No. 25-_____

In the Supreme Court of the United States

JAMES C. WETHERBE, PHD,

Petitioner,

v.

TEXAS TECH UNIVERSITY SYSTEM, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This is a First Amendment retaliation lawsuit under 42 U.S.C. § 1983. Around 1950, this Court first asked whether the common law in 1871 would have accorded immunity for a tort claim analogous to a claim under § 1983. However, not long after, this Court discarded the common law approach and established today's qualified immunity framework, including the clearly established law requirement, to avoid the costs of litigation. Assuming there is a common law basis for immunity in certain circumstances, the text of § 1983 makes no mention of a clearly established law requirement.

Does qualified immunity's clearly established law requirement have any basis in law, especially in First Amendment free speech situations where split-second, life and death decisions are not applicable?

2. If this Court refuses to abandon the clearly established law requirement, then it should clarify the level of generality used to evaluate free speech claims. The Fifth Circuit and other circuits require cases directly on point, by requiring that the specific speech at issue was a matter of public concern prior to an official's misconduct. There have been many, and there will be limitless future free speech violations under this approach because there are limitless topics of free speech, and most of them have not previously been held to constitute a matter of public concern.

In the free speech context, does qualified immunity's clearly established law requirement require law clearly establishing that the subject matter of specific speech was a matter of public concern before the time of a constitutional violation?

PARTIES TO THE PROCEEDINGS

1. **Petitioners** (Plaintiff-Appellee below): James C. Wetherbe, PhD.

2. **Respondents** (Defendants-Appellants below): Texas Tech University System, Lance Nail, PhD, former Dean of Rawls College of Business at Texas Tech University, in his individual capacity only, Margaret Williams, current Dean of Rawls College of Business at Texas Tech University, in her official capacity.

LIST OF ALL PROCEEDINGS

United States District Court for the Northern District of Texas

Wetherbe v. Tex. Tech Univ. Sys., No. 5:15-CV-119-Y, 2016 WL 1273471 (N.D. Tex. Mar. 31, 2016).

Wetherbe v. Nail, No. 5:15-CV-119-Y, 2019 WL 13240902, at *1 (N.D. Tex. Dec. 3, 2019).

United States Court of Appeals for the Fifth Circuit

Wetherbe v. Tex. Tech Univ. Sys., 699 Fed. Appx. 297 (5th Cir. 2017).

Wetherbe v. Tex. Tech Univ. Sys., 138 F.4th 296 (5th Cir. 2025).

Texas 72nd District Court of Lubbock County, Texas

Wetherbe v. Tex. Tech Univ. Sys., No. 2015-515,617 (Dist. Ct. of Lubbock County, Tex., April 2015).

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STATEMENT OF JURISDICTION

The court of appeals entered judgment on May 20, 2025. App. 1a-28a. The court of appeals denied the petition for rehearing en banc on July 31, 2025. App. 46a-47a. Petitioner invokes the Court's jurisdiction under 28 U.S.C.§1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional, U.S. Const. Amend. I, and statutory, 42 U.S.C. § 1983, provisions are reproduced in Appendix D.

INTRODUCTION

The First Amendment was categorically drafted to protect free speech, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. To interpret Section 1983 in a way to abridge free speech rights is antithetical to this sweeping language of the First Amendment.

This Court's review is necessary because its qualified immunity clearly established law requirement defies the First Amendment, is not grounded in law, and represents "precisely the sort of 'freewheeling policy choices' that [this Court has] previously disclaimed the power to make." *See Ziglar v. Abbasi*, 582 U.S. 120, 159, 137 S. Ct. 1843, 1871, 198 L. Ed. 2d 290 (2017) (Thomas, J., concurring in part) (quoting *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012)). If there is to be a balance between the First Amendment and governance, that power is assigned to Congress.

This Court is in the business of getting the law right—not following errant precedent. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 292, 142 S. Ct. 2228, 2279, 213 L. Ed. 2d 545 (2022) (overruling errant precedent and returning authority to regulate abortion to the people). Even if qualified immunity's clearly established law requirement survives, in part, it is far too strict and fails to serve its intended purpose. The contours of the requirement must be tethered to the statutory language of the Civil Rights Act of 1871 and grounded in the immunities available at common law in 1871 when the Act passed.

In 1871, immunity, if any, existed only in limited circumstances where in light of the discretion and responsibilities of the office, and under all of the circumstances as they appeared at the time, an officer acted reasonably and in good faith. Today, the Court should enforce the First Amendment by returning to the immunities at law and jettison its freewheeling policy creation—the clearly established law requirement.

The Court should grant certiorari. The Court should also enshrine the First Amendment right to free speech as more important than granting immunity to government actors who have the luxury of getting a legal opinion before they violated the constitution. The Court should abandon qualified immunity's clearly established law requirement altogether and ask instead, under the statutory language of the Civil Rights Act of 1871 and the immunities available at common law in 1871 when the Act passed, whether immunities at common law should be applied to First Amendment retaliation claims brought under 42 U.S.C. § 1983. At a minimum, this Court should detail the proper level of generality by which qualified immunity's clearly established law requirement is to be applied against the First Amendment for free speech claims.

STATEMENT OF THE CASE

Petitioner, Dr. James Wetherbe, is a Professor at the Texas Tech University (TTU) Rawls School of Business. For over twenty years, he distinguished himself as an outspoken critic of academic tenure, going so far as to reject tenure multiple times when it was awarded to him, to set an example. ROA.1751. *See*

generally ROA.1742-54. He also has given more financial support to TTU's Rawls College of Business than any other faculty member, donating more than one million dollars. ROA.1742.

From December 2012 to July 2013, Petitioner wrote several articles that criticized tenure generally, and reporters discussed with him his anti-tenure views in other articles. ROA.1742-43, 1747 In retaliation for this speech, in August 2013, Respondent Nail removed Petitioner from teaching the MBA communications course, ROA.1744-46, 1753, falsely accused him of sexual harassment, ROA.1746-47, and replaced him as faculty advisor for the MBA student association, ROA.1747. Petitioner published another article criticizing tenure, and Respondent revoked Petitioner's emeritus status on the Dean's Advisory Council in September 2013. ROA.1747. Around the time Respondent removed Petitioner from the MBA course, Respondent had also refused to communicate with Petitioner, stating that he did not "want to be in the Wall Street Journal anymore." ROA.1743.

In November 2013, a reporter published another piece addressing the debate over tenure and Petitioner's lawsuit specifically. ROA.1901-07. Over approximately the next eighteen months, Respondent made false and unproven financial misconduct claims against Petitioner, ROA.1742-54, ordered him to discontinue using a grant from Best Buy to fund one of his projects, ROA.1748-49, refused to renew his endowed Stevenson Chair position over the objections of the chair donor, ROA.1750, declined to reimburse for legitimate business that had been approved in the

past, ROA.1750, and demoted Petitioner from a position of Full Professor to a Professor of Practice for workload purposes, ROA.1751, which increased his teaching load by fifty percent. Removal from the MBA program triggered a twenty percent reduction in Petitioner's annual compensation, ROA.1744-46, the refund of the Best Buy grant adversely affected his income by $50,000, ROA.1748-49, and the loss of the Stevenson Chair position cost him $90,000 in funding per year, ROA.1750.

Petitioner sued Respondent Nail, TTU, and the new dean of the Rawls College of Business for, among other things, First Amendment retaliation based on his anti-tenure publications and alleges that he suffered retaliation—including a *de facto* demotion—in violation of the First Amendment.

Previous to this appeal, Respondents filed a motion to dismiss, which the district court granted, holding *inter alia,* that Petitioner's speech did not involve a matter of public concern. *Wetherbe v. Tex. Tech Univ. Sys.*, No. 5:15-CV-119-Y, 2016 WL 1273471 (N.D. Tex. Mar. 31, 2016). On Appeal, the Fifth Circuit reversed the district court's dismissal in part, holding that Petitioner's anti-tenure speech was a matter of public concern. *Wetherbe v. Tex. Tech Univ. Sys.*, 699 Fed. Appx. 297 (5th Cir. 2017) ("Wetherbe II"). However, the Fifth Circuit did not address whether the law was clearly established that Petitioner's anti-tenure speech was a matter of public concern.

After remand, the Defendants filed a second amended Rule 12(c) motion, but the district court found that Petitioner's allegations were sufficient to overcome Respondent's qualified immunity defense

and denied Respondent's motion for judgment on the pleadings. *Wetherbe v. Nail*, No. 5:15-CV-119-Y, 2019 WL 13240902, at *1 (N.D. Tex. Dec. 3, 2019). Respondent timely appealed, and the Fifth Circuit reversed. *Wetherbe v. Tex. Tech Univ. Sys.*, 138 F.4th 296 (5th Cir. 2025).

ARGUMENT

I. Qualified immunity's clearly established law requirement has no basis in law and must be abandoned.

Although this Court openly acknowledges that 42 U.S.C. § 1983 "on its face does not provide for any immunities[,]" *Malley v. Briggs*, 475 U.S. 335, 342 (1986), this Court appears to justify qualified immunity on the basis that "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them[,]" *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Even so, the Civil Rights Act of 1871 says nothing about a clearly established law requirement.

"Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this 'clearly established law' test." *Baxter v. Bracey*, 140 S. Ct. 1862, 1864, (2020) (Thomas, J., dissenting from denial of certiorari). Qualified immunity's clearly established law requirement is not the result of positive law enacted by Congress. It is an aspect of a defense that this Court created, and its application by the courts has led to countless public officials running roughshod over the citizens they are supposed to be serving. That practice should stop now.

The purview of balancing between vindication of constitutional rights and government officials' effective performance of their duties is for Congress—not this Court. *Ziglar v. Abbasi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring in part).

Even so, this Court openly admits that it "'completely reformulated qualified immunity,' replacing the common law subjective standard with an objective standard that allows liability only where the official violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Burns v. Reed*, 500 U.S. 478, 495 n.8, (1991) (citing *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982)). Thus, this Court's clearly established law jurisprudence is based upon "the sort of 'freewheeling policy choices' that [this Court has] previously disclaimed power to make." *Ziglar*, 582 U.S. at 159 (2017) (Thomas, J., concurring in part) (citing *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012)). *See also Rehberg*, 566 U.S. at 363 ("Recognizing that 'Congress intended [§1983] to be construed in the light of common-law principles,' the Court has looked to the common law for guidance in determining the scope of the immunities available in a §1983 action. We do not simply make our own judgment about the need for immunity. We have made it clear that it is not our role 'to make a freewheeling policy choice'").

Unfortunately, this Court's policy choice, intended to balance constitutional rights against governance, quickly morphed into an insurmountable hurdle, constantly barring constitutional claims except in the most rare, extreme, and unusual circumstances where an official has been found to be "incompetent or [to]

knowingly violate the law." *Malley,* 475 U. S. at 341 (1986). Stated succinctly:

> In the upside-down world of qualified immunity, everyday citizens are demanded to know the law's every jot and tittle, but those charged with enforcing the law are only expected to know the "clearly established" ones. Turns out, ignorance of the law is an excuse—for government officials. Such blithe "rules for thee but not for me" nonchalance is less qualified immunity than unqualified impunity.

Villarreal v. City of Laredo, 94 F.4th 374, 412 (5th Cir. 2024) (Willet, J., dissenting).

Even assuming the clearly established law requirement was based on common law established before 1871, this Court's clearly established law jurisprudence has gone astray of any such genesis, because it ignores the extent to which immunities were available at common law, and the statutory text of the Civil Rights Act of 1871 provides no basis for the "clearly established law" requirement.

As stated by Judge Willett in the Fifth Circuit, and urged by Justice Thomas in multiple dissents, "The entrenched, judge-invented qualified immunity regime ought not be immune from thoughtful reappraisal." *Cole v. Carson*, 935 F.3d 444, 470 (5th Cir. 2019), *as revised* (Aug. 21, 2019) (Willett, J., dissenting). *See also Ziglar,* 582 U.S. 120 (2017) (Thomas, J., concurring in part), *Baxter*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of

certiorari), and *Hoggard v. Rhodes,* 141 S. Ct. 2421 (2021) (Thomas, J., respecting the denial of certiorari).

The proper test should ask and answer only whether the common law in 1871 would have accorded immunity for a tort analogous to Petitioner's under § 1983. Because there was no statutory or common law basis for imposing the clearly established law requirement, it is time for this Court to do away with the clearly established law requirement.

II. The clearly established law requirement must abdicate to the common law immunities in 1871.

As noted above, the qualified immunity inquiry should not ask whether the law was clearly established but instead should ask whether an official in Respondent's position would have been accorded immunity at common law in 1871 for claims analogous to Petitioner's claim.

As discussed by Justice Scalia in 1971, one form of immunity at common law was a quasi-judicial immunity. *Burns,* 500 U.S. at 500 (1991). "This, unlike judicial immunity, extended only to government servants, protecting their 'quasi-judicial' acts—that is, official acts involving policy discretion but not consisting of adjudication." *Id.* At common law, quasi-judicial immunity did not apply where malice was shown. *Id.*

In 1849, this Court considered a matter of quasi-judicial immunity and stated broadly that:

> a public officer, invested with certain discretionary powers, never has been, and

> never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty.

Wilkes v. Dinsman, 48 U.S. 89, 129 (1849). The Court elaborated:

> Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated or however humble the victim.

Id. at 130.

To be clear, at common law in 1849, the law was clear that where an official acted within the scope of his authority and discretion to fulfill his duties, he could not be liable unless he was influenced by malice, corruption, or cruelty, i.e., he failed to act in good faith. This immunity at common law remained clear in 1881. *See, e.g., Edwards v. Ferguson*, 73 Mo. 686, 687 (Mo. 1881) (holding that "[n]o principle of law is better settled by the authorities than this, that persons holding official positions, positions giving them enlarged discretionary powers, cannot incur individual liability except" "for their own acts . . . maliciously done").

As well-stated by this Court in 1974, the test should be—whether Respondent, in light of the

discretion and responsibilities of his office, and under of the circumstances as they appeared at the time, acted reasonably and in good faith. *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974), overruled by *Davis v. Scherer*, 468 U.S. 183 (1984); *Wood v. Strickland*, 420 U.S. 308, 330, (1975), abrogated by *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (Powell, J., concurring) ("The italicized sentence from *Scheuer* states, as I view it, the correct standard for qualified immunity of a government official: whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith."). *See also Owen v. City of Indep., Mo.*, 445 U.S. 622, 667-68, (1980) (Powell, J., dissenting) (noting that a good faith limited qualified immunity extended to at least police officers, state executive officers, local school board members, superintendent of a state hospital, and prison officials).

III. If not rejected outright, the clearly established law requirement cannot remain an inflexible, one-size-fits-all test. This Court must detail the proper level of generality for officials making life-and-death, split-second decisions versus other decisions.

Barring the proper application of immunities at common law, the level of granularity applied to officials must be tethered to an official's scope of authority. As this Court noted in 1963, before abandoning the common law and statutory text approach, the scope of immunity has always been tied

to the "scope of authority." *Wheeldin v. Wheeler*, 373 U.S. 647, 651, (1963). This Court has explained:

> . . . a qualified immunity is available to officers of the executive branch of government, *the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.* It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheuer, 416 U.S. at 247-48 (1974) (emphasis added). Simply put, the gravity of responsibility shouldered by an official should receive a commensurate amount of discretion, and the law cannot be the same for all claims.

For example, officials with authority to make life-and-death, split-second decisions should receive more deference than officials who do not make life-and-death, split-second decisions, but instead have the luxury of time and the advice of legal counsel to make commonplace, but informed and calculated decisions, such as whether to fire or demote an employee. Yet, this Court applies the "'clearly established' standard 'across the board' and without regard to 'the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been

violated.'" *Ziglar,* 582 U.S. at 159 (2017) (citing *Anderson v. Creighton*, 483 U.S. 635, 641-43 (1987)).

While this Court routinely cautions that "clearly established law [is not defined] at a high level of generality[,]" *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, (2011), it also routinely instructs that a case directly on point is not required, *id.*, at 741; Circuit courts routinely struggle to apply this conflicting guidance. As a result, circuit courts apply a one-size-fits-all test, which has been reduced to extreme, granular requirements that almost never give rise to a constitutional violation.

Contrary to a one-size-fits-all test, this Court, in the context of a workplace termination, in *Lane v. Franks*, exemplified the proper level of generality for whether the law was clearly established for a workplace termination claim:

> "Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities?"

Lane v. Franks, 573 U.S. 228, 243 (2014). This Court never asked in *Lane* whether the law was clearly established that the underlying testimony given under subpoena was a matter of public concern, because the proper level of generality does not reach that granular level. Yet, that is precisely what the Fifth Circuit required from Petitioner.

The Fifth Circuit held "with respect to the 'clearly established prong' of qualified immunity[,]" that

"qualified immunity [applies] unless it was (1) clearly established that [Respondent's] alleged retaliatory acts were adverse employment actions and (2) clearly established that [Petitioner's] speech *regarding tenure* was on a matter of public concern." *Wetherbe v. Tex. Tech Univ. Sys.*, 138 F.4th 296, 303 (5th Cir. 2025) (emphasis added). In so doing, the Fifth Circuit essentially re-wrote the question posed by this Court in *Lane* as:

> Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave *[regarding "topic," because the law was clearly established that "topic" was a matter of public concern]*, under oath and outside the scope of his ordinary job responsibilities?"

Despite this Court's repeated instruction that the law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the court, so long as the prior decisions gave *reasonable warning* that the conduct then at issue violated constitutional rights, *see, e.g., Anderson*, 483 U.S. at 640 (1987); *Ashcroft*, 563 U.S. at 741 (2011); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (per curiam), the Fifth Circuit required a case directly on point and barred Petitioner's claim—by requiring a level of granularity that is excessively strict.

In essence, the Fifth Circuit tossed common sense to the wind—because no other case had previously held anti-tenure speech to be a matter of public concern. *Wetherbe*, 138 F.4th at 303. *See also*

Villarreal v. City of Laredo, 134 F.4th 273, 276 (5th Cir. 2025) (holding the previous en banc majority opinion is superseded only in part); *Villareal v. City of Laredo*, 94 F.4th 374, 395 (5th Cir. 2024) (holding that a plaintiff is barred by qualified immunity unless clearly established law is founded on materially identical facts).

As a practical matter, how can there ever be *fair warning* of a free speech violation without a case directly on point, when the *test as applied requires* a prior holding establishing anti-tenure speech as a matter of public concern? In the Fifth Circuit, until all free speech topics are adjudicated as matters of public concern, no plaintiff will ever escape qualified immunity's grasp, because the level of granularity is excessively strict. *Hershey v. City of Bossier City*, No. 21-30754, 2025 WL 2836908, at *1 (5th Cir. Oct. 7, 2025) (per curiam) (Ho, J. concurring) ("To be sure, I strongly disagree with our court's approach to qualified immunity as applied in the First Amendment and other contexts. . . . Our court's record of protecting First Amendment rights leaves much to be desired, to say the least. But as a member of this panel, . . . I reluctantly concur in affirming the grant of qualified immunity, as compelled by our (mistaken) circuit precedent."). *See also id.* at *3 ("As then-Judge Gorsuch put it, some things are so obviously unlawful that they don't require detailed explanation. Sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. It would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly

unlawful that few date its attempt.") (internal citations and quotations omitted).

Today's clearly established law requirement fails to reasonably accomplish the purpose for which it was created. *Ziglar*, 582 U.S. at 159-60. To accomplish its intended purpose, in the context of free speech claims, the level of granularity must be tethered to the content, form, and context of the speech—otherwise it violates this Court's directive specifying that cases directly on point are not required. *See, e.g., Anderson*, 483 U.S. at 640 (1987); *Ashcroft*, 563 U.S. at 741, (2011); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (per curiam).

IV. Petitioner's claim goes to trial under both the proper and current tests, when properly applied.

Petitioner is entitled to his day in court, whether under the proper test, based upon immunities available at common law in 1871, or under the current test, applied at the proper level of generality.

A. The proper test at common law.

The proper test, based upon immunities available at common law in 1871, asks whether Respondent, in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, acted reasonably and in good faith.

The circumstances at the time of the constitutional violation were that Petitioner was an outspoken critic of academic tenure, for over twenty years, who rejected tenure multiple times when it was awarded to him to set an example. ROA.1751. *See generally*

ROA.1742-54. From December 2012 to November 2013, Petitioner wrote and was featured in several articles that criticized tenure generally, and reporters discussed his anti-tenure views with him in other articles. ROA.1742-43, 1747. He also had given more financial support to Rawls College than any other faculty member, donating more than one million dollars. ROA.1742.

In response to Petitioner's anti-tenure publications and speech made between December 2012 and the end of 2013, and unrelated to his work as a professor for TTU, which Respondent/former Dean Nail described as "[g]oing to the media especially and attacking the college[,]" Respondent Nail retaliated against Petitioner. ROA.2001. Around the time Respondent removed Petitioner from the MBA course, Respondent had also refused to communicate in writing with Petitioner, stating that he did not "want to be in the Wall Street Journal anymore." ROA.1743.

Specifically, Respondent retaliated by removing Petitioner from teaching the MBA communications course, ROA.1744-46, 1753, falsely accusing him of sexual harassment with no supporting evidence, ROA.1746-47, replacing him as faculty advisor for the MBA student association, ROA.1747, revoking Petitioner's emeritus status on the Dean's Advisory Council in September 2013. ROA.1747. Over approximately the next eighteen months, Respondent further made false financial misconduct claims against Petitioner, ROA.1742-54, ordered him to return $100,000 in grant funds to Best Buy, ROA.1748-49, refused to renew his endowed Stevenson Chair position over the objections of the

chair donor and in violation of standard operating procedures, allegedly due to Respondent's "new" policy that was not uniformly enforced, ROA.1750, declined to reimburse one of his trips that had been approved in the past, ROA.1750, and informed him that he would be treated as a Professor of Practice for workload purposes, ROA.1751, which increased his teaching load by fifty percent. Removal from the MBA program triggered a twenty percent reduction in Petitioner's annual compensation, ROA.1744-46, the denied use of the Best Buy grant adversely affected his income by $50,000, ROA.1748-49, and the loss of the Stevenson Chair position cost him $90,000 in funding per year, ROA.1750.

It was patently unreasonable for Respondent Nail: (i) to remove Petitioner from the Stevenson Chair over the sponsor's objection, under an alleged new policy not enforced against any other TTU faculty members, ROA.1750; (ii) to freeze and return a $100,000 grant from Best Buy, ROA.1748-49; and (iii) to remove Petitioner from teaching a top-rated MBA course, which Petitioner had taught for more than thirty-five years at four universities, including TTU, on the basis of Petitioner's alleged lack of qualifications, ROA.1744-46, simply because Petitioner went to the media and challenged the adverse systemic impact of tenure on higher education. ROA.2001.

In light of the discretion and responsibilities of Respondent's office as dean, and under all of the circumstances as they appeared at the time, Respondent did not act reasonably and in good faith. Thus, Respondent Nail is not entitled to immunity, and Petitioner is entitled to his day in court. *Wilkes v.*

Dinsman, 48 U.S. 89, 129 (1849); *see also, Edwards v. Ferguson*, 73 Mo. 686, 687 (Mo. 1881).

B. The current test as properly applied.

Meanwhile, Respondent Nail also had fair notice that his actions violated clearly established law under the clearly established law requirement when properly applied. Turning to *Lane* for guidance, the proper level of generality for whether the law was clearly established should have been:

> Could Respondent reasonably have believed, at the time he demoted Petitioner, that a government employer could demote and cause financial harm to an employee on account of Petitioner's anti-tenure speech and publications, challenging the adverse systemic impact of tenure in higher education, made to international and national publications such as the Financial Times, the Wall Street Journal, and the Harvard Business Review, under oath and outside the scope of his ordinary job responsibilities?"

See Lane, 573 U.S. at 243.

More than half a century ago, this Court held that a letter to a local newspaper attacking the school's handling of bonds was a matter of public concern. *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 566 (1968). Petitioner's anti-tenure speech and publications, challenging the adverse systemic impact of tenure in higher education, made to international and national publications such as the Financial Times, the Wall Street Journal, and the Harvard Business Review, are materially identical

to the content, form, and context of the speech in *Pickering*.

Moreover, Judge Dennis correctly recognized in his dissent that "[f]or over forty years, [since *Connick v. Myers*, 461 U.S. 138 (1983)] 'government employers have known that, unless their interest in efficiency at the office outweighs the employee's interest in speaking, they cannot fire their employees for making statements that relate to the public concern.'" *Wetherbe v. Tex. Tech Univ. Sys.*, 138 F.4th 296, 309 (5th Cir. 2025) (Dennis, J., dissenting) (quoting *Kennedy v. Tangipahoa Par. Libr. Bd. of Control*, 224 F.3d 359, 377 (5th Cir. 2000)). Common sense dictates that every reasonable official knew or should have known based upon the content, form, and context of Petitioner's speech that he could not retaliate against Petitioner for publicly attacking the adverse systemic impact of tenure on higher education, a matter outside the scope of Petitioner's job and wholly unrelated to the efficiency of the office.

Even so, Judge Dennis further opined that "[i]f expressing an opinion about an elected official (*Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462 (5th Cir. 2014)), emailing elected officials about retaliation on the Texas Lottery Commission, (*Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008)), and discussing the resignation of a principal with a reporter (*Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 192 (5th Cir. 2005)), are all speech on matters of public concern, then a reasonable official should have known that publishing articles criticizing tenure was speech on a matter of public concern too." *Wetherbe v. Tex. Tech Univ. Sys.*, 138 F.4th 296, 309 (5th Cir. 2025) (Dennis,

J., dissenting) (cleaned up). Thus, even under today's modern clearly established law approach, the Fifth Circuit got it wrong by overzealously requiring a case directly on point.

Certainly, if Petitioner's anti-tenure speech had not been a matter of public concern, Petitioner's claim would fail; however, the Fifth Circuit in its earlier decision had no difficulty holding that Petitioner's anti-tenure speech was a matter of public concern. *See Wetherbe v. Tex. Tech Univ. Sys.*, 699 Fed. Appx. 297 (5th Cir. 2017) (citing, *e.g.*, *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178 (5th Cir. 2005) *and Moore v. Kilgore*, 877 F.2d 364 (5th Cir. 1989)). The Fifth Circuit did not have to parse conflicting case law or resolve a matter of first impression. Simply put, in *Wetherbe II*, it merely applied common sense to well-established law, which laws gave Respondent fair warning.

Surely, since *Pickering*, Respondent knew of should have known that he could not demote Petitioner for Petitioner's anti-tenure speech challenging the adverse systemic impact of tenure on higher education, which speech was wholly unrelated to his job and did not interfere with Respondents' interest in efficiency at the office. ROA.1731-32, 1742-54, 1766, 2001.

Therefore, viewed at the proper level of generality, the law was clearly established that Respondent could not punish Petitioner for this anti-tenure speech without violating Petitioner's constitutional rights under the First Amendment, and this Court should reverse the Fifth Circuit.

V. This case is the optimal vehicle for the Court to resolve these questions.

This case has several unique features which make it the optimal case to resolve these questions.

To begin, the clearly established law requirement has no basis in law. The bar to Petitioner's legitimate retaliation claim is only the clearly established law requirement. The proper test should ask and answer only whether the common law in 1871 would have accorded immunity for a tort analogous to Petitioner's under § 1983. That test would ask whether Respondent, in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, acted reasonably and in good faith? The answer is no.

Even if some form of the clearly established law requirement were to remain, it has been improperly applied, and this case presents a perfect opportunity to clarify how the requirement should apply in a free speech case. Although this Court commands that a case directly on point is not required, while also sternly warning that a case measured at too high a level of generality is improper, courts still struggle to apply the clearly established law requirement.

In the First Amendment context, the Fifth Circuit requires a prior holding establishing that specific speech was a matter of public concern prior to the constitutional violation at issue. This one-size-fits-all test is inflexible in the First Amendment context and is ill-equipped to perform the function for which it was created. To resolve these issues, this Court must clarify the proper level of generality to use when

answering whether the law was clearly established in free speech cases; i.e., is it not the content, form, and context of speech that puts a reasonable official on notice, as opposed to whether the specific speech at issue was previously declared a matter of public concern? The Court can also declare that the proper level of granularity applied hinges upon the authority or gravity of decisions made by an official, such as whether the official made life-and-death, split-second decisions, versus an official who made only a commonplace decision at his leisure and with the advice of legal counsel, such as the decision made in this case.

In sum, this case is the correct vehicle for this Court's consideration of this pressing issue.

CONCLUSION

The Court should grant this Petition and apply the immunities available at common law to 42 U.S.C. § 1983 and U.S. Const. Amend. I, within the context of a free speech retaliation claim brought by a university professor against the dean of his college.

Respectfully submitted,

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OCTOBER 29, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 20, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-11325

JAMES C. WETHERBE, PHD,

Plaintiff-Appellee,

versus

TEXAS TECH UNIVERSITY SYSTEM; LANCE NAIL, PHD, IN HIS INDIVIDUAL CAPACITY ONLY; MARGARET WILLIAMS, CURRENT DEAN OF RAWLS COLLEGE OF BUSINESS AT TEXAS TECH UNIVERSITY, IN HER OFFICIAL CAPACITY,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas. USDC No. 5:15-CV-119

May 20, 2025, Filed

OPINION

Before DENNIS, RICHMAN, and HAYNES, *Circuit Judges.*

Appendix A

PRISCILLA RICHMAN, *Circuit Judge*:

This is an interlocutory appeal from the district court's denial of qualified immunity. Professor James Wetherbe has long espoused anti-tenure views and rejected tenure at several universities. In this lawsuit, Wetherbe claims he was retaliated against for his anti-tenure views by the then-dean of the business school at Texas Tech University, Lance Nail. According to Wetherbe, once Nail became dean, he retaliated against him for (1) authoring several op-eds that criticized tenure and (2) op-eds written by reporters that discussed Nail's previous lawsuit against the university.

Wetherbe sued Nail under 42 U.S.C. § 1983, alleging his First Amendment rights had been violated. He also sought injunctive and declaratory relief against Margaret Williams, the current dean of the business school. The district court denied the defendants' second amended Rule 12(c) motion, holding that Wetherbe sufficiently alleged a constitutional violation and that Nail's actions were objectively unreasonable in light of clearly established law. We conclude that the contours of First Amendment law regarding retaliation were not clearly established at the time the events at issue occurred. We therefore reverse and render judgment in favor of the defendants on Wetherbe's First Amendment retaliation claim.

I

In providing the factual background relevant to this case, we accept the allegations in Wetherbe's complaint as

true. He is a business professor who has taught, published, consulted, and presented extensively in his field over the past several decades. Throughout his career, he has been known for his anti-tenure views as he believes tenure is harmful because it is "an obstacle to change" and is "more about job security than academic freedom." Wetherbe's actions mirror his beliefs; he resigned tenure at the University of Houston and the University of Minnesota and declined tenure at the University of Memphis and at Texas Tech University (TTU).

In 2000, Wetherbe joined TTU as the Robert G. Stevenson Chair in Information Technology. In the offer letter, TTU stated that it understood Wetherbe "reject[s] tenure." The appointment was initially for three years but was renewable. Wetherbe held this position until 2014 when Nail refused to extend it.

Wetherbe served in many capacities at TTU. He routinely taught an MBA communications course and advised MBA students. In addition, he was part of the Dean's Advisory Council and served as the Associate Dean for Outreach.

In 2011, Wetherbe became a candidate for dean of TTU's Rawls College of Business. He alleges that although the search committee listed him as one of the top four candidates, the Provost declined to interview him because of his views on tenure. The position went to Nail, who was not one of the original four candidates selected for an interview.

Appendix A

Wetherbe sued the Provost under 42 U.S.C. § 1983 for allegedly retaliating against him for his anti-tenure speech during the search for a new dean. In an interlocutory appeal, this court held that Wetherbe failed to state a claim.[1]

Not long after TTU selected Nail to serve as Dean over Wetherbe, friction between the two ensued. Wetherbe contends part of this tension related to his anti-tenure speech. From December 2012 to July 2013, Wetherbe wrote several articles that critiqued tenure generally, and reporters discussed his lawsuit against TTU in other articles. Wetherbe's present complaint alleges that in August 2013, Nail allegedly removed Wetherbe from teaching the MBA communications course, falsely accused him of sexual harassment, and replaced him as faculty advisor for the MBA student association. Wetherbe published another article criticizing tenure, and Nail revoked Wetherbe's emeritus status for the Dean's Advisory Council in September 2013. In November 2013, a reporter published another piece addressing the debate over tenure and Wetherbe's lawsuit specifically. Over approximately the following year and a half, Nail allegedly made false financial misconduct claims against Wetherbe, directed him to discontinue using a grant from Best Buy to fund one of his projects, refused to renew his Stevenson Chair position, declined to reimburse one of his trips, and informed him that he would be treated as a Professor of Practice for workload purposes, which

1. *Wetherbe v. Smith* (*Wetherbe I*), 593 F. App'x 323, 324 (5th Cir. 2014).

increased his teaching load by fifty percent. Wetherbe claims that his removal from the MBA program triggered a twenty percent reduction in his annual compensation, the denied use of the Best Buy grant adversely affected his income by $50,000, and the loss of the Stevenson Chair position cost him $90,000 in funding per year.

As of the filing of Wetherbe's third amended complaint in 2019, Wetherbe continued to publish about tenure, and reporters continued to discuss his views on tenure and lawsuits against TTU. Nail was replaced as dean in December 2015. Since then, Interim Dean Paul Goebel and Dean Margaret Williams have not "engaged in new retaliation."

Wetherbe sued Nail, TTU, and the new dean of the Rawls College of Business for First Amendment retaliation based on his anti-tenure publications and his prior lawsuit. The district court granted the defendants' motion to dismiss for failure to state a claim, holding among other things, that Wetherbe's speech did not involve a matter of public concern.[2] On appeal, Wetherbe abandoned his retaliation claim based on his prior lawsuits.[3] He challenged only the district court's dismissal

2. *Wetherbe v. Tex. Tech Univ. Sys.*, No. 5:15-CV-119-Y, 2016 U.S. Dist. LEXIS 44301, 2016 WL 1273471, at *7 (N.D. Tex. Mar. 31, 2016), *aff'd in part, rev'd in part and remanded*, 699 F. App'x 297 (5th Cir. 2017) (per curiam).

3. *Wetherbe v. Tex. Tech Univ. Sys.* (*Wetherbe II*), 699 F. App'x 297, 299 (5th Cir. 2017) (per curiam).

of his claim pertaining to the anti-tenure publications.[4] In *Wetherbe II*,[5] we reversed the district court's dismissal in part, holding that Wetherbe's anti-tenure speech was on a matter of public concern.[6] However, we affirmed in part because Wetherbe conceded that res judicata, collateral estoppel, and sovereign immunity barred some of the claims and issues in his complaint.[7] We did not address whether the law was clearly established that Wetherbe's speech was on a matter of public concern or any other qualified immunity issues.[8] The district court had not addressed whether the law was clearly established, either.[9]

On remand, the district court denied the defendants' second amended Rule 12(c) motion, holding that Wetherbe sufficiently alleged a constitutional violation and that Nail's actions were objectively unreasonable in light of clearly established law. The defendants timely appealed.

II

"A 12(c) motion for judgment on the pleadings is [] reviewed de novo."[10] When reviewing a district court's

4. *Id.*

5. *Wetherbe v. Tex. Tech Univ. Sys.* (*Wetherbe II*), 699 F. App'x 297 (5th Cir. 2017) (per curiam).

6. *Id.* at 298.

7. *Id.*

8. *See id.*

9. *See Wetherbe*, 2016 U.S. Dist. LEXIS 44301, 2016 WL 1273471, at *2 n.3.

10. *Guerra v. Castillo*, 82 F.4th 278, 284 (5th Cir. 2023).

denial of a Rule 12(c) motion, we use the same standard as in Rule 12(b)(6) motions.[11] We ask whether "in the light most favorable to the plaintiff, the complaint states a valid claim for relief."[12] Although we "accept the factual allegations in the pleadings as true,"[13] the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[14] "[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."[15]

Here, the central issue on appeal is qualified immunity. The Supreme Court established that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged

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11. *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n.8 (5th Cir. 2002) ("Rule 12(b)(6) decisions appropriately guide the application of Rule 12(c) because the standards for deciding motions under both rules are the same.").

12. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (quoting *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001)).

13. *Id.*

14. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

15. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

conduct."[16] Courts may address the two prongs in any order,[17] and defendants are entitled to qualified immunity if the plaintiff fails on either prong.[18] For the reasons considered below, we resolve this case on the second prong.

III

We start by addressing the required level of specificity by which Wetherbe's rights must be clearly established.

A

"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.'"[19] "[Q]ualified immunity is inappropriate only where the officer had 'fair notice'—'in light of the specific context of the case, not as a broad general proposition'—that his *particular* conduct was

16. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

17. *See id.* (noting that "lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first").

18. *Garcia v. Blevins*, 957 F.3d 596, 600 (5th Cir. 2020) ("We can analyze the prongs in either order or resolve the case on a single prong.").

19. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

unlawful."[20] "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"[21]

Recitation of general legal principles is not sufficient to prove a violation of a clearly established right. We require a more specific analysis. The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality."[22] Instead, "the clearly established law must be 'particularized' to the facts of the case."[23] The Supreme Court has explained that "[a]lthough 'this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'"[24] As a general proposition, "to show a violation of clearly established law, [a plaintiff] must identify a case that put [the defendant] on notice that his specific conduct was unlawful."[25]

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20. *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)).

21. *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)).

22. *Id.* at 742.

23. *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

24. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6, 142 S. Ct. 4, 211 L. Ed. 2d 164 (2021) (per curiam) (quoting *White*, 580 U.S. at 79).

25. *Id.*

A "general proposition," such as "that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."[26] Rather, "we must frame the constitutional question with specificity and granularity."[27] In other words, the "dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'"[28] We also note our "commandment" that clearly established law comes from "holdings, not dicta," because public officials "are charged with knowing the results of our cases . . . [but] are not charged with memorizing every jot and tittle we write to explain them."[29]

Respectfully, the district court erred by defining Wetherbe's rights at too high of a level of generality. The district court's order denying Nail qualified immunity held that "it was clearly established that a state official could not impose adverse employment actions on a state employee on account of that employee's outside speech on a matter of public concern." The district court's order recited a general legal proposition, instead of "fram[ing] the constitutional question with specificity and granularity."[30]

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26. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

27. *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019).

28. *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (quoting *Ashcroft*, 563 U.S. at 742).

29. *Morrow*, 917 F.3d at 875-76.

30. *Id.* at 874-75.

The district court's failure to apply the correct level of generality resembles the Eighth Circuit's error described in *Anderson v. Creighton*.[31] In *Anderson*, the Supreme Court rejected "[t]he [Eighth Circuit's] brief discussion of qualified immunity [which] consisted of little more than an assertion that a general right Anderson was alleged to have violated—the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances—was clearly established."[32]

Wetherbe contends that "[t]he law was clearly established that the First Amendment protects speech directed to a person outside of the workplace on a matter of public concern." Wetherbe's descriptions of clearly established law are too reliant on "broad general proposition[s]" and not sufficiently tied to "the specific context of the case."[33]

B

To determine the rights that must be clearly established, we briefly discuss First Amendment retaliation doctrine, as well as some law of the case

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31. 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

32. *Id.* at 640.

33. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)).

considerations. Albeit circumscribed, government employees, including professors, retain First Amendment protections.[34]

The test for evaluating a First Amendment retaliation claim by government employees has five elements. At the outset, there is a "threshold layer"[35] to the inquiry: whether the employee spoke as a citizen or instead made "statements pursuant to [his] official duties."[36] If the employee's speech was made "pursuant to [his] official duties," it is unprotected by the First Amendment.[37] However, even if the employee spoke as a citizen, there are additional elements he must prove. An employee must prove that "(1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct."[38]

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34. *See City of San Diego v. Roe*, 543 U.S. 77, 80, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) ("A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.").

35. *Williams v. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007) (per curiam).

36. *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

37. *Id.*

38. *Hurst v. Lee County*, 764 F.3d 480, 484 (5th Cir. 2014).

We consider three of the five parts of this test only briefly. Regarding the "threshold layer," Nail's briefing does not argue that Wetherbe spoke as an employee with respect to either prong of the qualified immunity test. We will therefore assume for the purposes of this appeal that Wetherbe was not speaking in that capacity.[39] With regard to element three, which balances the employee's and employer's interests, Nail's 12(c) motion did not address whether this element was met for purposes of the "constitutional violation" prong of qualified immunity, and his initial brief in our court does not raise the issue as to the "clearly established" prong. Nail's reply briefly mentions this element, but we will not consider issues raised for the first time in a reply brief. Nail's briefing does address element four, which concerns causation and retaliatory animus. However, "the 'clearly established' qualified immunity standard . . . . does not require that causation be clearly established,"[40] so we need not address element four.

That leaves two remaining elements with respect to the "clearly established" prong of qualified immunity: "(1) [the plaintiff] suffered an adverse employment decision" and "(2) [the plaintiff's] speech involved a matter of public concern."[41] Therefore, applying the structure of analysis

39. *See United States v. Beaumont*, 972 F.2d 553, 563 (5th Cir. 1992) (per curiam) ("Failure of an appellant to properly argue or present issues in an appellate brief renders those issues abandoned.").

40. *Johnson v. Halstead*, 916 F.3d 410, 421 n.4 (5th Cir. 2019).

41. *Hurst*, 764 F.3d at 484.

we employed in *Click v. Copeland*,[42] Nail is entitled to qualified immunity unless it was (1) clearly established that Nail's alleged retaliatory acts were adverse employment actions and (2) clearly established that Wetherbe's speech regarding tenure was on a matter of public concern. Because we conclude that it was not clearly established that Wetherbe's speech regarding tenure addressed a matter of public concern, we do not reach whether it was clearly established that Nail's alleged actions were adverse employment actions.

C

The relevant alleged retaliatory acts occurred from August 2013 to March 2015. Prior to (and during) this timeframe, no clearly established law would have put every reasonable person on notice that Wetherbe's speech regarding tenure involved a matter of public concern.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[43] This requires a fact-specific analysis

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42. *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992) ("We divide the analysis into two parts: whether it was clearly established (1) that transfers, as distinguished from discharges, were actionable, and (2) that political activity, as distinguished from political belief, was protected.").

43. *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 186 (5th Cir. 2005) (emphasis omitted) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)).

and weighing of the factors.[44] As we have explained, "[o]ne consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's [F]irst [A]mendment rights," so "[t]here will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights."[45]

This court's opinion in *Wetherbe II* said that Wetherbe "plausibly alleged that his speech in the form of articles published on tenure constituted speech on a matter of public concern."[46] That may be law of the case, but it is not binding precedent as to whether articles by a nontenured employee of a university about problems with tenure is speech on a matter of public concern. Of course, the

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44. *See id.* at 189 ("We held in *Terrell* [*v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986)] that the plaintiff's speech was not protected because, although it concerned police corruption, a matter of inherent public interest, the speech was made only in a private diary which the plaintiff never intended to make public . . . . Our *Terrell* holding, however, is more accurately characterized as one in which we completely discounted the *content* of an employee's speech because the *context* element weighed so heavily against a holding of protected speech." (footnote omitted) (citing *Terrell*, 792 F.2d at 1362-63)).

45. *Noyola v. Tex. Dep't of Hum. Res.*, 846 F.2d 1021, 1025 (5th Cir. 1988) (discussing the impact on the qualified immunity analysis of balancing an employee's First Amendment interests against government interests in efficiency and discipline).

46. *Wetherbe II*, 699 F. App'x 297, 301 (5th Cir. 2017) (per curiam).

most salient point for purposes of resolving Wetherbe's present suit is that our 2017 decision in *Wetherbe II* cannot clearly establish the law from August 2013 to March 2015 because it postdates Nail's alleged retaliation.[47] Moreover, *Wetherbe II* is unpublished.[48] Nor does *Wetherbe II*'s analysis support Wetherbe's position that it was clearly established from August 2013 to March 2015 that Wetherbe's speech on tenure regarded a matter of public concern.

For purposes of brevity, we will not summarize all of our First Amendment retaliation cases. But it suffices to say that none of our (or the Supreme Court's) precedents place the "constitutional question beyond debate."[49] As with the cases *Wetherbe II* cites, some provide rules and analyses that one could reasonably apply to suggest that Wetherbe's speech was on a matter of public concern. But "clearly established law comes from holdings,"[50] and none of our cases have held that speech regarding tenure is on a matter of public concern, or anything approaching that.[51]

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47. *See Wyatt v. Fletcher*, 718 F.3d 496, 502-03 (5th Cir. 2013) ("The applicable law that binds the conduct of officeholders must be clearly established at the time the allegedly actionable conduct occurs.").

48. *Garcia v. Blevins*, 957 F.3d 596, 601 (5th Cir. 2020) ("*Reyes* [*v. Bridgwater*, 362 F. App'x 403 (5th Cir. 2010)] is unpublished, however, and so cannot clearly establish the law.").

49. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

50. *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019).

51. *See, e.g., Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 191 n.47 (5th Cir. 2005) (collecting cases); *Kennedy v. Tangipahoa Par.*

Finally, the Supreme Court's decision in *Hope v. Pelzer*[52] does not allow Wetherbe to sidestep the general rule that law is clearly established when there is "controlling authority specifically prohibiting a defendant's conduct."[53] In *Hope*, the Court stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[54] In that case, the Court denied qualified immunity at the summary judgment stage to Alabama prison guards who handcuffed a prisoner to an outdoor hitching post for hours at a time, leading to burns on at least one occasion.[55] The Court noted that "[t]he obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment."[56] The case before us is not of this ilk.

Libr. Bd. of Control, 224 F.3d 359, 373 (5th Cir. 2000) (collecting cases), *abrogated in part on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Charles v. Grief*, 522 F.3d 508, 514 n.23 (5th Cir. 2008) (collecting cases).

52. 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

53. *Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013).

54. *Hope*, 536 U.S. at 741.

55. *Id.* at 733-35, 746.

56. *Id.* at 745.

Cases decided after *Hope* confirm this. For example, in *Brosseau v. Haugen*,[57] a case in which a law enforcement officer shot a fleeing suspect, the Supreme Court reiterated that "in an obvious case," statements of law "can 'clearly establish'" constitutional rights, "even without a body of relevant case law."[58] Nevertheless, the Supreme Court reversed the court of appeals because it had erroneously "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*."[59] Both *Graham*[60] and *Garner*[61] involved excessive-force claims, but the Supreme Court held that these and other excessive-force cases "by no means 'clearly establish' that [the officer's] conduct violated the Fourth Amendment."[62]

Similarly, although there was case law regarding what constitutes a matter of public concern at the time the events giving rise to this case occurred, at most, that precedent provided general principles. There was no fair warning when the conduct at issue in the present appeal occurred that Nail would be violating Wetherbe's

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57. 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam).

58. *Id.* at 199 (citing *Hope*, 536 U.S. at 738).

59. *Id.*

60. *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

61. *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

62. *Brosseau*, 543 U.S. at 201.

constitutional right to free speech. Neither Wetherbe nor the dissenting opinion cites a decision that intimates that diverging views among members of the academy about tenure rose to the level of a matter of public concern. Nor was it obvious that Wetherbe's speech regarding tenure was on a matter of public concern.

In light of our (and the Supreme Court's) precedents, we cannot say that Nail had "fair notice" from August 2013 to March 2015 that Wetherbe's speech regarding tenure was on a matter of public concern. Consequently, Nail is entitled to qualified immunity.

IV

The parties ask us to determine if Wetherbe's claims for declaratory and injunctive relief against Williams may proceed. However, nothing indicates that the district court ruled on Wetherbe's claims for declaratory and injunctive relief. The district court's order denying the Rule 12(c) motion focused entirely on Nail's qualified immunity defense. The decretal language in the order is telling: "Consequently, Nail's Motion for Judgment on the Pleadings . . . is DENIED." There was no mention of Williams or the claims for declaratory and injunctive relief. Those issues are not before us.[63]

* * *

63. *See Masat v. United States*, 745 F.2d 985, 988 (5th Cir. 1984) ("This court is solely a court of appeals, and its powers are limited to reviewing issues raised in, and decided by, the trial court.").

For the foregoing reasons, we REVERSE the district court's order denying qualified immunity to defendant Nail and RENDER judgment granting him qualified immunity from plaintiff Wetherbe's First Amendment retaliation claims.

Appendix A

JAMES L. DENNIS, *Circuit Judge*, dissenting:

Dr. James Wetherbe is a professor at Texas Tech University's Rawls School of Business. For over twenty years, Wetherbe has distinguished himself as an outspoken critic of academic tenure, even going so far as rejecting tenure "to set an example." In this lawsuit, Wetherbe alleges that he suffered retaliation—a *de facto* demotion—in violation of the First Amendment for a series of articles he published that criticized academic tenure. Wetherbe sued the business school's former dean, Dr. Lance Nail, under 42 U.S.C. § 1983. The district court found that Wetherbe's allegations were sufficient to overcome Nail's qualified immunity defense and denied Nail's motion for judgment on the pleadings.

The majority opinion disagrees, reversing the district court's denial of qualified immunity and rendering judgment in favor of Nail. In doing so, it truncates the analysis, only addressing the clearly established prong of qualified immunity, and errantly finds that "no clearly established law would have put every reasonable person on notice that Wetherbe's speech regarding tenure involved a matter of public concern." *Ante*, at 11. Because I would find that Wetherbe sufficiently alleged a violation of his constitutional rights that was clearly established at the time of the incident, as evidenced by binding precedents cited to in a previous appeal in this same case, *Wetherbe v. Texas Tech University System*, 699 Fed. App'x 297 (5th Cir. 2017) (first citing *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 190 (5th Cir. 2005); and then citing *Moore v. Kilgore*, 877 F.2d 364, 370-72 (5th Cir. 1989)), I respectfully dissent.

Appendix A

* * *

Whether an official is entitled to qualified immunity involves two inquiries: "The first question is whether the officer violated a constitutional right. The second question is whether the 'right at issue was clearly established at the time of [the] alleged misconduct.'" *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)).

As the majority opinion ably explains, Wetherbe alleges Nail violated his First Amendment rights by retaliating against his protected speech. To establish retaliation under the First Amendment, Wetherbe must show "(1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the government defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct." *Hurst v. Lee Cty.*, 764 F.3d 480, 484 (5th Cir. 2014) (quoting *Juarez v. Aguilar*, 666 F.3d 325, 332 (5th Cir. 2011)).[1] The majority opinion finds, and I agree, that Nail waived any

1. There is an additional threshold inquiry to determine whether speech is protected by the First Amendment: whether the employee spoke as a citizen (protected) or instead made "statements pursuant to [his] official duties" (unprotected). *Williams v. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)). The majority opinion correctly notes that Nail's briefing does not argue that Wetherbe spoke as an employee and thus assumes for the purpose of this appeal that Wetherbe was speaking as a citizen. *Ante*, at 10.

argument on the third element, and that the fourth need not be clearly established. *Ante*, at 10-11. Employing the framework from *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992), the majority opinion correctly explains that "Nail is entitled to qualified immunity unless it was (1) clearly established that Nail's alleged retaliatory acts were adverse employment actions and (2) clearly established that Wetherbe's speech regarding tenure was on a matter of public concern." *Ante*, at 11.

The majority opinion and I diverge on the application of *Click*'s rubric.

First, the majority opinion doesn't address whether Wetherbe suffered an adverse employment action—but of course he did, as Texas Tech effectively demoted him. *Benningfield v. City of Hous.*, 157 F.3d 369, 376 (5th Cir. 1998) ("Adverse employment actions are . . . demotions . . . ." (quoting *Pierce v. Tex. Dep't of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994))).

Wetherbe alleges he was transferred from teaching an MBA course to an introductory course, which amounts to a demotion. Specifically, he alleges that the change resulted in "a twenty percent reduction in annual compensation," and his job being "markedly less prestigious and interesting" than it was before the change. *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (explaining that a transfer can constitute an adverse employment action where the new job is "markedly less prestigious and less interesting than the old one"). Beyond this, Wetherbe also alleges that his

change from full professor to professor of practice caused a fifty percent increase in his workload, significantly reducing his time for research and publications. And he alleges that the ability to research and publish are the mark of prestige. Taking these allegations as true, these actions made Wetherbe's job markedly less interesting, prestigious, and substantially diminished his pay. *Sharp v. City of Hous.*, 164 F.3d 923, 933 (5th Cir. 1999) ("To be equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement."). This is clearly sufficient to constitute an adverse employment action under this court's precedents, and I would hold that Wetherbe successfully established that he suffered several adverse employment actions. *Id.*; *Breaux*, 205 F.3d at 157.

Second, on the issue that the majority opinion does reach, it concludes there was "no clearly established law [that] would have put every reasonable person on notice that Wetherbe's speech regarding tenure involved a matter of public concern." *Ante*, at 11. Not so.

Nail correctly acknowledges that we concluded in our previous appeal, *Wetherbe*, 699 F. App'x 297, that "Wetherbe's anti-tenure speech involved a matter of public concern." In that previous appeal, we held that "articles published on tenure constituted speech on a matter of public concern" because they "focus on the systemic impact of tenure, not Wetherbe's own job conditions." 699 F. App'x at 300, 301. The majority opinion skirts this

conclusion by holding that *Wetherbe*, an unpublished case issued in 2017, cannot serve to clearly establish the law from August 2013 to March 2015. *Ante*, at 12-13. While the majority opinion is correct that "[t]he applicable law that binds the conduct of officeholders must be clearly established at the time the allegedly actionable conduct occurs," *Wetherbe* points to various published cases that, when taken together, clearly established the law prior to August 2013. *Wyatt v. Fletcher*, 718 F.3d 496, 502-03 (5th Cir. 2013). Specifically, *Wetherbe* explained that because the articles do not discuss Wetherbe's own job conditions and only discuss the systematic impact of tenure, they are a matter of public concern. 699 F. App'x at 300 (first citing *Salge*, 411 F.3d at 190 (finding that the content of an employee's speech weighed "in favor of holding that she spoke on a matter of public concern" when she spoke about a matter unrelated to her own employment status or job performance); and then citing *Moore*, 877 F.2d at 370-72 (firefighter's thoughts about staffing shortage constituted speech on a matter of public concern)); *see also Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008) (explaining that where the speech "was not made in the course of performing or fulfilling his job responsibilities, was not even indirectly related to his job, and was not made to higher-ups in his organization . . . but was communicated directly to elected representatives of the people," it constituted speech on a matter of public concern).

The majority opinion simply concludes that "none of our cases have held that speech regarding tenure is on a matter of public concern." *Ante*, at 13. Our analysis is not so narrow, however. *See Warnock v. Pecos Cnty., Tex.*,

116 F.3d 776, 782 (5th Cir. 1997) (holding that, though the contours of a right must be adequately defined, "'[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987))). "The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (quoting *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013)); *see also Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462 (5th Cir. 2014) (finding that several cases, when considered together, were sufficient to provide clear warning that termination on the basis of the plaintiff's speech violated the First Amendment).

Salge, decided in 2005, held that a high school secretary's telephone conversation with a reporter regarding the "high-profile" resignation of the school principal constituted speech on a matter of public concern and established the rule that employee speech unrelated to the employee's own employment status or job performance weighs in favor of holding that the employee spoke on a matter of public concern. 411 F.3d at 192. In *Moore*, decided in 1989, we held that speech regarding fire department layoffs and possible staffing shortages was on a matter of public concern following the death of a firefighter and a "caldron" of media coverage that "was still simmering" regarding the layoffs, explaining that "[t]

he First Amendment accords all of us, as participants in a democratic process, room to speak about public issues." 877 F.2d at 371. In another case cited by Wetherbe, we held that a library employee spoke on a matter of public concern when she wrote a letter to library management suggesting new library safety and security policies after a library employee was raped—"a violent crime that had shaken the local community and generated significant press coverage." *Kennedy v. Tangipahoa Par. Libr. Bd. of Control*, 224 F.3d 359, 373 (5th Cir. 2000), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). *Kennedy* explained "speech made against the backdrop of ongoing commentary and debate in the press involves the public concern." *Id.* Wetherbe's publicized speech regarding tenure was unrelated to his responsibilities and on a matter the public has an interest in, as evidenced by the variety of articles and publications cited in Wetherbe's amended complaint. *Wetherbe*, 699 Fed. App'x at 301 ("the fact that various media outlets published Wetherbe's articles, shows that Wetherbe's speech was made against the backdrop of an ongoing public conversation about tenure, which indicates that the public is actually concerned about tenure.") (citing *Kennedy*, 224 F.3d at 373 ("[S]peech made against the backdrop of ongoing commentary and debate in the press involves the public concern.")).

If expressing an opinion about an elected official (*Cutler*, 767 F.3d 462), emailing elected officials about retaliation on the Texas Lottery Commission, (*Charles*, 522 F.3d 508), and discussing the resignation of a principal with a reporter (*Salge*, 411 F.3d at 192), are all speech on

matters of public concern, then a reasonable official should have known that publishing articles criticizing tenure was speech on a matter of public concern too. For over forty years, "government employers have known that, unless their interest in efficiency at the office outweighs the employee's interest in speaking, they cannot fire their employees for making statements that relate to the public concern." *Kennedy*, 224 F.3d at 377. Accordingly, I would hold that based on these precedents Nail had clear warning that demoting Wetherbe on the basis of his publications about the institution of tenure in general, which were unrelated to his employment or job duties, would violate Wetherbe's First Amendment rights. *Ante*, at 10 (the majority itself assuming Wetherbe was not speaking as an employee for the purposes of this appeal); *see also Cutler*, 767 F.3d at 473 (affirming the denial of summary judgment on qualified immunity grounds where "reasonable officials . . . should have known on the basis of *Charles* and *Davis* that [the plaintiff's] speech was protected as the speech of a citizen and that their decision to terminate [the plaintiff] on the basis of that citizen speech would violate" the First Amendment).

Because I would affirm the district court's denial of qualified immunity and remand for further proceedings, I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, N.D. TEXAS, LUBBOCK DIVISION, SIGNED DECEMBER 3, 2019

UNITED STATES DISTRICT COURT,
N.D. TEXAS, LUBBOCK DIVISION.

2019 WL 13240902

JAMES C. WETHERBE

v.

LANCE NAIL, ET AL.

ACTION NO. 5:15-CV-119-Y

Signed December 3, 2019

ORDER DENYING SECOND AMENDED RULE 12(C) MOTION FOR JUDGMENT

TERRY R. MEANS, UNITED STATES DISTRICT JUDGE

Pending before the Court is Defendants' Second Amended Rule 12(c) Motion for Judgment on the Pleadings (doc. 90).[1] After review of the motion, the related briefs,

1. Defendants have submitted an appendix with their motion, which includes Nail's deposition. Inasmuch as Defendants' motion is brought under Rule 12(c), the Court has not considered the appendix. *See U.S. v. Renda Marine, Inc.* 667 F.3d 651, 654 (5th Cir. 2012) (noting that in considering a Rule 12(c) motion for judgment on the pleadings, a court "must look only to the

Plaintiff's (third) amended complaint (doc. 86), and the applicable law, the Court concludes that the motion should be and hereby is denied.

I. Facts

Plaintiff James Wetherbe was recruited to be a professor at his alma mater, Texas Tech University ("TTU"), in 2000. He had previously obtained from TTU his M.B.A. in Management Information Systems in 1973 and his Ph.D. in Management Information Systems, Organizational Behavior and Computer Science Management in 1976. Prior to having been recruited back to TTU, Wetherbe had served on the faculty of the Universities of Houston, Minnesota, and Memphis.

Wetherbe contends that while a professor at TTU, he suffered retaliation in violation of his First Amendment rights at the hands of TTU's former Rawls College of Business dean, Lance Nail. Wetherbe alleges that Nail retaliated against him for being an outspoken critic of tenure. Wetherbe rejected offers of tenure at all of the universities for which he has taught, including TTU. He also authored and had published numerous articles challenging the concept of tenure. Wetherbe contends that Nail was aware of the many articles he had written against tenure and retaliated against Wetherbe because of those articles.

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pleadings and accept all allegations contained therein as true.") (quotation omitted).

Appendix B

This Court previously granted a motion to dismiss the claims Wetherbe asserted in a prior version of his complaint. The United States Court of Appeals for the Fifth Circuit affirmed in part, concluding that certain of Wetherbe's claims were barred by the doctrines of res judicata, collateral estoppel, or sovereign immunity.[2] But the Fifth Circuit reversed to the extent this Court held that Wetherbe's First Amendment retaliation claim failed because his anti-tenure speech was not a matter of public concern. Wetherbe subsequently was permitted to again amend his complaint, and Defendants now seek judgment on Wetherbe's remaining claims.

II. Standard of Review

Rule 12(c) states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). "The standard for dismissal under Rule 12(c) is the same as that for dismissal for failure to state a claim under Rule 12(b)(6)." *Johnson v. Johnson*, 385 F.3d 503, 528 (5th Cir. 2004) (citing *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313

2. Specifically, the Fifth Circuit concluded "that Wetherbe is collaterally estopped from asserting claims that he was retaliated against for his personal anti-tenure views and for rejecting tenure," (Opn. [doc. 40] 8), that he had waived "any arguments in opposition to the application of res judicata to claims predicated on events that occurred before the commencement of the previous action on June 17, 2013," (id. at 8-9), and that his claims against TTU "are barred by Eleventh Amendment sovereign immunity," (id. at 9).

n.8 (5th Cir. 2002)). A Rule 12(c) motion for judgment on the pleadings is essentially a Rule 12(b)(6) motion made after the pleadings close. *See* 2 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 12.38 at 12-136 (3d ed. 2017). "Thus, the 'inquiry focuses on the allegations in the pleadings' and not on whether the 'plaintiff actually has sufficient evidence to succeed on the merits.' " *Ackerson v. Bean Dredging, LLC*, 589 F.3d 196, 209 (5th Cir. 2009) (quoting *Ferrer v. Chevron Corp.*, 484 F.3d 776, 782 (5th Cir. 2007)).

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails "to state a claim upon which relief can be granted." This rule must, however, be interpreted in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court. Rule 8(a) calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding Rule 8(a)'s simplified pleading standard applies to most civil actions). As a result, "[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) (quoting Wright & Miller, *Federal Practice and Procedure* § 1357 (1969)). The Court must accept as true all well pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *Kaiser Aluminum*, 677 F.2d at 1050.

The plaintiff must, however, plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry*

v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992). Indeed, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," and his "factual allegations must be enough to raise a right to relief above the speculative level, ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 & 1974 (2007). The Court need not credit bare conclusory allegations or "a formulaic recitation of the elements of a cause of action." *Id.* at 1955. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liabile for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

III. Analysis

A. Adverse Employment Action

To adequately plead a claim for retaliation based on the exercise of free speech, a public employee "must establish that: (1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the government defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct." *Hurst v. Lee Cty., Miss*, 764 F.3d 480, 484 (5th Cir. 2014). Defendants' motion initially seeks judgment on Wetherbe's retaliation claim on the grounds that he has not alleged that he suffered an adverse employment action.[3]

3. Wetherbe contends that the Court already determined in its prior order of dismissal that he had sufficiently alleged he

Appendix B

An adverse employment action is "a judicially-coined term referring to an employment decision that affects the terms and conditions of employment." *Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014). "The broadest definition of an adverse employment action includes hires, refusals to hire, discharges, promotions, refusals to promote, demotions, compensation decisions, and formal reprimands." *Mylett v. City of Corpus Christi*, 97 F. App'x 473, 475 (5th Cir. 2004). " '[D]ecisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures,' while extremely important

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suffered an adverse employment action and that, as a result of the law-of-the-case doctrine, Defendants cannot revisit that issue. (Wetherbe's Resp. (doc. 93) 7.) The Court's prior order of dismissal noted that "[t]aken as true, Wetherbe's allegations sufficiently posit that he suffered an adverse employment action." (Mem. Op. and Order (doc. 32) 12.) But that determination was made on the basis of a pleading that has now been amended. *See Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042-43 (9th Cir. 2018) (concluding that district court erred by concluding that, because it had dismissed the plaintiff's original complaint, albeit without prejudice, it was precluded by the law-of-the-case doctrine from reviewing an amended complaint that included different factual allegations than those alleged in the original complaint). And in any event, the law-of-the-case doctrine "operates to preclude a reexamination of issues of law decided on appeal, explicitly or by necessary implication, either by the district court on remand or by the appellate court in a subsequent appeal." *Chapman v. Nat'l Aeronautics and Space Admin.*, 736 F.2d 238, 241 (5th Cir. 1984). On appeal of this Court's prior order, the Fifth Circuit did not address whether Wetherbe had sufficiently alleged he suffered an adverse employment action. And the doctrine "does not operate to prevent a district court from reconsidering prior rulings." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010).

to the person who dedicated his or her life to teaching, do not rise to the level of constitutional deprivation." *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997) (quoting *Dorsett v. Bd. of Trs. for State Colls. & Univs.*, 940 F.2d 121, 123 (5th Cir. 1991)). Nevertheless, "[a] transfer may be considered the functional equivalent of a demotion and qualify as an adverse employment action if the new position is 'objectively worse.' " *Id.*; *see also Thompson*, 764 F.3d at 503 ("[T]o be the equivalent to a demotion, a transfer need not result in a decrease in pay, title or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement."). And, a " 'campaign of retaliatory harassment' is actionable [but] only where it constitutes 'a constructive adverse employment action." *Mylett*, 97 F. App'x at 476 (quoting *Colson v. Grohman*, 174 F.3d 498, 514 (5th Cir. 1999)).

Wetherbe's latest amended complaint claims that the following alleged incidents constitute adverse employment actions:

(1) Nail changed Wetherbe's fall 2013 semester schedule at the last minute during a meeting on August 5, 2013, between Nail, Wetherbe, and Wetherbe's area coordinator, Dr. Glenn Browne, which required Wetherbe to cancel his family vacation plans to prepare. (Pl.'s Am. Compl. (doc. 86) 17, ¶ 38.) Wetherbe alleges that faculty normally have at least five months to prepare to teach their classes. (*Id.* at 15, ¶ 34; 23, ¶ 56(5).) During the August 5 meeting,

Nail removed Wetherbe from a top-rated MBA communications class, asserting that Wetherbe was not qualified to teach it and his doing so would jeopardize accreditation, despite the fact that he had taught the course over forty times during a ten-year period at TTU and had also taught it at each of the universities for which he previously worked. (*Id.* at 15-17, ¶¶ 35-39.) Instead, Nail assigned Wetherbe to an introductory freshman/sophomore class that doctoral students normally teach. (*Id.* at 17, ¶39; 23, ¶ 56(5).) Importantly for purposes of whether this rose to the level of an adverse employment action, Wetherbe alleges that his removal from this MBA course "came with a loss of pay." (*Id.* at 23, ¶ 56(4).)

(2) Wetherbe also alleges that Nail refused to permit him to lead the development of "an internet-based social media thought leadership platform for entrepreneurs called Entrepreneur & Innovation Exchange, or EIX," that was funded by Best Buy and its founder Dick Schulze, which "adversely affected his income by approximately $50,000." (*Id.* at 19-20, ¶¶ 45-46; 23, ¶ 56(2),(3).)

(3) Nail removed Wetherbe from the Stevenson Chaired Professorship over protests by Bobby Stevenson, the donor of the chair, thus "cost[ing] Wetherbe approximately $90,000 per year in funding to support research and philanthropy." (*Id.* at 21, ¶§ 49-50; 24, ¶ 56(7).) Wetherbe was allegedly removed as a result of Nail's "new

uniform policy limiting the amount of time professors could hold endowed professorships to 15 years," but "this new policy was not implemented for any other faculty." (*Id.* at 21, ¶50.)

(4) Nail informed Wetherbe on March 5, 2015, that he would henceforth be treated as a "professor of practice" rather than a "full research professor without tenure" for purposes of assigning his teaching load, which increased that "workload by fifty percent" and "was a demotion." (*Id.* at 22, ¶¶ 52; 23-24, ¶ 56(1), (6).)

The Court agrees with Wetherbe that, as alleged, these incidents rise to the level of adverse employment actions. Wetherbe alleges that he was demoted from a full professor to a professor of practice, which drastically increased his teaching workload. He also alleges that he was removed from an endowed chair over the protest of its donor, allegedly in accordance with new policy that was only applied to him, resulting in a decrease in his available funds for research. And he also alleges that he was removed from a long-taught MBA course to teach an introductory course generally taught by graduate students, which resulted in a loss of pay. The Court has little trouble concluding that Wetherbe has adequately alleged that he suffered adverse employment actions. Nail may disagree about what exactly happened, why it happened, or the effect those events had on Wetherbe's pay, status, or even workload, but that is not within the purview of a Rule 12(c) motion challenging Wetherbe's

pleading.[4] Wetherbe has adequately alleged the he suffered adverse employment actions in the form of losses of pay and a demotion.

B. Qualified Immunity

Nail also contends that he is entitled to qualified immunity from Wetherbe's suit. The doctrine of quality 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Claims of qualified immunity are evaluated using a two-prong analysis, which requires the plaintiff to show (1) that the official's conduct violated plaintiff's constitutional right and (2) that the constitutional right was clearly established at the time of the violation. *Id.* at 232. Courts may address these prongs in either order. *Id.* at 242.

1. Constitutional Violation

Wetherbe has sufficiently alleged a violation of his constitutional rights. As previously mentioned, to

4. Indeed, most of the cases cited in Defendants' brief involved decisions on or reviews of summary judgments or trials.

adequately plead a claim for retaliation based on the exercise of free speech, a public employee "must establish that: (1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the government defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct." *Hurst*, 764 F.3d at 484. Defendants' motion only challenges "elements one and four here." (Defs.' Br. (doc. 91) 17.) The Court has already determined, above, that Wetherbe has sufficiently alleged he suffered an adverse employment action. And Wetherbe clearly alleges that Nail knew about—and that his actions were motivated by—Wetherbe's published articles against tenure.[5] (Pl.'s Am. Compl. (doc. 86) 2, ¶ 2; 4, ¶6; 18, ¶¶ 41-42; 20, ¶ 47; 23, ¶ 55.)

2. Clearly Established Law

Under the second prong of the qualified-immunity test, the Court must determine whether Wetherbe has sufficiently alleged facts demonstrating that Nail's conduct "was objectively unreasonable in light of clearly established law at the time of the incident." *Charles v. Grief*, 522 F.3d 508, 511 (5th Cir. 2008). This prong also "entails [a] two-part inquiry[:] whether the right was

5. Defendants contend that "this Court already made a finding that Wetherbe failed to establish that Nail had any knowledge of his views on tenure prior to or in conjunction with his publication or speeches." (Defs.' Br. (doc. 91) 18 (citing "Doc. No. 32, pgs 13-14").) But any such "finding" related to a prior version of Wetherbe's complaint and not the one currently pending before the Court.

clearly established at the time of the challenged conduct, and, even if it was, whether the individual [d]efendant's conduct was nevertheless objectively reasonable." *Kostic v. Tex. A&M Univ. at Commerce*, 11 F. Supp. 3d 699, 721 (N.D. Tex. 2014) (Lynn, J.) (quotations omitted).

Regarding the first part of this inquiry, the Court finds its decision in *Kostic* instructive:

> The critical question is whether the state of the law at the time gave the official "fair warning" that his or her act was unconstitutional. *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741). The Court "must ask whether the law so clearly and unambiguously prohibited [the official's] conduct that every reasonable official would understand that what he is doing violates [the law]," and, "[t]o answer that question in the affirmative, [the Court] must be able to point to controlling authority"—or a "robust consensus of persuasive authority"—"that defines the contours of the right in question with a high degree of particularity." *Id.* (internal quotation marks and footnotes omitted). [However, a] " 'case directly on point' " is not required. *Id.* at 412 (quoting [*Ashcroft v.*] *al-Kidd*, 131 S. Ct. [2074,] 2083 [2011]). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

But a court must ask "not only whether courts have recognized the *existence* of a particular constitutional right, but also ... whether that right has been defined with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct." *Morgan*, 659 F.3d at 372 (quoting *McClendon [v. City of Columbia]*, 305 F.3d [314,] 331 [5th Cir. 2002]). "Under the Fifth Circuit standard, the doctrine of qualified immunity protects government officials from civil damages liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question *beyond debate*." *Wyatt [v. Fletcher*], 718 F.3d [496,] 503 [(5th Cir. 2013)]. "This requirement establishes a high bar. When there is no controlling authority specifically prohibiting a defendant's conduct, the law is not clearly established for the purposes of defeating qualified immunity." *Id.*

....

At the time of the alleged violation of Plaintiff's First Amendment rights in 2009 and later, both Supreme Court and Fifth Circuit law clearly proscribed retaliation by a government employer against an employee for engaging in protected speech. *See Davis* [*v. McKinney*], 518 F.3d [304,] 317 [(5th Cir. 2008)] (citations omitted); *Petrie* [*v. City of Grapevine*], 904

> F. Supp. 2d [569,] 589-91 [(N.D. Tex. 2012) (Lynn, J.)]; *see also Haverda* [*v. Hays Cty.*], 723 F.3d [586,] 599 [(5th Cir. 2013)] ("[T]here is no doubt that Haverda had a clearly established constitutional right not to be fired for engaging in protected speech."). "More specific to the conduct at issue in this case, the law was clearly established that speech directed to a person outside of the workplace on a matter of public concern only tangentially related to official duties is speech protected by the First Amendment." *Petrie* [*v. Salame*], 546 F. App'x [466,] 470 [(5th Cir. 2013)], *see also Petrie*, 904 F. Supp. 2d at 590 ("By the summer of 2009, when the alleged violation occurred, the Supreme Court and Fifth Circuit had explained that speech was not constitutionally protected if made 'pursuant to official duties.' The Fifth Circuit had further defined 'pursuant to official duties' as 'activities undertaken in the course of performing ones job.' And it had clarified that an employee making external communications is typically not speaking 'pursuant to official duties.' " (Citations omitted.)).

Kostic, 11 F. Supp. 3d at 721-22. The events about which Wetherbe complains took place in 2013 and thereafter. Thus, in light of this Court's decision in *Kostic*, the Court concludes that at the time of the events alleged in Wetherbe's complaint, it was clearly established that a state official could not impose adverse employment actions

on a state employee on account of that employee's outside speech on a matter of public concern.[6]

Finally, the Court must determine whether Wetherbe has adequately alleged that Nail's actions were objectively unreasonable in light of that clearly established law. *See id.* at 723 ("Even if the right [were] clearly established at the time of the alleged violation, a defendant [would] still be entitled to qualified immunity if the defendant's conduct was 'objectively reasonable in light of 'clearly established' law at the time of the violation.") (quoting *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004)). "The reasonableness of an official's actions

6. Defendants allege that Wetherbe loses on this issue because he "failed to cite to any cases where actions taken by a university Dean in accordance with university policy and administration affecting a faculty member who spoke out against the tenure system was a violation of that faculty member's First Amendment right." (Defs.' Br. (doc. 91) 14.) Essentially, Defendants contend that if there is not a factually identical case in which the defendant's actions were held to be unconstitutional, they are entitled to immunity. The Court disagrees. Defendants are correct that the bar is high, inasmuch as "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). But Defendants place it out of reach. Although courts are "not to define clearly established law at a high level of generality, this does not mean that a case directly on point is required." *Morgan*, 659 F.3d at 372; *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point"). At the time Nail acted, the law was clearly established, as noted in Kostic, that a university dean could not demote or reduce the pay of a professor on account of his having spoken publicly on a matter of public concern.

must be assessed in light of the facts available to him at the time of his action and the law that was clearly established at the time of the alleged illegal acts." *Porter*, 393 F.3d at 614. But because this is a Rule 12(c) motion, the Court looks only to the facts alleged in Wetherbe's amended complaint. Wetherbe alleges that Nail demoted him, caused him to suffer reductions in his pay, and essentially engaged in a pattern of harassment against him simply because Nail did not agree with or appreciate Wetherbe's authoring anti-tenure articles. At the time of his actions, however, any reasonable official in Nail's position should have understood that demoting or reducing Wetherbe's pay on account of his publication of articles expressing anti-tenure views violated Wetherbe's First Amendment rights.[7] Consequently, the Court concludes that Wetherbe has sufficiently alleged that Nail's actions were objectively unreasonable in light of clearly established law.

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7. Defendants point out that previously, "this Court found that Wetherbe's publications regarding tenure did not qualify as speech on a matter of public concern." (Defs.' Br. (doc. 91) 16.) Thus, Defendants argue the law on this issue was not clearly established. Wetherbe has not responded to this contention. Nevertheless, the Court is not persuaded, at least at this juncture of these proceedings, that its prior error is a sufficient basis upon which to conclude that the law regarding retaliating against a public employee for speaking out on a matter of public concern was not clearly established when Nail allegedly acted in mid-to-late 2013. Indeed, almost all of the cases upon which the Fifth Circuit relied in reversing this Court's prior decision on the public-concern issue were decided well before the year of Nail's alleged actions.

IV. Conclusion

For the foregoing reasons, the Court concludes that Wetherbe has adequately pled that he suffered adverse employment actions by way of Nail's actions, and that Wetherbe's allegations are sufficient to overcome Nail's qualified immunity defense. Consequently, Nail's Motion for Judgment on the Pleadings (doc. 90) is DENIED.

APPENDIX C — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 31, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-11325

JAMES C. WETHERBE, PH.D.,

Plaintiff-Appellee,

versus

TEXAS TECH UNIVERSITY SYSTEM; LANCE NAIL, PH.D., IN HIS INDIVIDUAL CAPACITY ONLY; MARGARET WILLIAMS, CURRENT DEAN OF RAWLS COLLEGE OF BUSINESS AT TEXAS TECH UNIVERSITY, IN HER OFFICIAL CAPACITY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:15-CV-119

FILED July 31, 2025

ON PETITION FOR REHEARING EN BANC

Before DENNIS, RICHMAN, and HAYNES, *Circuit Judges*.

Appendix C

PER CURIAM:

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

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUATORY PROVISIONS

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix D

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Currentness

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.