED FACTUAL BACKGROUND

For the purposes of ruling on Defendants' motion to dismiss, the Court accepts as true the following allegations set forth in the amended complaint and attached exhibits.

A. The October 25 Microaggression Panel Discussion

On October 25, 2018, Bhattacharya—then a second-year medical student at the University of Virginia School of Medicine ("UVA Medical School")—attended a panel discussion on "microaggressions." Dkt. 33 ¶ 3. During the event, UVA Professor Beverly Colwell Adams, Ph.D., gave a roughly seventeen-minute presentation about her research on microaggressions, and Bhattacharya asked Adams some questions. *Id.* The exchange began:

> Bhattacharya: Hello. Thank you for your presentation. I had a few questions just to clarify your definition of microaggressions. Is it a requirement, to be a victim of microaggression, that you are a member of a marginalized group?
>
> Adams: Very good question. And no. And no—
>
> Bhattacharya: But in the definition, it just said you have to be a member of a marginalized group—in the definition you just provided in the last slide. So that's contradictory.
>
> Adams: What I had there is kind of the generalized definition. In fact, I extend it

> beyond that. As you see, I extend it to any marginalized group, and sometimes it's not a marginalized group. There are examples that you would think maybe not fit, such as body size, height, [or] weight. And if that is how you would like to see me expand it, yes, indeed, that's how I do.
>
> Bhattacharya: Yeah, follow-up question. Exactly how do you define marginalized and who is a marginalized group? Where does that go? I mean, it seems extremely nonspecific.
>
> Adams: And—that's intentional. That's intentional to make it more nonspecific. . . .

Dkt. 33-2 (audio recording of panel discussion).

After the initial exchange, Bhattacharya challenged Adams's definition of microaggression. He argued against the notion that "the person who is receiving the microaggressions somehow knows the intention of the person who made it," and he expressed concern that "a microaggression is entirely dependent on how the person who's receiving it is reacting." *Id.* He continued his critique of Adams's work, saying, "The evidence that you provided—and you said you've studied this for years—which is just one anecdotal case—I mean do you have, did you study anything else about microaggressions that you know in the last few years?" *Id.* After Adams responded to Bhattacharya's third question, he asked an additional series of questions: "So, again, what is the

basis for which you're going to tell someone that they've committed a microaggression? . . . Where are you getting this basis from? How are you studying this, and collecting evidence on this, and making presentations on it?" *Id.*; *see also* Dkt. 33 ¶ 56.

At that point, Assistant Professor Sara Rasmussen, a fellow panelist who helped organize the event, responded, "OK, I'll take that. And I think that we should make sure to open up the floor to lots of people for questions." Dkts. 33-2; 33 ¶ 4. Bhattacharya agreed, "Of course, yeah." Dkt. 33-2. Rasmussen then told a story about how her former peers and colleagues had subjected her to "harmless jokes" and microaggressions related to stereotypes about those who come from rural states, as she did. *Id.* She concluded:

> You have to learn to uncouple the intent of what you're saying and the impact it has on the audience. And you have to have a responsibility for the impact of your actions. And if you make a statement that someone considers insensitive, the first thing you can say is, "Oh my gosh, that was not my intent." But don't get frustrated with that person for bringing it to your attention.

Id.; *see also* Dkt. 33 ¶ 58. Bhattacharya responded to Rasmussen, saying:

> Bhattacharya: I have to respond to that because I never talked about getting frustrated at a person for making a statement. I never

> condoned any statements that you are making like that. But what I am saying is that what you're providing is anecdotal evidence. That's what you provided. That's what she provided—
>
> Rasmussen: No, I think she's provided a lot of citations in the literature. And I'm sorry—I was just reading your body language.

Dkt. 33-2; *see also* Dkt. 33 ¶¶ 59-60. Bhattacharya then began to speak over Rasmussen, who called on someone else to ask a question. Dkts. 33-2; 33 ¶ 60. Bhattacharya's dialogue with Adams and Rasmussen lasted approximately five minutes and fifteen seconds. Dkt. 33-2.

B. Kern's October 25 Professionalism Concern Card

Assistant Professor of Urology Nora Kern, who helped organize the panel and attended it, filed a Professionalism Concern Card ("Card") against Bhattacharya on the same day as the event. Dkt. 33-13; *see also* Dkt. 33 ¶ 66.[3] Kern's Card identified "Respect for Others" and "Respect for Differences" as areas of concern. Dkt. 33-13; *see also* Dkt. 33 ¶ 67. The comments section reads:

> For [an] AMWA session, we held a panel on micro aggression. Myself and 2 other faculty members were invited guests. This student

3. Professionalism Concern Cards are records of students' violations of UVA Medical School's professionalism standards. Dkt. 33 ¶ 44. *See* Dkt. 33-9 at 2.

> asked a series of questions that were quite antagonistic toward the panel. He pressed on and stated one faculty member was being contradictory. His level of frustration/anger seemed to escalate until another faculty member defused the situation by calling on another student for questions. I am shocked that a med student would show so little respect toward faculty members. It worries me how he will do on wards.

Dkt. 33-13; *see also* Dkt. 33 ¶ 67. The Card noted that Kern had not discussed her concerns with Bhattacharya, but it also noted that she did not feel uncomfortable discussing her concerns with him. Dkt. 33-13; Dkt. 33 ¶ 69. Kern told Rasmussen and Peterson about the Card she filed, but Kern did not directly notify Bhattacharya. Dkt. 33 ¶ 69. Bhattacharya did not receive a copy of the Card until December 20, 2018, after his suspension. *Id.*

C. Peterson's October 25 Email and October 31 Meeting

Hours after the panel, Christine Peterson, Assistant Dean for Medical Education, sent Bhattacharya an email with the subject "The panel today." Dkt. 33-12. The email read:

> Kieran,
>
> I was at the noontime "Microaggressions" panel today and observed your discomfort with the speaker's perspective on the topic.

> Would you like to come share your thoughts with me? I think I can provide some perspective that will reassure you about what you are and are not responsible for in interactions that could be uncomfortable even when that's not intended. If you'd prefer to talk with your own college dean, that's fine too. I simply want to help you understand and be able to cope with unintended consequences of conversations.
>
> Dr. Peterson

Id.; *see also* Dkt. 33 ¶ 63. Kieran responded a couple of hours later:

> Dr. Peterson,
>
> Your observed discomfort of me from wherever you sat was not at all how I felt. I was quite happy that the panel gave me so much time to engage with them about the semantics regarding the comparison of microaggressions and barbs. I have no problems with anyone on the panel; I simply wanted to give them some basic challenges regarding the topic. And I understand that there is a wide range of acceptable interpretations on this. I would be happy to meet with you at your convenience to discuss this further.
>
> Sincerely,
> Kieran Bhattacharya

Dkt. 33-12; *see also* Dkt. 33 ¶ 65. That evening, Peterson replied: "I understand. I don't know you at all so I may have misinterpreted your challenges to the speaker." Dkt. 33-12; *see also* Dkt. 33 ¶ 65. The two agreed to meet on October 31. Dkt. 33-12; *see also* Dkt. 33 ¶ 65.

During Bhattacharya and Peterson's one-hour meeting, Peterson "barely mentioned" Bhattacharya's questions and comments at the panel discussion. Dkt. 33 ¶ 73. Instead, Peterson attempted to determine Bhattacharya's "views on various social and political issues—including sexual assault, affirmative action, and the election of President Trump." *Id.*

D. The November 1 Meeting with Densmore

On October 26, the day after the panel discussion, Densmore—Associate Dean for Admissions and Student Affairs, and Bhattacharya's assigned academic dean—emailed Bhattacharya. *Id.* ¶ 71. Densmore's email read:

> Hi Kieran,
>
> I just wanted to check in and see how you were doing. I hope the semester is going well. I'd like to meet next week if you have some time.
>
> JJD

Id.; *see also* Dkt. 33-14. Bhattacharya agreed to meet with Densmore on November 1. Dkt. 33 ¶ 72. During their ten-minute meeting, Densmore did not inform Bhattacharya

about Kern's Card, nor did he mention Bhattacharya's questions and comments at the panel discussion. *Id.* ¶¶ 74-75. When Bhattacharya mentioned his meeting with Peterson, Densmore informed Bhattacharya that he was aware of that meeting. At no point during the meeting did Densmore convey any concerns related to his meeting with Peterson or to Bhattacharya's behavior during the panel. *Id.*

E. The November 14 Academic Standards and Achievement Committee ("ASAC") Meeting and Tucker's November 15 Letter

At an ASAC meeting on November 14, the committee considered Kern's Card against Bhattacharya. *Id.* ¶ 77. UVA Medical School's Policy on Academic and Professional Advancement vests the ASAC with the power to act on behalf of the School of Medicine's faculty with respect to "patterns of unprofessional behavior and egregious violations of professionalism." Dkt. 33-9 at 2. The policy includes the following provision:

> If a student receives three or more written observations of concern . . . , or is cited for a single egregious breach of professionalism, notice will be sent to ASAC for review. A student identified as having a pattern of unprofessional behavior may be directed to further counseling and/or to supportive remediation and/or placed on *academic warning* or *academic probation* . . . , or if the professional violations are severe, a student may be dismissed from school even

> if they have passing grades in all courses.. . . . Egregious behaviors, such as but limited to assault on or threat to a patient, patient's family member, student, GME trainee or faculty member, conduct that may constitute a felony, etc., regardless of whether criminal prosecutions are initiated or pursued, will be referred immediately to ASAC, irrespective of whether previous observations of concern exist, with the recommendation for dismissal from school.

Id. at 3 (emphasis in original).

Kern, a voting ASAC member, attended and voted at the meeting. Dkt. 33 ¶ 79. She was the only voting member at the meeting who witnessed the events at the microaggression panel. *Id.* ¶ 95. Peterson also attended the meeting as a guest. *Id.* ¶ 84. The meeting minutes memorialized the text of the Card that Kern submitted. Dkts. 33-35; 33 ¶¶ 86-87. Under "Professionalism Issues," the meeting minutes state: "The committee voted unanimously to send Kieran Bhattacharya (Densmore) a letter reminding him of the importance in medicine to show respect to all: colleagues, other staff, and patients and their families." Dkt. 33 ¶¶ 77, 88; *see also* Dkt. 33-15. At the time, Bhattacharya remained unaware that Kern had issued a Card against him. Dkt. 33 ¶ 90.

The ASAC's letter, in its entirety, dated and emailed to Bhattacharya on November 15, reads as follows:

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Dear Mr. Bhattacharya:

The Academic Standards and Achievement Committee has received notice of a concern about your behavior at a recent AMWA panel. It was thought to be unnecessarily antagonistic and disrespectful. Certainly, people may have different opinions on various issues, but they need to express them in appropriate ways.

It is always important in medicine to show mutual respect to all: colleagues, other staff, and patients and their families. We would suggest that you consider getting counseling in order to work on your skills of being able to express yourself appropriately.

Sincerely,
Jim B. Tucker, M.D.
Chair, Academic Standards and
Achievement Committee

Id. ¶ 91; Dkt. 33-36.

F. The November 28 ASAC Suspension Hearing

Eleven days later, on the afternoon of November 26, Densmore sent Bhattacharya an email stating, "We were notified by the Dean of Students Office that you were heading back to Charlottesville. You will need to be seen by CAPS [Counseling and Psychological Services] before you can return to classes." *Id.* ¶ 96-97; *see also* Dkt. 33-37.

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On the morning of November 27, Bhattacharya responded in an email questioning UVA Medical School's ability to "mandate psychiatric evaluations" before allowing him to continue his education. Dkt. 33 ¶ 98; Dkt. 33-37.

The same day, R. J. Canterbury, Senior Associate Dean for Education at UVA Medical School, emailed Bhattacharya telling him that he was not permitted to return to class until he had "been evaluated by CAPS at the Student Health Service." Dkt. 33 ¶ 99; Dkt. 33-40.

On the afternoon of November 28, UVA Medical School Registrar Katherine Yates emailed Bhattacharya notifying him that "The Academic Standards and Achievement Committee will be meeting today to discuss your current enrollment status. You are invited to attend to share your insights with the committee." Dkt. 33 ¶ 101; Dkt. 33-42. Within ten minutes, Bhattacharya responded:

> [ ]Who exactly will be present? Do you normally just give students 3 hours to prepare after indirectly threatening to kick them from medical school? Why exactly is my enrollment status up for discussion?

Dkt. 33 ¶ 102; Dkt. 33-43. Bhattacharya asked whether he could have legal representation at the meeting, but he did not have time to obtain legal advice or counsel before the meeting. Dkt. 33 ¶¶ 102, 108. Yates responded to Bhattacharya's email with hyperlinks to the ASAC's policies. *Id.* ¶ 103; Dkt. 33-44. Section III.D of the ASAC

Operating Procedures requires the Committee to notify a student "in writing as to what the major concerns of the Committee are likely to be during the coming meeting." Dkt. 33 ¶ 104; Dkt. 33-45 at 4. Bhattacharya did not obtain "any written statement of the allegations against him" before the hearing. Dkt. 33 ¶¶ 105, 107.

Bhattacharya attended the hearing that evening. Dkt. 33 ¶ 110. He photographed the attendees, Dkt. 33-47, and recorded audio of the hearing, Dkt. 33-48. Dkt. 33 ¶ 110. Tucker and Kern both attended the hearing. *Id.* ¶ 112; Dkt. 33-49.

Bhattacharya first asked Tucker to explain why the ASAC was meeting to discuss his enrollment status. Tucker referred to the November 15 letter, which "was talking about some interactions [Bhattacharya] had at a forum on microaggression." Dkt. 33-48. Bhattacharya repeatedly denied receiving the letter.[4] *Id.*

Tucker explained that the ASAC was "concerned with the interactions [Bhattacharya] had since [the microaggression panel discussion]." *Id.* Tucker repeated, "What we're concerned about is some of the behaviors you've shown since then. . . . There's concern about your interactions and behaviors most recently." *Id.* When Bhattacharya pressed Tucker to identify what interactions were concerning and who found them concerning, Tucker mentioned "interactions" with Densmore as well as

4. Bhattacharya admits that he had in fact received the letter. *See* Dkts. 33 ¶ 91; 33-36.

"students" and "other administrators." *Id.* Tucker elaborated that he "suspect[ed] [Bhattacharya's behavior in those interactions] was similar to what [Bhattacharya was] showing" at the hearing. *Id.*

Tucker then noted that "Dr. Canterbury recommended that [Bhattacharya] go to CAPS before returning to class and [Bhattacharya had] been resisting that." *Id.* Bhattacharya objected to Tucker's use of the word "recommend," saying it was "a very key mistake." *Id.* He read the subject line of Canterbury's email: "required process to attend class." *Id.* Bhattacharya also told the ASAC that "it's not about whether or not [he wanted] to go to CAPS, it's about being told to go to CAPS. It's about being required to receive a . . . psychiatric evaluation to attend school, a public university." *Id.*

After several minutes, another voting ASAC member, Dr. Bart Nathan, said that the ASAC was holding the hearing because of concerns "about [Bhattacharya's] professionalism and [his] professional behavior in medical school." *Id.* Nathan mentioned "[Bhattacharya's] behavior at a panel meeting and other subsequent behaviors, including the behavior [Bhattacharya was] exhibiting right" then. *Id.* Nathan described Bhattacharya as "extremely defensive" and noted that Bhattacharya's "recording" of the hearing "[was] unusual behavior" not "typical" of "a medical student." *Id.* Nathan said that the ASAC was "requiring [Bhattacharya] to change" his "aggressive, threatening behavior." *Id.* Bhattacharya retorted that Nathan was "just projecting." *Id.* Nathan replied, "Any patient that walked into the room with [Bhattacharya]

would be scared." *Id.* Nathan characterized that as "the professionalism issue that [the ASAC was] having." *Id.* Bhattacharya insisted that "[he had] been near patients as part of the training here, and [he had] never received any complaints from any patients about that." *Id.*

Toward the end of the hearing, Tucker told Bhattacharya that "[t]he concern [was] how [Bhattacharya had] been coming across to people in the last few weeks." *Id.* Bhattacharya said that "[he] just wish[ed] [the ASAC members] would provide a specific example of what exactly [he had] said and done." Another doctor stated that the "entire episode . . . [was] a very good example of inappropriate behavior and aggressive behavior." *Id.*

Under the heading "Professionalism Issues," the minutes of the hearing state that "[t]he committee convened to discuss concerning behaviors exhibited by Kieran Bhattacharya (Densmore) over the past weeks after members of the Technical Standards Committee determined that the concerns were best addressed by the ASAC." Dkt. 33 ¶ 115; Dkt. 33-49. After noting that Bhattacharya attended and participated in the hearing when "given the opportunity to address concerns about his behavior," the minutes note that "[t]he Committee reviewed the list of technical standards that are acknowledged annually by the students[,] especially the Emotional, Attitudinal and Behavioral Skills." Dkt. 33 ¶ 115; Dkt. 33-49. The minutes then state:

> Because the student's behavior demonstrated his inability to meet several of those standards,

> Dr. Nathan made a motion to suspend Kieran Bhattacharya (Densmore) from the School of Medicine, effective immediately, with the option to petition to return in August of 2019. . . . The committee voted unanimously to accept the motion. Nora Kern did not vote on the matter, as personal business required her to leave before the vote was executed.

Dkt. 33 ¶ 115; Dkt. 33-49.

G. The November 29 Suspension Letter

The day after the hearing, Tucker sent Bhattacharya an email with a letter attached. The letter, in relevant part, reads:

> The Academic Standards and Achievement Committee ("ASAC") convened on November 28, 2018 to review concerns that your recent behavior in various settings demonstrated a failure to comply with the School of Medicine's Technical Standards. . . . The ASAC decided that the nature of the concerns necessitated the calling of an emergency meeting. . . .
>
> The Academic Standards and Achievement Committee has determined that your aggressive and inappropriate interactions in multiple situations, including in public settings, during a speaker's lecture, with your Dean, and during the committee meeting yesterday, constitute a

> violation of the School of Medicine's Technical Standards that are found at: https://med.virginia.edu/student-affairs/policies/technical-standards/
>
> Those Standards, in relevant part and as related to professionalism, state that each student is responsible for: Demonstrating self-awareness and self-analysis of one's emotional state and reactions; Modulating affect under adverse and stressful conditions and fatigue; Establishing effective working relationships with faculty, other professionals and students in a variety of environments; and Communicating in a non-judgmental way with persons whose beliefs and understandings differ from one's own.
>
> The committee has voted to suspend you from school, effective immediately. You may apply for readmission to return to class no earlier than August, 2019. . . . The committee would only approve your return if you are able to provide evidence that further violations of the Technical Standards are unlikely to occur. . . .

Dkts. 33 ¶ 116-17; 33-53 at 2-3. The suspension letter also states that Bhattacharya could file an appeal of his suspension within 14 days and explains the appeal procedures. Dkts. 33 ¶ 122; 33-53 at 4.

Five days later, on December 4, Bhattacharya emailed Densmore to initiate an appeal of the ASAC's decision to

suspend him. Dkts. 33 ¶ 123; 33-54. Densmore replied later that day and acknowledged that the appeal process had started. Dkts. 33 ¶ 123; 33-55. In the meantime, Bhattacharya sent information about these events to SecureDrop, a website through which individuals can anonymously transmit documents to dozens of news organizations. Dkt. 33 ¶ 124. In addition, because he was no longer actively enrolled in medical school, the National Board of Medical Examiners canceled Bhattacharya's registration for the United States Medical Licensing Exam Step 1 ("USMLE Step 1"). *Id.* ¶ 126; Dkt. 33-57.

H. The January 2019 No Trespass Order

On December 30, Deputy Chief of Police of the University of Virginia Melissa Fielding called Bhattacharya to inform him that the UVA Police Department would be issuing a No Trespass Order ("NTO") against him. Dkt. 33 ¶ 127. When Bhattacharya inquired into the basis for the NTO, Fielding did not provide any additional information. *Id.* On January 2, 2019, Fielding sent Bhattacharya a letter with the NTO attached. *Id.* ¶ 128; Dkt. 33-58. The NTO stated that, for four years from its effective date of January 3, Bhattacharya was "not to come on **any** property or facility on the Grounds of the University of Virginia **except** as a patient at the University of Virginia Medical Center." Dkt. 33 ¶ 28; Dkt. 33-58 at 3 (emphasis in original). The NTO also stated that it "must be appealed in writing to the Associate Vice President for Safety and Security within five (5) calendar days" after service; failure to deliver or postmark an appeal within that timeframe would constitute "waive[r of] the opportunity to appeal." Dkt. 33-58 at 4.

The next day, Densmore informed Bhattacharya that UVA Medical School would "not be able to proceed with an appeal of [his] suspension" because of the NTO. Dkt. 33 ¶ 129; Dkt. 33-59. Bhattacharya spoke with Fielding by phone on January 15. Despite his request that UVA rescind the NTO, Fielding refused to do so, and she told Bhattacharya that he could not appeal at that time. Dkt. 33 ¶ 130.

After six months, in early July 2019, Bhattacharya emailed Densmore regarding readmission to UVA Medical School. Densmore informed Bhattacharya that the school "cannot address [his] request for readmission while a no trespass order is in effect." *Id.* ¶ 132; Dkt. 33-61. In response, Bhattacharya called and emailed Fielding asking for "specific reasons" why the NTO was issued, for the NTO to be "dissolve[d] . . . immediately," or "both." Dkts. 33 ¶ 134; 33-62. Fielding responded that the UVA Police Department had issued the NTO "after concerns were raised about comments on a chat room that were perceived as threats." Dkts. 33 ¶ 135; 33-63. She said that those "comments raised safety concerns for the community" and that "[t]he NTO was not a result of [Bhattacharya's] suspension." *Id.* Fielding also noted that Bhattacharya "did not appeal the NTO as specified in the appeal process instructions." *Id.* Bhattacharya responded with a list of questions asking for further details. Dkt. 33 ¶ 136.

A week after his exchange with Fielding, Bhattacharya appealed the NTO in writing to the Associate Vice

President for Safety and Security. *Id.* ¶ 137; Dkt. 33-65. In the appeal letter, Bhattacharya wrote:

> It is not clear to me what Deputy Chief Melissa Fielding was referring to by the term "chat room." I have posted on publicly available internet forums which include but are not limited to the following: StudentDoctorNetwork, College-Confidential, Reddit, 4chan, and others. The term "internet forum" itself is ambiguous and difficult for one to distinguish from "social media." This includes but is not limited to the following: Facebook, Twitter, Google hangou[ ] ts, Skype, and others.
>
> Furthermore, Deputy Chief Melissa Fielding mentions that concerns were raised about comments on a chat room that were perceived as threats. . . . It is [ ] unclear as to what, if any, perceived threats were a direct result of any actions that I have taken or statements that I have made. I do not want anyone to feel threatened.

Dkt. 33-65.

On August 7, UVA upheld the NTO because Bhattacharya had "engag[ed] in conduct that threatened the well-being of members of the community through various social media platforms," Dkt. 33 ¶ 137; Dkt. 33-66, and because "[t]he conduct [Bhattacharya] directed at members of the university community compromised safety and security and caused fear." *Id.*; Dkt. 33 ¶ 137.

II. LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint to determine whether a plaintiff has properly stated a claim. The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), with all allegations in the complaint taken as true and all reasonable inferences drawn in the plaintiff's favor. *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016). A motion to dismiss "does not, however, resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* at 214.

Although the complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). A court need not "accept the legal conclusions drawn from the facts" or "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 768 (4th Cir. 2011) (internal quotations omitted). And the court cannot "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. This is not to say Rule 12(b)(6) requires "heightened fact pleading of specifics"; instead,

the plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Still, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679.

III. ANALYSIS

A. Count I: First Amendment Retaliation

The First Amendment protects not only the affirmative right to speak, but also the "right to be free from retaliation by a public official for the exercise of that right." *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000)). Under § 1983, a student at a public university may state a plausible claim for First Amendment retaliation if he alleges that (1) he "engaged in protected First Amendment activity," (2) "the defendants took some action that adversely affected [his] First Amendment rights," and (3) "there was a causal relationship between [his] protected activity and the defendants' conduct." *Buxton v. Kurtinitis*, 862 F.3d 423, 427 (4th Cir. 2017) (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005) (citing *Suarez*, 202 F.3d at 686)).

Defendants argue that Bhattacharya's claim fails because his speech was not protected. They submit that Bhattacharya was dismissed not because of his speech but because he violated the school's professional standards. They also argue that the Individual Defendants—Peterson, Kern, and Rasmussen—to the extent that

they are sued in their individual capacities, are entitled to qualified immunity. Dkt. 113 at 20-25; Dkt. 116 at 3-7.

But, as discussed below, the Court disagrees with Defendants' arguments and concludes that Bhattacharya states a plausible claim for First Amendment retaliation.

1. Protected Speech

The first prong of the First Amendment retaliation test asks whether the plaintiff "engaged in protected First Amendment activity." *Buxton*, 862 F.3d at 427. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *see also Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 670 (1973) (per curiam) (emphasizing that "'state colleges and universities are not enclaves immune from the sweep of the First Amendment'") (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)). But the Supreme Court has recognized two major categories of speech that public schools, including public universities, may regulate.

First, schools may regulate "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513; *see also Papish*, 410 U.S. at 669-70 (recognizing "a state university's undoubted prerogative to enforce reasonable rules governing student conduct" and "legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination").

Second, schools "need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)). For example, school officials can punish students for "vulgar and lewd" speech at school because it "undermine[s] the school's basic educational mission" and "is wholly inconsistent with the 'fundamental values' of public school education." *Fraser*, 478 U.S. at 685-86. School officials also may "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273. Expressive activities are school-sponsored when the school "lend[s] its name and resources to the dissemination of student expression" such that "students, parents, and members of the public might reasonably perceive [that student's expression] to bear the imprimatur of the school." *Id.* at 271-73.

Finally, the First Amendment does not protect "true threats" within or beyond the schoolhouse gates. *United States v. Bly*, 510 F.3d 453, 458-59 (4th Cir. 2007); *see Virginia v. Black*, 538 U.S. 343, 359 (2003).

Still, where speech occurs off campus, school officials may regulate that speech only if it has a "sufficient nexus with the school." *Kowalski v. Berkeley Cnty. Schools*, 652 F.3d 565, 577 (4th Cir. 2011). In *Kowalski*, the Fourth Circuit found that a school did not violate the First

Amendment when it suspended a student who created a webpage ridiculing a fellow student. The court rejected the student's argument that the webpage was not school-related, noting that the student "designed the website for 'students' . . . ; she sent it to students inviting them to join; . . . those who joined were mostly students[;] . . . and [t]he victim understood the attack as school-related, filing her complaint with school authorities." *Id.* at 576.

Bhattacharya claims that Defendants retaliated against him for his questions and comments during the Microaggression Panel Discussion, his attempt to defend himself at his ASAC hearing, and his attempt to seek press coverage of his suspension. Dkt. 33 ¶ 140. He also alleges that Defendants informed him that the NTO was issued "for engaging in conduct that threatened the well-being of members of the community through various social media platforms." *Id.* ¶ 137; Dkt. 33-66. The Court examines each of these expressive activities in turn to determine which, if any, were protected by the First Amendment.

i. Comments and Questions at the Microaggression Panel Discussion

Bhattacharya's speech at the panel discussion—questioning and critiquing the theory of microaggression—does not clearly fall into any category of speech that UVA Medical School can regulate or prohibit. His comments and questions did not "materially disrupt[ ] classwork or involve[ ] substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. Defendants argue that because "the purpose of the panel discussion was

to teach students about a social issue in medicine, it was not the time or place for Plaintiff to dispute the validity of the subject matter, argue with faculty, or disparage a professor's substantial research in the field." Dkt. 113 at 23. To support this contention, Defendants assert that "speech reflecting non-compliance with [a professional conduct] [c]ode that is related to academic activities materially disrupts the [p]rogram's legitimate pedagogical concerns." *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016).

In *Keefe*, the Eighth Circuit upheld, at the summary judgment stage, a school's decision to dismiss Keefe, a nursing student, for Facebook posts that were offensive and threatening to other students. *Id.* at 532. The court found that Keefe's "posts were directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies—'I'm going to . . . give someone a hemopneumothorax.[5]'" *Id.* Considering that fellow students reported these posts and their resulting fears to instructors, Keefe's "disrespectful and threatening statements toward his colleagues had a direct impact on the students' educational experience. They also had the potential to impact patient care" because students who cannot communicate and collaborate in a clinical setting may cause "poor outcomes for the patients." *Id.* The court concluded that the First Amendment did not prevent the school from dismissing Keefe because he "had crossed the professional boundaries line, but . . . he had

5. In *Keefe*, the plaintiff testified that a hemopneumothorax is "a 'trauma' where the lung is punctured and air and blood flood the lung cavity." *Id.* at 527.

no understanding of what he did or why it was wrong, and he evidenced no remorse for his actions." *Id.* at 532-33.

Here, Bhattacharya's comments and questions were directed at the professors participating in the panel during a time designated for asking questions. His statements were academic in nature. Bhattacharya challenged one professor's definitions of "microaggression" and "marginalized group" as "contradictory" and "extremely nonspecific." Dkt. 33-2. He also asked several questions about the "evidence" underlying that professor's claims, critiquing it—and the professor's research over "years"—as "anecdotal." *Id.* These comments and questions might be forward or pointed, but—as alleged—they did not materially disrupt the discussion or substantially invade the professor's, or anyone else's, rights. Certainly, Bhattacharya's line of questioning concerned Rasmussen enough that she mentioned the need to "make sure to open up the floor to lots of people for questions" and ultimately called on another student to ask a question. *Id.* But Bhattacharya's allegations do not show that his statements had a "direct impact on [other] students' educational experience" or "had the potential to impact patient care." *Keefe*, 840 F.3d at 531. Indeed, Bhattacharya's comments are a far cry from the comments at issue in *Keefe*.

Nor were Bhattacharya's comments and questions at the panel "vulgar," "lewd," "indecent," or "plainly offensive." *See Fraser*, 478 U.S. at 685-86. Defendants argue that Bhattacharya's comments meet these criteria because they were "insulting, disrespectful, and uncivil" to the faculty. Dkt. 113 at 23. In *Fraser*, the Supreme

Court upheld the school district's decision to suspend a high school student who gave a speech at a school assembly in which he described a student he was nominating for student elective office "in terms of an elaborate, graphic, and explicit sexual metaphor." 478 U.S. at 678. But Bhattacharya's comments were not offensive or indecent in this manner. Indeed, the comments did not involve ad-hominem attacks or curse words. At worst, they were aggressive critiques.

Accordingly, the Court concludes that the amended complaint alleges sufficient facts to find that Bhattacharya's questions and comments at the microaggression panel were protected speech. His expressions were not made at inappropriate times or places, nor were his comments disruptive or offensive.

ii. Speech at the ASAC Suspension Hearing

Similarly, Bhattacharya's comments at his suspension hearing were not materially disruptive or offensive. The panel convened to give Bhattacharya a chance to explain to faculty members on the ASAC why he should be able to remain enrolled at UVA Medical School. He inquired why the hearing had been convened and complained about the lack of due process and transparency. Dkt. 33-48. Indeed, Bhattacharya fixated on whether or not he had received the November 15 letter from the ASAC, and he contested—at length—Tucker's statement that Canterbury had "recommended" that Bhattacharya go to CAPS in order to attend class. *Id.* In addition, several

ASAC members told Bhattacharya that his behavior was "extremely defensive," "aggressive," "threatening," and "inappropriate," and that his insistence on recording the meeting was "unusual." *Id.* But the Fourth Circuit has held that "the First Amendment protects bizarre behavior," and "bizarre does not equal disruptive." *Tobey v. Jones*, 706 F.3d 379, 388 (4th Cir. 2013). Furthermore, the audio recording did not contain "true threats," *Black*, 538 U.S. at 359, nor did the ASAC members say that the *content* of Bhattacharya's speech was threatening or might scare patients. Even if Bhattacharya's comments were contentious, rude, and defensive, they did not materially disrupt the hearing or substantially invade the ASAC members' rights. *Tinker*, 393 U.S. at 513. Nor did they "undermine the school's basic educational mission." *See Fraser*, 478 U.S. at 685-86.

Accordingly, the Court concludes that the amended complaint alleges sufficient facts to find that Bhattacharya's expressions at the ASAC suspension hearing were protected speech. His expressions were not made at inappropriate times or places, nor were his comments disruptive or offensive.

iii. Online Speech

Defendants argue that Bhattacharya has not alleged enough facts about the social media statements that drove UVA's decision to issue an NTO against him. Dkt. 113 at 24. Defendants also argue that Bhattacharya's statements that triggered the NTO were not protected

speech because they were "true threats" related to the school. *Id.* But Bhattacharya alleges that Defendants have not disclosed any social media statements to him, even after he repeatedly requested them. Dkts. 33 ¶ 136-37; 33-65. In his appeal, Bhattacharya provided UVA with a list of social media platforms and other online forums he had been active on at the time the NTO was issued. *See id.* Without the statements, the Court cannot determine whether they are "true threats" related to the school. But Bhattacharya's amended complaint makes clear that the statements in question are those that UVA used as the basis for issuing the NTO against him. Of course, once UVA discloses the statements underlying the issuance of the NTO, UVA may again then that the statements are "true threats" that receive no First Amendment protection. *Black*, 538 U.S. at 359. At this stage, however, the Court concludes that Bhattacharya has sufficiently alleged that his statements were protected speech.

2. Adverse Action

The second prong of the First Amendment retaliation test asks whether "the defendants took some action that adversely affected [the student's] First Amendment rights." *Buxton*, 862 F.3d at 427. "[A] plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *Martin v. Duffy*, 858 F.3d 239, 249 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018). Indeed, because "conduct that tends to chill the exercise of constitutional rights might not itself deprive such rights, . . . a plaintiff need not actually be

deprived of [his] First Amendment rights in order to establish . . . retaliation." *Constantine*, 411 F.3d at 500.

Bhattacharya sufficiently alleges that Defendants retaliated against him. Indeed, they issued a Professionalism Concern Card against him, suspended him from UVA Medical School, required him to undergo counseling and obtain "medical clearance" as a prerequisite for remaining enrolled, and prevented him from appealing his suspension or applying for readmission by issuing and refusing to remove the NTO. *Id.* ¶ 142. Because a student would be reluctant to express his views if he knew that his school would reprimand, suspend, or ban him from campus for doing so, the Court concludes that Bhattacharya has adequately alleged adverse action.

3. Causal Connection

The third prong of the First Amendment retaliation test asks whether "there was a causal relationship between [the student's] protected activity and the defendants' conduct." *Buxton*, 862 F.3d at 427. To allege a causal connection between the protected speech and the adverse action, a plaintiff must show (1) the defendants' awareness of the plaintiff's protected speech and (2) "some degree of temporal proximity" between that awareness and the adverse action. *Constantine*, 411 F.3d at 501.

Bhattacharya alleges that Defendants were aware of his comments and questions at the microaggression panel discussion and suspension hearing. *Id.* ¶ 144. Certainly, the faculty members present at the microaggression

panel discussion and those present at the suspension hearing were aware of his speech. In addition, he points to Kern's Card, which stated that Bhattacharya "asked a series of questions that were quite antagonistic toward the panel" and "stated one faculty member was being contradictory." Dkts. 33 ¶ 67; 33-13. He also points to the November 15 letter from the ASAC, which states that his "behavior" at the panel was "thought to be unnecessarily antagonistic and disrespectful." Dkts. 33 ¶ 91; 33-35. The November 29 suspension letter, too, states that his "aggressive and inappropriate interactions in multiple situations, including in public settings, during a speaker's lecture, with your Dean, and during the committee meeting yesterday, constitute a violation of the School of Medicine's Technical Standards." Dkts. 33 ¶ 116-17; 33-51. Finally, Bhattacharya also alleges that UVA Defendants were aware of some unidentified comments on "various social media platforms," which UVA informed him were the basis of the NTO banning him from campus. Dkts. 33 ¶ 137; 33-66. These allegations are sufficient to show that Defendants were aware of Bhattacharya's speech at the panel discussion, suspension hearing, and on social media.[6]

In terms of temporal proximity, Bhattacharya's comments and questions at the microaggression panel discussion occurred on October 25, 2018, Dkt. 33 ¶ 3, and his suspension hearing occurred on November 28, *id.*

6. However, Bhattacharya does not allege any facts from which the Court can draw the inference that Defendants were aware of his attempts to gain publicity about his situation by submitting documents to SecureDrop.

¶ 110. UVA Medical School suspended him on November 29, *id.* ¶ 116—just over a month after the panel discussion and one day after the suspension hearing. UVA issued the NTO against him on January 2, 2019, *id.* ¶ 128—just over two months after the panel discussion and one month after his suspension hearing. The Court is satisfied that the time that elapsed between Bhattacharya's protected speech and his suspension and ban from the UVA Grounds is sufficient to raise a plausible inference of a causal connection. *Constantine*, 411 F.3d at 501 (finding a causal connection where "[a]t most, four months elapsed from the time [plaintiff] complained about [a professor's] exam and the grade appeals process to the time of the defendants' alleged retaliatory conduct"). At this stage, no more is needed.

i. But-For Causation

Defendants contest causation and argue that they suspended Bhattacharya for behavior that violated UVA Medical School's professional code of conduct, and not for the content of his speech or his viewpoint. *See*, *e.g.*, Dkt. 116 at 3-5. Defendants rely on the same exhibits that Bhattacharya does. They point to Kern's Card, which stated that Bhattacharya's "level of frustration/anger seemed to escalate" and expressed "shock" that Bhattacharya showed "so little respect toward faculty members." Dkts. 33 ¶ 67; 33-13. They also note that the November 15 letter from the ASAC emphasized that "people may have different opinions on various issues, but they need to express them in appropriate ways," and that "[i]t is always very important in medicine to show

mutual respect to all." Dkts. 33 ¶ 91; 33-35. In addition, the physicians at the suspension hearing told Bhattacharya that his behavior *since* the panel discussion was the primary focus on their meeting, and that they felt patients in the room during the suspension hearing would be "scared" of him. Dkt. 33-48. Finally, Defendants point to the same language as Bhattacharya does in the November 29 suspension letter to underscore that the letter cited specific UVA Medical School Technical Standards that Bhattacharya violated, including "[d]emonstrating self-awareness and self-analysis of one's emotional state and reactions, . . . [e]stablishing effective working relationships with faculty, other professionals and students in a variety of environments; and [c]ommunicating in a non-judgmental way with persons whose beliefs and understandings differ from one's own." Dkts. 33 ¶ 116-17; 33-51.

But to survive a motion to dismiss, Bhattacharya does not need to establish that but for his protected speech he would not have been suspended from UVA Medical School or banned from the UVA Grounds. Of course, Bhattacharya must clear a higher hurdle to *prevail* on a First Amendment retaliation claim. "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 260 (2006)). In *Mount Healthy City School Board of Education v. Doyle*, for example, the Supreme Court held that even if a teacher's "protected

conduct played a part, substantial or otherwise, in [the] decision not to rehire," he was not entitled to reinstatement "if the same decision would have been reached" absent his protected speech. 429 U.S. 274, 285 (1977).

Although the Fourth Circuit has yet to address this question, several courts have found that schools may enforce academic professionalism requirements in programs that train licensed medical professionals without violating the First Amendment. *Keefe*, 840 F.3d at 532-33; *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011). "Given the strong state interest in regulating health professions, teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school's curriculum that do not, at least on their face, run afoul of the First Amendment." *Keefe*, 840 F.3d at 530. Still, a university may violate the First Amendment if it uses a professional code of conduct or ethics as a pretext to punish the content of a student's speech. *Ward*, 667 F.3d at 735 (denying university's motion for summary judgment because student produced sufficient evidence to show that university's decision to dismiss counseling student from training program on basis that student's request for a referral to avoid counseling gay and lesbian clients violated professional code of ethics may have been "deployed as a pretext for punishing" student's speech). *See also Papish*, 410 U.S. at 671 (ordering a student's reinstatement where the facts "show[ed] clearly that petitioner was expelled because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution").

Bhattacharya's amended complaint and attached exhibits provide some evidence regarding Defendants' justifications for their actions. Yet Bhattacharya adequately alleges that Defendants used the professionalism standards as a pretext for engaging in content-based or viewpoint discrimination, thereby calling that justification into question. *See* Dkt. 33 ¶¶ 144-45. Bhattacharya also adequately alleges that UVA's issuance of the NTO was pretextual. *Id.* ¶ 137.

The record is not developed sufficiently at this stage to determine whether Bhattacharya's First Amendment retaliation claim fails as a matter of law. Moreover, such fact-intensive arguments about causation are better evaluated on summary judgment. "Based on [Bhattacharya's amended] complaint, it is unclear whether [Defendants'] behavior was reasonably motivated by [his] 'disruptive' conduct or unreasonably motivated by his protected [speech]." *Tobey*, 706 F.3d at 389 (finding, at the motion to dismiss stage, that plaintiff who was arrested when he "removed his sweatpants and t-shirt to reveal the text of the Fourth Amendment on his chest" at airport screening checkpoint had stated a valid First Amendment retaliation claim).

4. Qualified Immunity for Individual Defendants

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Taylor v. Riojas*, 141

S. Ct. 52, 53 (2020) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)) (internal quotation marks omitted). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (citing *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)). To determine whether a complaint should survive a motion to dismiss on grounds of qualified immunity, the Court asks (1) "whether a constitutional violation occurred" and (2) "whether the right violated was clearly established." *Tobey v. Jones*, 706 F.3d at 385 (4th Cir. 2011). But the Court need not address the questions in that order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). A right is clearly established if it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)) (internal quotation marks and alteration omitted).

Based on Bhattacharya's allegations, the Court cannot conclude that the Individual Defendants are entitled to qualified immunity on the First Amendment retaliation claim.

A defendant is entitled to raise a qualified immunity defense at the motion to dismiss stage of litigation, and later on a motion for summary judgment. *Tobey*, 706 F.3d at 393-94. In *Tobey*, the Fourth Circuit affirmed the denial of qualified immunity on a motion to dismiss. The court concluded that "[t]he question whether Mr. Tobey's conduct was so 'bizarre' and 'disruptive' that Appellant's reaction was reasonable" in "jump[ing] straight to arrest"

Tobey could not "be decided at the 12(b)(6) stage." *Id.* at 393. Here, the ultimate question whether Individual Defendants in fact violated Bhattacharya's First Amendment rights by retaliating against him because of his protected speech—and accordingly, whether the First Amendment right violated was clearly established—requires a more developed record. Indeed, "[o]rdinarily, the question of qualified immunity should be decided at the summary judgment stage." *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005). Thus, while the Court reviews this issue based on the allegations in the complaint now, "[i]t may be that discovery will reveal there is no genuine issue of material fact," and Peterson, Kern, and Rasmussen "can move for summary judgment" on qualified immunity grounds. *See Tobey*, 706 F.3d at 393.

At this stage of the litigation, the Court finds that Peterson, Kern, and Rasmussen are not entitled to qualified immunity on the First Amendment retaliation claim.

Accordingly, the Court will deny Defendants' motion to dismiss Count I of the amended complaint.

B. Count II: Constitutional Due Process

The Due Process Clause of the Fourteenth Amendment provides that "no state shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV § 1. To state a procedural due process claim, Bhattacharya must allege: "(1) a cognizable 'liberty' or 'property' interest; (2) the deprivation of that interest

by 'some form of state action'; and (3) that the procedures employed were constitutionally inadequate." *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 145 (4th Cir. 2009) (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 (4th Cir. 1988)).

Bhattacharya argues that he had a "liberty interest in [his] Protected Free Speech" and a "liberty and property interest in continuing his medical studies at UVA Med School and pursuing the practice of medicine." Dkt. 33 ¶¶ 148-49. He claims that Defendants deprived him of these interests without proper notice and the opportunity to be heard. *Id.* ¶ 152. Specifically, when UVA Medical School suspended him, it failed to accord with all of its internal policies and procedures, including the ASAC Operating Procedures. *Id.* ¶ 151.

1. Liberty Interest in Protected Free Speech

Defendants' purported deprivation of Bhattacharya's free speech interest is not cognizable as a procedural due process claim.

The Supreme Court's decision in *Board of Regents of State Colleges v. Roth* addressed this issue directly. 408 U.S. 564 (1972). In *Roth*, a university professor claimed that his removal could have been based in part on the exercise of his First Amendment right to freedom of speech. *Id.* The Court remarked that "[w]hen a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede

the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Id.* at 575 n.14. However, the Court went on to note that actions requiring such procedural safeguards were those in which the core interest at stake was "itself a free speech interest," such as "before an injunction is used against the holding of rallies and public meetings" or "before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth." *Id.* (internal citations omitted). The Supreme Court reasoned that the deprivation of the plaintiff's free speech rights was not "directly impinged . . . in any way comparable to a seizure of books or an injunction against meetings." *Id.* It concluded that "[w]hatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest." *Id.*

In this case, Bhattacharya has faced no direct deprivation of his free speech rights comparable to the examples the Supreme Court highlighted. Indeed, Bhattacharya does not allege that Defendants prohibited him from expressing his views at all. Whatever may be Bhattacharya's free speech rights as a medical student, his interest in continuing his medical studies and pursuing a career in the medical profession "is not itself a free speech interest" cognizable under procedural due process. *Id.*

2. Liberty and Property Interest in Continued Enrollment and Practice of Medicine

Bhattacharya claims a purported liberty and property interest in continuing his studies at UVA Medical School and pursuing the practice of medicine. Assuming such interests are cognizable,[7] this procedural due process claim also would fail.

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7. The Court doubts that Bhattacharya has sufficiently pled either a property or a liberty interest in continued enrollment. "A protected property interest cannot be created by the Fourteenth Amendment itself, but rather must be created or defined by an independent source." *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 109 (4th Cir. 2011) (citing *Roth*, 408 U.S. at 577). For example, in *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975), the Supreme Court held that a student had a property interest in continued public school enrollment because the student located a state statute creating an entitlement to a free education to all residents between 5 and 21 years old. Here, Bhattacharya's amended complaint "fails to cite or to identify any statute or other source of a legitimate claim of entitlement to [Bhattacharya's] continued enrollment at [UVA Medical School]." *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 720 (E.D. Va. 2015). Furthermore, "[n]either the Supreme Court nor the Fourth Circuit has held that such a property interest exists in connection with higher education, either categorically or specifically with regard to Virginia law." *Id.* at 720-21. But the Supreme Court and Fourth Circuit have assumed without deciding that students have a protected property right to continued enrollment, as the Court does here. *See Tigrett v. Rector & Visitors of the Univ. of Va.*, 290 F.3d 620, 627 (4th Cir. 2002).

Bhattacharya also argued that he has alleged a liberty interest in his reputation. A plaintiff has a right to due process "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,"

Appendix E

When determining what procedural safeguards are required under the Due Process Clause, courts distinguish between academic and disciplinary dismissals. A disciplinary dismissal is one in response to charges of misconduct; in such circumstances, a hearing at which a student can present his side of a factual issue could "provide a meaningful hedge against erroneous action." *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (classifying as disciplinary students' suspension for participating in demonstrations that had disrupted classes, attacking a police officer, and damaging school property). In contrast, an academic dismissal is one related to performance in studies; an academic "judgment is by its nature more subjective and evaluative than the typical factual questions

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Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), as long as a "tangible interest such as employment"—or perhaps suspension from a public school—is involved. *Paul v. Davis*, 424 U.S. 693, 701 (1976). In *Goss*, the Supreme Court found that public school students suspended for misconduct allegations had been deprived of a reputational liberty interest. 419 U.S. at 575. To state a claim for procedural due process violations based on a reputational interest in the context of suspension from a public university, a student must allege (1) a stigmatizing statement (2) made public by the public university, (3) in conjunction with his suspension from the university, and (4) that the charge triggering his suspension was false. *Doe*, 132 F. Supp. 3d at 723-24 (citing *Sciolino v. City of Newport News*, 480 F.3d 642, 646 (4th Cir. 2007)). Here, Bhattacharya's amended complaint has not alleged any of these elements. His allegations do not raise the inference that he was suspended for misconduct, nor that UVA Medical School made public a stigmatizing statement about him. If anything, Bhattacharya alleges that *he* sought to make information about his suspension public. *See* Dkt. 33 ¶ 124.

presented in the average disciplinary decision" and requires "expert evaluation of cumulative information." *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (classifying as academic a student's dismissal because she lacked "the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal"). A public university must give a student notice and an opportunity to be heard when taking disciplinary action. *Goss*, 419 U.S. at 581. But the Due Process Clause does not require such "stringent procedural protection[s]" for academic dismissals. *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 75 (4th Cir. 1983); *see also Horowitz*, 435 U.S. at 86 (1978). Indeed, no formal hearing at all is required for an academic dismissal. *Id.* at 90.

Bhattacharya's due process claim faces an uphill climb because the allegations in the amended complaint demonstrate that the decision to suspend Bhattacharya from the medical school was an academic judgment, not a disciplinary one. The ASAC members who suspended Bhattacharya from the medical program were evaluating whether Bhattacharya met the professionalism standards set by the institution.[8] Dkt. 33-49 at 2. Professionalism

8. This section focuses, of course, on the process that plaintiff was afforded. The analysis is different from that for a First Amendment retaliation claim. A university is not required under the Constitution to provide a hearing for academic dismissals, but that does not mean that university officials who retaliate against students for their speech under the guise of dismissing them for academic reasons do not violate the Constitution. *See Booker v. S.C. Dep't of Corrs.*, 855 F.3d 533, 542 (4th Cir. 2017) ("That a

is a core competency of the degree program at UVA Medical School, evaluated by faculty along with any other competency required to obtain a medical degree. *See* Dkt. 33-9 at 2. And evaluating professionalism is a subjective inquiry best suited for the judgment of medical educators, not the Court. *See Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 462 (4th Cir. 2012) ("[T]he Supreme Court has held that a court should defer to a school's professional judgment regarding a student's academic or professional qualifications."). *See also Al-Dabagh v. Case Western Reserve Univ.*, 777 F.3d 355, 359-60 (6th Cir. 2015) (holding that a medical student's dismissal for failing to meet the school's professionalism standards was an academic judgment that deserved deference under procedural due process analysis); *Nofsinger v. Va. Commonwealth Univ.*, 3:12-cv-236, 2012 WL 2878608, at *7 (E.D. Va. July 13, 2012), *aff'd* 523 F. App'x 204 (4th Cir. 2013) (holding on a motion to dismiss that plaintiff who was a graduate student in physical therapy was "well aware that professionalism was a criterion used to evaluate her in her Clinical, and was also on notice that professionalism was at the very core of the Department's philosophy—and thus necessary for her success in the program," making dismissal based in part on professionalism an academic judgment).

Accordingly, Bhattacharya was given more process than the Constitution required. Indeed, although the

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prison is not required under the Constitution to provide access to a grievance process does not mean that prison officials who retaliate against inmates for filing grievances do not violate the Constitution.").

Constitution does not require a hearing before rendering an academic judgment, *Horowitz*, 435 U.S. at 90, Bhattacharya received one.[9] Further, the Constitution, not university policies and procedures, determines the process that is required. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Thus, Bhattacharya's allegations that ASAC failed to abide by its own policies and procedures cannot support a claim that he did not receive constitutional due process.

Finally, nothing in Bhattacharya's amended complaint suggests that he was denied due process with respect to the NTO. Bhattacharya does not claim to have a property or liberty interest in being present on the UVA Grounds. In any event, he was given the right to appeal the NTO, which he did in July 2019. Dkt. 33-65. His appeal was subsequently denied. Dkt. 33-66.

For these reasons, Bhattacharya's procedural due process claim under Count II will be dismissed.

C. Count III: § 1985(3) Civil Rights Conspiracy

Bhattacharya must plausibly allege the following elements to state a Section 1985(3) claim:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive

9. Bhattacharya also had notice of the professional standards he was expected to abide by, as well as notice of the consequences of failing to meet them, Dkt. 33-9 at 2-3.

> the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

A Soc'y Without A Name v. Virginia, 655 F.3d 342, 346 (4th Cir. 2011) (citing *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995)). "To meet the requirement of a class-based discriminatory animus, under this section the class must possess the 'discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex.'" *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985) (citation omitted).

Bhattacharya argues that the class-based animus requirement should be read to encompass those who are discriminated against based on their political views. He points to the Supreme Court's decision in *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 836 (1983), as evidence that § 1985(3) has not been interpreted to exclude conspiracies motivated by bias against groups who hold particular political views. Dkt. 115 at 30-32. Indeed, Bhattacharya argues that the Supreme Court expressly left this question open when it said, "[I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *Scott*, 463 U.S. at 836.

What Bhattacharya leaves out of his quotation, however, is what the Court went on to state in the following

sentences: "the predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters."[10] Moreover, the Supreme Court has expressed reservation in expanding the scope of § 1985(3) beyond race discrimination. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993).

To the extent the Supreme Court left the issue Bhattacharya presents open, the Fourth Circuit has foreclosed his argument. *Harrison v. KVAT Food Mgmt., Inc.*, 766 F.2d 155, 157 (4th Cir. 1985); *see also Farber v. City of Paterson*, 440 F.3d 131, 139, 143 (3rd Cir. 2006) (noting a circuit split over the question and siding with the Fourth, Seventh, and Eighth Circuits in holding that § 1985(3) "does not provide a cause of action for individuals allegedly injured by conspiracies motivated by discriminatory animus directed toward their political affiliation").

In *Harrison v. KVAT Food Mgmt., Inc.*, the Fourth Circuit specifically held that the Supreme Court's reasoning in *Scott* could not be extended to include claims citing discriminatory animus against a class formed around purely political views. 766 F.2d at 157. In coming

10. The Fourth Circuit provides additional detail of § 1985(3)'s history: "[The] failure or inability on the part of local southern governments to control the Klan was particularly troubling to Republican Congressmen. During this period, Republicans were leading supporters of the emancipation of blacks, and as a result frequently joined the blacks as common victims of Klan intimidation and violence." *Harrison v. KVAT Food Mgmt., Inc.*, 766 F.2d 155, 157 (4th Cir. 1985).

to this conclusion, the Court addressed how the legislative history of § 1985, also known as the "Ku Klux Klan Act," made clear that the statute was intended to provide relief for those who suffered at the hands of Klan violence. *Id.* at 160-61. It also explained that the Supreme Court's opinion in *Scott* "exhibits a noticeable lack of enthusiasm for expanding the coverage of § 1985(3) to any classes other than those expressly provided by the Court." *Id.* at 161. The Court's later decision in *Bray* not to extend the scope of invidious class-based animus in § 1985(3) to include discrimination based on opposition to abortion only serves to emphasize this point. 506 U.S. at 269; *see also Buschi*, 775 F.2d at 1258 ("It is obvious that, whether we take the majority or the dissenting view in *Scott*, the class protected can extend no further than to those classes of persons who are, so far as the enforcement of their rights is concerned, 'in unprotected circumstances similar to those of the victims of Klan violence.'") (quoting *Scott*, 463 U.S. at 851 (Blackmun, J., dissenting)).

Bhattacharya has expressly acknowledged that the bias against him was not motivated by any discriminatory animus toward his race or national origin. Dkt. 115 at 31. Rather, his contention is that the alleged conspiracy was motivated by animus based on "ideological views." Dkt. 33 at 52. But this is not the type of class-based discriminatory animus that is cognizable under § 1985(3) in this Circuit. *See Harrison*, 766 F.2d at 157. The class Bhattacharya cites is not one in "unprotected circumstances" remotely similar to those who were victims of Klan violence, nor does he cite political views in support of such victims that might subject him to such violence. *See Buschi*, 775 F.2d at 1258.

Finally, Bhattacharya's conspiracy claim also fails because Peterson, Kern, and Rasmussen are protected by the intracorporate conspiracy doctrine, which the Fourth Circuit has applied in the civil rights context. *Id.* at 1251-52. The intra-corporate conspiracy doctrine protects individual defendants who are employees of a corporation and were acting in their capacities as employees in connection with the alleged conspiracy. *Id.* at 1252. "Simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiff must also allege that they acted other than in the normal course of their corporate duties." *Id.* (internal quotation marks and citation omitted). Only if corporate employees have "an independent personal stake in achieving the corporation's illegal objective," *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974), or if corporate employees' acts in furtherance of a conspiracy were "unauthorized," *Buschi*, 775 F.2d at 1253 (internal quotation marks and citation omitted).

Here, Bhattacharya's amended complaint and attached exhibits allege that Peterson, Kern, and Rasmussen were UVA Medical School faculty members. Dkt. 33 at 1. None of his allegations support a reasonable inference that Peterson, Kern, or Rasmussen conspired with anyone outside UVA, or that they were not acting in their capacities as UVA Medical School faculty members in participating in the decision to suspend Bhattacharya. To the contrary, Rasmussen's discussion with Bhattacharya at the microaggression panel discussion, Peterson's meeting with Bhattacharya, Kern's Card, and Kern's

attendance at the ASAC's meetings all occurred at UVA Medical School and in relation to the Individual Defendants' responsibilities as faculty members. Moreover, Bhattacharya's conclusory allegations, Dkt. 33 ¶¶ 161-62, lack factual support and do not support an inference that the Individual Defendants' acts were unauthorized or that they had an independent personal stake in Bhattacharya's suspension. Thus, the Court concludes that the Individual Defendants are protected by the intracorporate conspiracy doctrine.

For these reasons, Bhattacharya's § 1985(3) claim will be dismissed.

D. Count IV: Va. Code § 18-499-500 Conspiracy to Injure in Trade, Business, or Profession

Bhattacharya alleges that Defendants Peterson, Kern, and Rasmussen are liable to him for violating Virginia Code § 18.2-499. The statute states in relevant part, "Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever . . . shall be jointly and severally guilty of a Class 1 misdemeanor." Va. Code. § 18.2-499.[11] "To ultimately prevail under the Virginia conspiracy statute, a plaintiff must prove by clear and convincing evidence the

11. Section 18.2-500 creates a private cause of action for parties injured under this statute, permitting them to recover treble damages.

following elements: (1) concerted action; (2) legal malice; and (3) causally related injury." *Schlegel v. Bank of Am., N.A.*, 505 F. Supp. 2d 321, 325 (W.D. Va. 2007).

A claim under these statutes "focuses upon conduct directed at property, that is, one's business, and applies only to conspiracies resulting in business-related damages." *Buschi*, 775 F.2d at 1259 (internal quotation marks omitted); *see Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 321 (4th Cir. 2012) (stating it is "well-settled" that the Va. Code § 18-499 does not apply to "personal or employment interests") (citing *Andrews v. Ring*, 585 S.E.2d 780, 784 (2003)). The statute does not cover a claim that only relates to "employment and possible injury to their employment reputation" because the claim does not include any "business-related injury." *Buschi*, 775 F.2d at 1259.

Bhattacharya alleges that the purported co-conspirators conspired to deprive him "of the ability to complete his medical school studies and enter the medical profession." Dkt. 33 at 53. He does not raise anything more than a harm to his interest in pursuing employment.[12] He does not allege to have any existing stake or interest in a business, let alone one that was the target of a conspiracy. Rather, he claims injury to a future interest in employment, which does not raise a right to relief under

12. Bhattacharya argues that his pursuit of the practice of medicine is an interest in a *profession*, not *employment*. The Court sees no cognizable difference between the two for purposes of the Virginia statute, and moreover, Bhattacharya has provided no argument delineating the difference.

the statute. *See Shirvinski*, 673 F.3d at 321 (denying claim under Va. Code § 18-499 where plaintiff suffered harm to only his "personal employment prospects"); *Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 636 (W.D. Va. 2015) (holding that harm to a future business or employment interest is not cognizable under Va. Code. § 18-499).

Finally, for the same reasons noted above, Bhattacharya's conspiracy claim also must fail because Peterson, Kern, and Rasmussen's actions fall under the intra-corporate conspiracy doctrine. *See Buschi*, 775 F.2d at 1251-53.

Accordingly, because Bhattacharya's alleged harm falls outside the scope of the statute and the Individual Defendants are protected by intracorporate immunity, the Court will dismiss the conspiracy claim under Virginia Code § 18.2-499.

IV. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part Defendants' motion to dismiss. The Court will grant the motion to dismiss Counts II, III, and IV with prejudice. The Court will deny the motion to dismiss Count I.

An appropriate Order will issue.

The Clerk of Court is directed to send this Memorandum Opinion to all counsel of record.

Appendix E

Entered this 31st day of March 2021.

/s/
NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1999 (L)
No. 22-2064
(3:19-cv-00054-NKM-JCH)

KIERAN RAVI BHATTACHARYA,

Plaintiff-Appellant,

v.

JAMES B. MURRAY, JR., IN HIS OFFICIAL CAPACITY AS RECTOR OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; WHITTINGTON W. CLEMENT, IN HIS OFFICIAL CAPACITY AS VICE RECTOR OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; ROBERT M. BLUE; MARK T. BOWLES; L. D. BRITT, M.D. , M.P.H.; FRANK M. CONNER, III; ELIZABETH M. CRANWELL; THOMAS A. DEPASQUALE; BARBARA J. FRIED; JOHN A. GRIFFIN; LOUIS S. HADDAD; ROBERT D. HARDIE; MAURICE A. JONES; BABUR B. LATEEF, M.D.; ANGELA HUCLES MANGANO; C. EVANS POSTON, JR.; JAMES V. REYES, IN HIS OFFICIAL CAPACITIY AS MEMBER OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; PETER C. BRUNJES, IN HIS

Appendix F

OFFICIAL CAPACITIY AS MEMBER OF THE BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA; MELISSA FIELDING, IN HER OFFICIAL CAPACITY AS DEPUTY CHIEF OF POLICE OF THE UNIVERSITY OF VIRGINIA; JOHN J. DENSMORE, M.D., PH.D., IN HIS OFFICIAL CAPACITY AS ASSOCIATE DEAN FOR ADMISSIONS AND STUDENT AFFAIRS OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; JIM B. TUCKER, M.D., IN HIS OFFICIAL CAPACITY AS CHAIR OF THE ACADEMIC STANDARDS AND ACHIEVEMENT COMMITTEE OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; CHRISTINE PETERSON, M.D., ASSISTANT DEAN FOR MEDICAL EDUCATION OF THE UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE; EVELYN R. FLEMING; CARLOS M. BROWN; LEWIS FRANKLIN (L. F.) PAYNE, JR.,

Defendants-Appellees.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Thacker, Judge Quattlebaum, and Senior Judge Keenan.

For the Court

/s/ Nwamaka Anowi, Clerk