No. 23-363

In the Supreme Court of the United States

STEPHEN R. PORTER,
Petitioner,
v.

BOARD OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that Petitioner failed to plausibly allege a claim for First Amendment retaliation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Petitioner Stephen Porter is an education professor at North Carolina State University. In this case, he claims that the University has retaliated against him for his protected speech. But as the Fourth Circuit correctly held, Porter failed to plausibly allege any violation of his First Amendment rights.

Porter nonetheless seeks this Court's review, claiming that the decision below implicates a division among the courts of appeals on three issues. But these alleged splits of authority are illusory.

First, Porter claims that the circuits are divided on whether public university professors have greater First Amendment rights than other government employees when they engage in "speech related to scholarship or teaching." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (noting that "expression related to academic scholarship or classroom instruction implicates" distinct "constitutional interests"). Yet Porter does not dispute that all five courts of appeals to have addressed this question have held that scholarship and teaching are entitled to special protection. Instead, he claims that there is a circuit split merely because some courts have not yet reached the issue. But such silence, by definition, cannot create a *conflict* among the courts of appeals.

Second, Porter claims that the decision below diverges from the Ninth Circuit on the scope of what constitutes "scholarship or teaching" deserving of enhanced constitutional protection. But the

approaches of the Fourth and Ninth Circuits readily align. Both courts recognize that speech related to classroom instruction or academic research is protected. They reached different outcomes simply because they applied this same legal rule to different sets of facts. That fact-specific variation does not warrant this Court's review.

And third, Porter claims that the courts of appeals are broadly confused about the causation standard for First Amendment retaliation claims. But despite this supposed confusion, Porter cannot cite even a single case that purportedly diverges from the decision below on this issue. Instead, he merely complains that the Fourth Circuit should have found causation on the facts of this case.

In sum, Porter seeks nothing more than factbound error correction. This Court should deny the petition.

STATEMENT OF THE CASE

A. Porter alleges First Amendment retaliation.

Stephen Porter is a tenured professor in the College of Education at North Carolina State University. He teaches graduate-level courses in statistics and research methods. Pet. App. 3.

In this case, Porter alleges that the University retaliated against him based on his First Amendment protected speech. He specifically alleges retaliation based on three episodes: (1) comments that he made during a faculty meeting, (2) an email that he sent to

other faculty members, and (3) a post that he published on his personal blog.

First, in the spring of 2016, Porter attended a faculty meeting where a colleague introduced a proposal to add a question on diversity to student course evaluations. Pet. App. 5. Porter alleges that he asked "about what work had gone into the design of the question" and "expressed his concern" about whether the question had been properly designed and tested. Pet. App. 5, 17. Porter does not allege that he said anything about diversity. Rather, he claims that he raised purely methodological concerns with the proposed question and was merely "doing his job." Pet. App. 17.

Later, in an internal faculty survey, "some colleagues" reported that Porter had acted like a "bully" during the meeting. CA4 J.A. 13; *see* Pet. App. 5. In November 2017, the head of Porter's department, Penny Pasque, told Porter about the allegation and implied that other concerns had been raised about his behavior as well. Pet. App. 5, 19-20. After the meeting, Pasque separately emailed him about the alleged bullying and invited him to respond. Pet. App. 5.

Second, in April 2018, an online publication released an article that was critical of a faculty search committee chaired by one of Porter's colleagues, Alyssa Rockenbach. Pet. App. 6. Porter emailed all the faculty members in his department a link to the article, writing: "Did you all see this? . . . This kind of publicity will make sure we rocket to number 1 in the

rankings. Keep up the good work, Alyssa!" Pet. App. 6.

That same day, two colleagues forwarded Porter's email to university administrators. Pet. App. 6. A week later, Pasque met with Porter about the email. Pet. App. 6. Porter also alleges that, at a later meeting, Pasque told him that she had asked the administration about whether Porter had to remain in the "Higher Education Program Area," Porter's academic concentration in the College of Education, or whether he could serve as a faculty member without a designated program area. Pet. App. 3-4, 6-7.

Third, in September 2018, Porter published a post about the Association for the Study of Higher Education, or "ASHE," on his personal blog. Pet. App. 7 & n.2. He titled the post "ASHE Has Become a Woke Joke." Pet. App. 7. The post reported statistics that another professor had compiled showing that programs at ASHE's upcoming conference used words like "identity" and "diversity" more frequently than words like "quantitative" and "regression." CA4 J.A. 37-38. Porter then wrote: "I prefer conferences where 1) the attendees and presenters are smarter than me and 2) I constantly learn new things. That's why I stopped attending ASHE several years ago" and switched to a different association. Pet. App. 7; *see* CA4 J.A. 38. Porter alleges that the post generated controversy on social media. Pet. App. 7.

Separately, the next month, Porter attended a meeting to discuss hiring a new faculty member. Pet. App. 7. At the meeting, Pasque suggested that Porter

leave his program area, proposing that he join Pasque and the new hire in starting a new program area. Pet. App. 8. In response to this suggestion, Porter said: "Give me a f***ing break, folks. I was the one who said [the potential hire] should come. And now I'm the bad guy because I don't want to leave Higher Ed for a non-existent program area." Pet. App. 8.

Several days later, Pasque sent Porter a letter "chastising him" for using profanity at the meeting. Pet. App. 8. The next month, Pasque sent Porter another letter expressing a broader set of concerns about his collegiality in the workplace. In addition to Porter's recent use of profanity, the letter cited Porter's being described as a "bully" and his email mocking his colleague about negative coverage of her faculty search committee. Pet. App. 8. The letter warned Porter that if he failed to repair his relationships with his colleagues or displayed a further lack of collegiality, he would be removed from his program area. Pet. App. 8-9. The letter did not mention Porter's blog post. Pet. App. 8.

Porter soon learned that the president of ASHE had criticized his blog post at the association's annual conference. Pet. App. 9. Pasque told Porter by email that students were having "strong reactions" to the president's comments and proposed that Porter host a community meeting to discuss their concerns. Pet. App. 9. Porter declined to hold a meeting. Porter alleges that, in February 2019, Pasque "repeatedly expressed her frustration" that he "had not proactively addressed student and faculty concerns" about the conference. Pet. App. 9.

In July 2019—roughly ten months after Porter's blog post—Pasque removed Porter from his program area. Pet. App. 9. He alleges that this change has limited his ability to recruit and advise doctoral students. Pet. App. 10-12. Because advising doctoral students is one of his job's requirements, Porter further alleges that the change could someday jeopardize his tenure. Pet. App. 12. But Porter remains a tenured professor and he does not allege any immediate risk to his tenure status. Pet. App. 64. Nor does he allege that he has suffered any changes to his salary, job responsibilities, or promotional opportunities. Pet. App. 64.

B. The district court dismisses Porter's retaliation claim.

Porter sued under 42 U.S.C. § 1983, bringing a First Amendment retaliation claim against the Board of Trustees of North Carolina State University and various university administrators in their individual and official capacities. Pet. App. 50-51. He sought damages, as well as injunctive and declaratory relief. Pet. App. 51.

The district court held that Porter failed to state a claim. Although the court assumed without deciding that Porter's statements were protected speech, Pet. App. 66 n.3, the court nonetheless held that Porter's claim failed for three independent reasons.

First, the district court held that Porter failed to allege a material adverse action. Pet. App. 63-64. The court reasoned that the alleged limits on Porter's ability to recruit and advise doctoral students were too

"speculative." Pet. App. 64. Although Porter alleged that those limits might affect his job "in the future," he failed to allege that he had actually lost advisees or that his tenure status was in fact at risk. Pet. App. 64.

Second, the district court held that Porter failed to allege a causal connection between protected speech and any adverse action. Pet. App. 65. The court noted that nearly a year had passed between Porter's latest speech and his removal from his program area. Pet. App. 65. This period was "too long" to show the kind of temporal proximity that would support a First Amendment retaliation claim. Pet. App. 65.

Third, the district court held that even if Porter had alleged a plausible First Amendment retaliation claim, qualified immunity barred his individual-capacity damages claims against the university administrators. Pet. App. 66-68. The court held that Porter had failed to identify a case from this Court or the Fourth Circuit that would show the violation of a clearly established First Amendment right under similar circumstances. Pet. App. 68.

C. The Fourth Circuit affirms.

The Fourth Circuit affirmed the district court's dismissal. The court began by asking whether Porter's speech was protected under the First Amendment. To answer this question, the court applied the test for First Amendment retaliation claims that this Court set out in *Garcetti*. *See* Pet. App. 14-17. That test seeks to balance a public employee's interests, "as a citizen, in commenting upon matters of public concern," and the State's interests, "as an employer, in promoting

the efficiency of the public services it performs through its employees." *Garcetti*, 547 U.S. at 417 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). To strike this balance, courts first ask whether an employee spoke "as a citizen" or rather pursuant to the employee's "official duties." *Id.* at 421-22. Courts next ask whether an employee spoke on a matter of public concern or instead on a matter of personal interest. *Id.* at 423

Unless a public employee speaks both as a citizen and on a matter of public concern, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* at 418. Only when an employee speaks in that specific way does "the possibility of a First Amendment claim arise[ ]." *Id.* If so, courts then proceed to balance the employee's speech interests against the government's justifications for the speech restriction. *Id.* (citing *Pickering*, 391 U.S. at 568).

The Fourth Circuit recognized, however, that a university professor may be entitled to more expansive First Amendment rights than other public employees. Pet. App. 15; *see Garcetti*, 547 U.S. at 425 (suggesting that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests"). Specifically, the Fourth Circuit has held that even when a faculty member speaks pursuant to her official job duties, that speech is still protected when it relates to "scholarship or teaching." Pet. App. 15 (quoting *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011)). A rule of that kind

preserves the "First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to official duties." *Adams*, 640 F.3d at 564 (alterations omitted) (quoting *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting)). As a result, in the Fourth Circuit, public university professors have a First Amendment right to speak on matters of public concern in their teaching and scholarship. *See id.*

In this case, the Fourth Circuit applied these well-established legal principles to the facts alleged in Porter's complaint. The court first held that Porter made his comments at the faculty meeting in his role as an employee, not as a citizen. Pet. App. 17. The court then held that the comments did not relate to scholarship or teaching and were therefore unprotected. Pet. App. 17-18. The court also held that even if Porter spoke as a citizen, his comments were still unprotected because they did not involve matters of public concern. Pet. App. 17. The court pointed to the "wholly internal" nature of Porter's speech and its focus on "complaints over internal office affairs." Pet. App. 18-19.

The court next held that Porter's email mocking his colleague was similarly unprotected. The court held that, in sending this email, Porter spoke as an employee, not as a citizen, and that the email was "plainly" unrelated to Porter's teaching or scholarship. Pet. App. 18-19. The court also held that even if Porter spoke as a citizen, the email was not on matters of public concern. Pet. App. 18. The court emphasized that the email was "sent only to other

faculty members" within Porter's department and that its content consisted entirely of "an unprofessional attack" on one of his colleagues. Pet. App. 18.

Finally, the court assumed that Porter's blog post was protected speech. Pet. App. 19. The court nonetheless held that Porter failed to allege a sufficient causal connection between that speech and any adverse action. Pet. App. 19. The court reasoned that Porter published his blog post in September 2018—ten months before he was removed from his program area. Pet. App. 19. The court also noted that the complaint itself alleged facts showing that Porter was removed for his lack of collegiality rather than the blog post. Pet. App. 19. For example, shortly after the post, Porter responded with a profane outburst when his department head invited him to start a new program area with her. Pet. App. 20. And even though Porter was warned that he needed to "repair the relationships" with other faculty members, he failed to "proactively address[ ] student and faculty concerns" with his hostile and unprofessional behavior. Pet. App. 20.

Judge Richardson dissented. The dissent disagreed with the majority only on how to apply the well-established framework for First Amendment retaliation claims to the facts alleged in Porter's complaint. *See* Pet. App. 30-33. The dissent would have held that Porter spoke as a citizen on matters of public concern. Pet. App. 34-39. It therefore did not "consider the scope of any exception for duties related to scholarship or teaching." Pet. App. 31 n.3. The

dissent also would have held that Porter plausibly alleged a causal connection between his protected speech and an adverse action. Pet. App. 34-41. Finally, the dissent would have proceeded to balance Porter's speech interests against the University's countervailing interests, and would have held that this balance favored Porter at the pleading stage. Pet. App. 42-47.

Porter now petitions for certiorari.

REASONS FOR DENYING THE PETITION

I. Petitioner Has Failed to Identify Any Meaningful Split of Authority.

In his petition, Porter requests that this Court review three discrete questions. *See* Pet. i. At the threshold, he asks the Court to consider whether the *Garcetti* standard for public-employee speech "applies in the same manner to cases involving scholarship or teaching." Pet i. If not, he then asks this Court to review whether his specific statements were "protected by the First Amendment," including because they "related to scholarship and teaching." Pet. i. And finally, if those statements were protected, he asks the Court to review whether there was a "causal connection" between his protected speech and any "adverse employment actions." Pet i.

However, Porter fails to identify a split of authority on any of these questions. As to the first, the claimed circuit split is completely imaginary. Every court of appeals to consider the question, including the Fourth Circuit below, has held that *Garcetti* does

not remove First Amendment protection for speech related to scholarship and teaching. Porter nevertheless claims a division among the circuits because the remaining courts of appeals have not yet had occasion to reach the issue. Pet. 27. But such silence, by definition, cannot create a *conflict* among the courts of appeals.

On the second question, Porter claims that the decision below diverges from the Ninth Circuit on the scope of the "scholarship and teaching" exception under *Garcetti*. *See* Pet. 28-29. But the different outcomes of these cases arise merely from the application of the same legal standard to different facts. That fact-specific variation does not constitute a division of legal authority at all, let alone one that justifies this Court's review.

Finally, on the third question, Porter does not make a serious attempt to identify a circuit split. Instead, he generally claims that there is "confusion" on the standard for causation in the First Amendment retaliation context. Pet. 30-32. But he fails to cite a single case that purportedly diverges from the Fourth Circuit's analysis below.

In sum, Porter seeks review because he disagrees with the Fourth Circuit's resolution of his claims. But that sort of splitless, factbound error correction is no reason to grant certiorari.

A. The courts of appeals have uniformly held that the *Garcetti* rule does not apply to speech related to scholarship or teaching.

In *Garcetti*, this Court held that the First Amendment does not protect speech by public employees that is made "pursuant to their official duties." 547 U.S. at 421. Recognizing the unique constitutional interests implicated by "academic freedom," however, the Court left open whether this rule "would apply in the same manner to a case involving speech related to scholarship or teaching." *Id*. at 425.

Since *Garcetti*, five circuit courts have directly addressed the question left open by this Court—and all five have answered that question in the same way. These courts all hold that the First Amendment continues to protect the speech of university professors in their scholarship and teaching. *See Heim v. Daniel*, 81 F.4th 212 (2d Cir. 2023); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir.), *cert. denied* 140 S. Ct. 432 (2019); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Adams*, 640 F.3d 550 (4th Cir.).

Porter agrees that these five circuits have held that "*Garcetti* does not apply to speech related to scholarship and teaching." Pet. 27. However, he goes on to claim that this unanimity somehow creates a circuit split, merely because seven other courts of appeals have yet to address the issue. Pet. 27.

This argument fails at the threshold. Where a limited number of circuit courts have resolved a

question uniformly—and others have not yet had occasion to reach it—that is not a circuit split. By definition, a split arises only when there is an affirmative "conflict" between the courts of appeals on a legal question. S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice §4.4 (10th ed. 2017) (noting that this Court will often grant review "where the decision of a federal court of appeals . . . is in direct conflict with a decision of another court of appeals on the same matter").

Here, it is technically true, as Porter says, that some courts of appeals "have not held that *Garcetti* applies in this context." Pet. 27. But that is only because they have never considered the question in the first place. That silence cannot possibly create a circuit split justifying this Court's review.

B. Porter has failed to identify a split of authority on what kinds of speech constitute "scholarship or teaching."

Porter next claims that the decision below "created a further split . . . over what constitutes 'speech related to scholarship and teaching.'" Pet. 28. Specifically, he argues that the Fourth Circuit defined the "scholarship and teaching" exception too narrowly and in a way that conflicts with a decision of the Ninth Circuit. Pet. 28-29 (citing *Demers*, 736 F.3d 402). Once again, Porter's attempt to manufacture a split between the courts of appeals falls flat.

At the outset, Porter does not dispute that four of the five circuits to have reached the "scholarship and teaching" exception to *Garcetti* have defined and

applied the exception consistently. *See* Pet. 28-29. These courts have all held that the exception applies to classroom speech, research and academic writing, or other speech related to teaching. *E.g.*, *Meriwether*, 992 F.3d at 505 (holding that *Garcetti* does not apply to "teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor").

Instead, Porter points only to the Ninth Circuit's decision in *Demers*, which he reads as establishing a broader exception for scholarship and teaching than the other courts of appeals. But the Ninth Circuit's ruling merely applied the same legal standard to the unique facts at issue in that case.

Specifically, in *Demers*, the Ninth Circuit held that a professor's proposal to reorganize his department involved "academic speech" that placed it outside the scope of *Garcetti*. 746 F.3d at 413-15. This "broad proposal" included changes that, "if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it." *Id*. at 415-16. For this reason, the court concluded that the proposal was directly related to the professor's scholarship or teaching. *Id*.

There is no daylight between this ruling and the decision below. The Fourth Circuit held that two of Porter's statements were unprotected: his comments criticizing a survey question during a faculty meeting and his email sarcastically mocking a colleague who chaired a faculty search committee. Pet. App. 17-19;

see also Pet. App. 19 (assuming that Porter's blog post was protected speech).

Neither of these statements involved Porter's classroom speech, his academic research, or his plans for teaching. And the statements are a far cry from the proposal by the professor in *Demers*—a proposal that, had it been accepted, would have directly affected the professor's own teaching and instructional speech. *See* 746 F.3d at 415. Porter has not alleged that his technical critique of a proposed student survey question implicates his own teaching or research. Nor can he allege that his email about the faculty search committee was anything more than an unprofessional jab at a colleague.

Porter may well be right that the First Amendment protects speech by public university professors that addresses "how . . . students should be taught," as the Ninth Circuit has held. Pet. 28-29. But his speech here does not touch on such matters. As a result, any discrepancy between the outcome below and the Ninth Circuit's decision in *Demers* arises only from differences in the facts at issue in the two cases. Those factual differences do not warrant this Court's review.[1]

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[1] Porter also requests that this Court grant review to clarify what "f[alls] within the scope of one's employment duties" for public university professors. Pet. 24. Similar to his argument on the scope of the "teaching and scholarship" exception, Porter claims that the Fourth Circuit below "broadly defined the scope of one's official duties, resulting in less protection for faculty speech." Pet. 25. But once again, Porter fails to identify any other

This case would be a poor vehicle for considering the scope of any exception to *Garcetti* for teaching and scholarship in any event. The Fourth Circuit barely discussed the exception—summarily concluding that Porter's email about the faculty hiring committee was "plainly" unrelated to teaching or scholarship, for example. Pet. App. 18. And the Court assumed without deciding that the blog post constituted protected speech without discussing *Garcetti* at all. Pet. App. 19. Indeed, Judge Richardson's dissent expressly declined to address the exception, further underscoring the lack of a reasoned discussion on this issue below. *See* Pet. App. 31 n.3. Should this Court wish to explore the contours of the academic-speech exception under *Garcetti*, it should wait for a case that addresses the issue more directly.

C. Porter has failed to identify a circuit split on the causation standard for First Amendment retaliation claims.

Porter finally asks this Court to review the Fourth Circuit's conclusion that there was no causal connection between his blog post and the University's allegedly adverse actions against him. Pet. 30-32. In support, he claims that there is "broad" and "widespread" confusion "among the lower courts" on the causation standard for First Amendment retaliation claims. Pet. 30-32. But he fails to explain exactly what that confusion entails or how that

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decision that conflicts with the decision below on this score. *See* Pet. 24-26. His request that this Court generally "clarify" the law thus boils down to a simple request for error correction.

purported confusion has led to a division among the courts of appeals. In fact, Porter does not cite a single case decided by any other court on this issue. *See* Pet. 30-32.

Instead, Porter merely argues that the Fourth Circuit misapplied the well-settled causation standard to the facts in this case. He complains, for example, that the Fourth Circuit "treated the date of the post, rather than the date that the post created a controversy on campus, as the operative date" for measuring causation. Pet. 31. But these sorts of routine pleas for error correction based on the facts of a particular case do not justify this Court's review.

II. The Decision Below Was Rightly Decided.

Review here is unwarranted for the additional reason that the decision below was correct. Thus, even Porter's requests for error correction fall short.

First, the Fourth Circuit was right to hold that Porter spoke as an employee, not as a citizen, when he criticized a proposed survey question at a faculty meeting. As this Court has explained, this "inquiry is a practical one." *Garcetti*, 547 U.S. at 424. Porter spoke at a faculty meeting, to his work colleagues, about an administrative issue at his workplace. Pet. App. 17. Speech of that kind "owes its existence" to Porter's "professional responsibilities" as a tenured university professor. *Garcetti*, 547 U.S. at 421. Indeed, Porter himself alleged that in making these comments, he was "doing his job." Pet. App. 17.

The court below was also right to hold that, although this speech was related to Porter's job, it did not relate to his teaching or scholarship. Porter was not teaching a class, conducting research, or writing an academic paper. Pet. App. 17-18. He was discussing a colleague's proposal for a student survey. Speech of that kind falls outside the "expression related to academic scholarship or classroom instruction" that implicates the "additional constitutional interests" that this Court recognized in *Garcetti*. 547 U.S. at 425.

Second, the Fourth Circuit was right to conclude that Porter's email to colleagues about the faculty hiring committee was not entitled to First Amendment protection. Assuming that Porter spoke as an employee, the Fourth Circuit correctly held that the email "plainly was unrelated to [his] teaching or scholarship." Pet. App. 18. The Fourth Circuit also correctly held that, even if Porter spoke as a citizen, his email did not involve a matter of public concern. Speech relates to public concerns when it discusses "any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). To decide whether speech qualifies under this test, courts look to the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

Here, as the Fourth Circuit rightly held, Porter's email was nothing more than an "unprofessional attack on a colleague." Pet. App. 18. It was circulated "only to other faculty members" within Porter's department, and thus arose solely in an internal

workplace setting. Pet. App. 18. "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. To be sure, Porter's email did include a link to a news article. But other than a sophomoric comment mocking his colleague, the email "expressed no viewpoint and made no mention of policy or anything else that might be of public concern." Pet. App. 18. That email, moreover, related merely to an internal hiring decision by the University. Pet. App. 6. And this Court has made clear that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.8.

Finally, the Fourth Circuit also correctly held that Porter failed to allege a sufficient causal connection between his blog post and an adverse action. To show causation in this context, a plaintiff must allege but-for cause—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); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977).

Here, the Fourth Circuit was right to conclude that Porter failed to plausibly allege causation of this kind. Porter himself alleges that there was a ten-month gap between his blog post and his removal from his program area. Pet. App. 19. His complaint therefore cannot establish causation solely based on the temporal proximity between his protected speech and

the adverse action. Pet. App. 19; *see Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (per curiam) (holding that a twenty-month gap "suggests, by itself, no causality at all").

Regardless, Porter's own allegations defeat causation because they show that Respondents "would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. As the Fourth Circuit rightly held, Porter's complaint makes clear that he was removed from his program area because of his "ongoing lack of collegiality"—not any protected speech. Pet. App. 19. For example, Porter alleged that, shortly after his blog post, he directed profanity toward his supervisor during an unrelated meeting with several colleagues. Pet. App. 20. And despite having been warned numerous times that he could not continuously antagonize his colleagues in hostile and unprofessional ways, he declined to do anything to "repair relationships" that had been strained by his behavior. Pet. App. 20. The Fourth Circuit was therefore right to conclude that Porter failed to show the requisite causal connection between his protected speech and any adverse action.

Moreover, although the Fourth Circuit did not reach the issue, the district court correctly held that Porter's retaliation claims fail for the separate reason that he has not plausibly alleged that he suffered an adverse action in the first place. Pet. App. 64. As the district court observed, Porter remains a tenured professor and does not allege that his tenure status is currently at risk. Pet. App. 64. Nor has he alleged any

change to his pay, job responsibilities, or promotional opportunities. Pet. App. 64. Although he claims that his removal from his program area "will, in the future, result in his being unable to obtain advisees," this possibility is "speculative." Pet. App. 64. As a result, Porter cannot show that he has suffered an adverse action at all, let alone one that is causally connected to his protected speech. For this further reason, the courts below correctly dismissed Porter's retaliation claim.

The district court was also right to hold that qualified immunity bars Porter's individual-capacity damages claims. Pet. App. 66-68. Porter failed to identify a case from this Court or the Fourth Circuit that would show a violation of his clearly established First Amendment rights under similar circumstances. Pet. App. 67-68. Qualified immunity is thus yet another independent ground supporting the dismissal of Porter's retaliation claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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