

No. 25-927

IN THE
Supreme Court of the United States

RICHARD LOWERY,

Petitioner,

v.

LILLIAN MILLS, in her official capacity as Dean of the
McCombs School of Business at the University of
Texas at Austin, et al.,

Respondents.

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

**BRIEF OF ALLIANCE DEFENDING FREEDOM
AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER**

JAMES A. CAMPBELL
ALLIANCE DEFENDING
FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176

JOHN J. BURSCH
Counsel of Record
TYLER W. SHANNON
ALLIANCE DEFENDING
FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adfllegal.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Authorities	iii
Interest of <i>Amicus Curiae</i>	1
Summary of the Argument	2
Argument.....	3
I. The First Amendment precludes the use of government power to punish or suppress disfavored expression.	3
II. The First Amendment prevents government actors from wielding their power to interfere with employee speech rights, including through threats of punitive action.	5
III. The adverse-action test adopted by ten circuits protects public employees from all forms of speech suppression.....	8
1. The majority test protects against less formal actions that are effective means of suppressing speech, like threats and harassment.....	9
2. The majority test is essential to protect disfavored political and religious speech.....	10
IV. The Fifth Circuit’s test is underinclusive, inevitably chills speech, and provides a	

roadmap to suppress speech without risk of accountability.....	12
V. The test adopted by the majority of circuits leaves employers with ample room to govern the workplace without undue interference.	14
Conclusion	19

TABLE OF AUTHORITIES

Cases

<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023).....	1
<i>Alston v. Spiegel</i> , 988 F.3d 564 (1st Cir. 2021)	8
<i>American Communications Association v. Douds</i> , 339 U.S. 382 (1950).....	4
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	4, 5
<i>Bart v. Telford</i> , 677 F.2d 622 (7th Cir. 1982)	9, 18
<i>Barton v. Clancy</i> , 632 F.3d 9 (1st Cir. 2011).....	9
<i>Belcher v. City of McAlester</i> , 324 F.3d 1203 (10th Cir. 2003).....	10
<i>Benison v. Ross</i> , 765 F.3d 649 (6th Cir. 2014)	7
<i>Bennett v. Hendrix</i> , 423 F.3d 1247 (11th Cir. 2005).....	8, 16
<i>Board of County Commissioners v. Umbehr</i> , 518 U.S. 668 (1996).....	4, 6, 7, 15
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980).....	5

<i>Breaux v. City of Garland</i> , 205 F.3d 150 (5th Cir. 2000)	12, 13, 14, 16
<i>Burlington Northern & Santa Fe Railway Company v. White</i> , 548 U.S. 53 (2006).....	7, 9, 17
<i>City of San Diego v. Roe</i> , 543 U.S. 77 (2004).....	15
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	15
<i>Coszalter v. City of Salem</i> , 320 F.3d 968 (9th Cir. 2003)	8, 9
<i>Couch v. Board of Trustees of Memorial Hospital of Carbon County</i> , 587 F.3d 1223 (10th Cir. 2009).....	15, 16, 18, 19
<i>Dahlia v. Rodriguez</i> , 735 F.3d 1060 (9th Cir. 2013)	10
<i>Damiano v. Grants Pass School District No. 7</i> , 140 F.4th 1117 (9th Cir. 2025)	1
<i>Dodge v. Evergreen School District #114</i> , 56 F.4th 767 (9th Cir. 2022)	10, 13, 19
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	5
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	15

<i>Houston Community College System v. Wilson</i> , 595 U.S. 468 (2022).....	19
<i>Josephson v. Ganzel</i> , 115 F.4th 771 (6th Cir. 2024)	1, 11
<i>Keenan v. Tejeda</i> , 290 F.3d 252 (5th Cir. 2002)	8, 16
<i>Kennedy v. Bremerton School District</i> , 597 U.S. 507 (2022).....	15
<i>Kubala v. Smith</i> , 984 F.3d 1132 (6th Cir. 2021)	18
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972).....	4
<i>McKee v. Hart</i> , 436 F.3d 165 (3d Cir. 2006)	9, 18
<i>Meriwether v. Hartop</i> , 992 F.3d 492 (6th Cir. 2021)	1
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958).....	3, 4, 7
<i>National Institute of Family and Life Advocates</i> <i>v. Becerra</i> , 585 U.S. 755 (2018).....	1
<i>National Rifle Association v. Vullo</i> , 602 U.S. 175 (2024).....	3, 4, 7, 16, 18
<i>Nieves v. Bartlett</i> , 587 U.S. 391 (2019).....	16

<i>Okwedy v. Molinari</i> , 333 F.3d 339 (2d Cir. 2003)	12
<i>Pickering v. Board of Education of Township High School District 205</i> , 391 U.S. 563 (1968).....	5, 6, 13
<i>Pieczynski v. Duffy</i> , 875 F.2d 1331 (7th Cir. 1989)	9
<i>Quantity of Copies of Books v. Kansas</i> , 378 U.S. 205 (1964).....	14
<i>Rutan v. Republican Party of Illinois</i> , 497 U.S. 62 (1990).....	5, 6, 7
<i>Snoeyenbos v. Curtis</i> , 60 F.4th 723 (4th Cir. 2023)	18
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	3
<i>Specht v. City of New York</i> , 15 F.4th 594 (2d Cir. 2021)	15
<i>Stavropoulos v. Firestone</i> , 361 F.3d 610 (11th Cir. 2004)	14
<i>Theis v. Intermountain Education Service Board of Directors</i> , No. 2:25-CV-00865-HL, 2025 WL 2406871 (D. Or. Aug. 20, 2025)	11, 12
<i>United States v. Stevens</i> , 559 U.S. 460 (2010).....	3

Other Authorities

- Paycheck to Paycheck: what, who, where, why?*,
Bank of America Institute (Oct. 22, 2024),
<https://perma.cc/X6UR-XUPY> 6
- Transcript of Oral Argument, *Burlington*
Northern & Santa Fe Railway Company v.
White, 548 U.S. 53 (2006) (No. 05-259) 17

INTEREST OF *AMICUS CURIAE*¹

Alliance Defending Freedom is a non-profit, public-interest legal organization providing strategic planning, training, funding, and litigation representation to protect Americans’ constitutional rights—including the First Amendment right to the freedom of speech. Since 1994, ADF has played a role, either directly or indirectly, in many free-speech cases before this Court. *E.g.*, *Chiles v. Salazar*, No. 24-539 (U.S.); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *National Inst. of Family and Life Adovcs. v. Becerra*, 585 U.S. 755 (2018).

As relevant here, ADF regularly represents public employees whose free-speech rights have been abridged by government employers. *E.g.*, *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117 (9th Cir. 2025); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). The circuit split over the adverse-action test in First Amendment retaliation claims directly impacts ADF clients. *E.g.*, *Josephson v. Ganzel*, 115 F.4th 771 (6th Cir. 2024) (ruling for plaintiff by defining an adverse action in a First Amendment retaliation case as an action that “would chill or silence a person of ordinary firmness from future First Amendment activities.” (citation omitted)). Yet courthouse doors will be closed to many clients under the Fifth Circuit’s restrictive test. The Court should grant the petition, resolve the split, and reject the Fifth Circuit’s test.

¹ No party’s counsel authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution to fund the preparation or submission of this brief. Counsel were timely notified of this brief. S. Ct. R. 37.2.

SUMMARY OF THE ARGUMENT

The petition presents a clear, deep, and long-standing circuit split on a question of importance to millions of Americans: What employer conduct constitutes sufficiently adverse action for a public employee to allege a First Amendment retaliation claim? In all but two federal courts of appeals, an employee satisfies the adverse action requirement by identifying government conduct that would deter a reasonable person from exercising their First Amendment rights. Two circuits—including the Fifth Circuit below—apply a narrower test that requires a completed action, such as a discharge, demotion, or reprimand. The Court should grant the petition and reverse.

The First Amendment broadly protects speech and, absent exceptional circumstances, precludes all government conduct that punishes or suppresses disfavored but protected speech. Those same principles apply to government action that punishes or suppresses public-employee speech. The First Amendment prevents government employers from wielding their power to interfere with employees' free-speech rights, including through threats of punitive action and other informal workplace conduct.

The reasonably-likely-to-deter test adopted by most circuits accounts for these interests. The test encompasses all employer conduct that's reasonably likely to deter employees from engaging in protected expression. It captures completed, ultimate employment actions, like termination, plus other informal workplace conduct that suppresses speech, like harassment and threats of punitive action. That's because, in either circumstance, speech is chilled.

The Fifth Circuit’s alternative test is radically underinclusive, inevitably chills speech, and provides employers with a roadmap to suppress speech without accountability. By the court of appeals’ own admission, the test fails to capture some employer conduct that suppresses speech. And the test excludes from its reach particular employer conduct that this Court has acknowledged gives rise to First Amendment claims—most notably, threats of termination.

The majority test is administrable, protects more employee speech, excludes trivial workplace annoyances, leaves employers with sufficient room to manage the workplace without undue interference, and has governed most of the country for decades without issue. Rather than allowing public-employee-speech protections to vary based on where an individual lives, the Court should grant the petition, adopt the reasonably-likely-to-deter test, and reverse.

ARGUMENT

I. The First Amendment precludes the use of government power to punish or suppress disfavored expression.

The First Amendment’s core command is that government officials may not “use the power of the State to punish or suppress disfavored expression.” *NRA v. Vullo*, 602 U.S. 175, 188 (2024). Punishment and suppression “may inevitably follow from varied forms of governmental action.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). Often, government actors directly punish and suppress expression through criminal or civil sanctions. *E.g.*, *United States v. Stevens*, 559 U.S. 460, 465–67 (2010); *Snyder v. Phelps*, 562 U.S. 443, 450 (2011).

At other times, government actors use less direct means to suppress speech. This Court has long “[r]ecogniz[ed] that ‘constitutional violations may arise from the deterrent, or “chilling,” effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights.’” *Board of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). In other words, the Constitution precludes government action that “would have the practical effect ‘of discouraging’ the exercise of constitutionally protected” rights. *NAACP*, 357 U.S. at 461 (quoting *American Commc’ns Ass’n v. Douds*, 339 U.S. 382, 393 (1950)).

Few means are more effective at indirectly suppressing speech than the threat of future punitive action. That’s why, for more than six decades, this Court has held “that the First Amendment prohibits government officials from relying on the ‘threat of invoking legal sanctions ... to achieve the suppression’ of disfavored speech.” *Vullo*, 602 U.S. at 189 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)) (emphasis added). That is, the First Amendment prohibits “impermissible *attempts* to coerce,” regardless of whether those attempts are accompanied by formal sanctions or punishment. *Id.* at 188 (emphasis added). So when a plaintiff plausibly alleges “conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff’s speech,” a First Amendment claim arises. *Id.* at 191. Otherwise, bureaucrats can control speech through threats of punishment.

To put it another way, the First Amendment precludes government efforts to suppress or coerce expression, “[r]egardless of the nature of the inducement.” *Branti v. Finkel*, 445 U.S. 507, 514 n.9 (1980) (quoting *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality)). What matters is not the “form” of the government conduct, but its “substance.” *Bantam Books*, 372 U.S. at 67. When government actors engage in conduct that’s likely to chill speech—whether directly or indirectly, through enforced punishment or threats of future punishment—a First Amendment claim exists to stop the censorship.

II. The First Amendment prevents government actors from wielding their power to interfere with employee speech rights, including through threats of punitive action.

This Court’s public-employee-speech precedents reflect the same principles. “The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees’ freedom to” speak as citizens on matters of public concern. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990); accord *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568–75 (1968).

Like its treatment of the public, government may wield its power to interfere with employee speech rights in various ways. Although this Court’s prior public-employee cases dealt with ultimate employment actions or direct monetary harms, the Court has often explained that the First Amendment precludes other forms of employment action that function to suppress speech. *E.g.*, *Rutan*, 497 U.S. at 75 n.8

("[T]he First Amendment ... protects state employees ... from even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights." (citation modified)).

The Court has declined to curate a list of particularly "acute" adverse employment actions giving rise to First Amendment claims. *Id.* at 79. Rather, the key question is "whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights." *Ibid.*

Few actions are likely to suppress speech more than threats of future punitive actions—like termination, pay cuts, or demotions. Consider threats of termination. This Court has repeatedly explained that "the First Amendment forbids government officials to ... threaten to discharge public employees solely for" their engaging in protected expression. *Id.* at 64; accord, *e.g.*, *Pickering*, 391 U.S. at 572 ("it is essential that [employees] be able to speak out freely" on issues of public concern "without fear of retaliatory dismissal").

That makes sense. Like actual termination, "the threat of dismissal from public employment is ... a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. Employment relationships "provide[] a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern." *Umbehr*, 518 U.S. at 674. Many employees live paycheck to paycheck. *Paycheck to Paycheck: what, who, where, why?*, Bank of America Institute (Oct. 22, 2024), <https://perma.cc/X6UR-XUPY> (concluding that a quarter of all households

live paycheck to paycheck). And the risk of losing even one paycheck—let alone the prospect of no paycheck until a favorable final judgment in a post-termination First Amendment lawsuit—will deter many employees from engaging in constitutionally protected speech. *Umbehr*, 518 U.S. at 674; *cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 73 (2006) (“A reasonable employee facing the choice between retaining her job (and paycheck) and [engaging in protected activities] might well choose the former.”). Unsurprisingly, threats of significant financial penalties often dissuade “a reasonable individual ... from engaging in protected activity.” *Benison v. Ross*, 765 F.3d 649, 660 (6th Cir. 2014).

In most instances and in most courts, threats of punitive action give rise to First Amendment claims. The First Amendment broadly bars indirect suppression of speech through coercive threats. *Vullo*, 602 U.S. at 189. And this Court’s cases have long protected citizens against government conduct that is “likely” to threaten the citizen’s employment and economic well-being. *NAACP*, 357 U.S. at 462–63.

Even in the context of public employment, “[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” *Rutan*, 497 U.S. at 77–78. So, to comply with the First Amendment’s commands, an adverse-action test for employee-speech claims must account for actions *and* threats levied by government actors that are likely to suppress speech.

III. The adverse-action test adopted by ten circuits protects public employees from all forms of speech suppression.

Applying these principles, most courts of appeals apply an adverse-action test that captures *all* employer conduct that is reasonably likely to deter employees from engaging in protected expression. As the petition explains, though precise formulations vary, most circuits require employees to identify employer conduct that “would deter a reasonable person from exercising his First Amendment rights.” *Alston v. Spiegel*, 988 F.3d 564, 575 (1st Cir. 2021); Pet.2, 8–10.

This test aligns with decades of First Amendment retaliation precedent. *E.g.*, *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003) (adopting the test “not as a new test, but merely as a more specific articulation of the standard set forth in previous First Amendment retaliation cases.”). It’s the test that courts already use to evaluate First Amendment retaliation claims brought by private citizens, even in the Fifth and Eleventh Circuits. *E.g.*, *Keenan v. Tejada*, 290 F.3d 252, 259 (5th Cir. 2002); *Bennett v. Hendrix*, 423 F.3d 1247, 1254–55 (11th Cir. 2005). And it shares significant similarities with the Title VII retaliation test adopted by this Court in *Burlington*. Pet.8–9.

The reasonably-likely-to-deter test provides two key features. *First*, it protects against less formal employer actions that are effective means of suppressing speech. *Second*, its broader scope provides greater protection for disfavored political and religious speech.

1. The majority test protects against less formal actions that are effective means of suppressing speech, like threats and harassment.

The category of adverse action covered by the majority test is not limited to completed, ultimate employment actions, like termination, pay cuts, demotions, and formal discipline. Instead, the majority test accounts for *all* employer conduct that reasonably interferes with and deters protected employee speech. Because there are “many forms that effective retaliation can take,” *Burlington*, 548 U.S. at 64, the reasonably-likely-to-deter test requires a careful examination of the context and nature of the employer’s conduct, *Coszalter*, 320 F.3d at 975. But decades of experience have identified two categories of conduct that employers frequently use to suppress employee speech.

First, the majority test accounts for significant acts of workplace harassment that seek to deter protected expression. See *Barton v. Clancy*, 632 F.3d 9, 29–30 (1st Cir. 2011); *McKee v. Hart*, 436 F.3d 165, 169 (3d Cir. 2006). The harassment cases pick up on the common-sense intuition that employers can suppress unpopular speech by engaging in a variety of workplace conduct that’s detrimental to the employee but does not amount to a completed, ultimate employment action. *E.g.*, *Coszalter*, 320 F.3d at 976–77 (disciplinary investigations, change in duties, verbal harassment); *Pieczynski v. Duffy*, 875 F.2d 1331, 1335–36 (7th Cir. 1989) (removing workplace privileges, denying requests for vacation time, altering duties to less favorable work); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (Posner, J.)

(“campaign of petty harassments,” including baseless reprimands and public ridicule for innocuous acts). An employer can, for example, wield its power to suppress disfavored speech on topics like sex or gender by publicly ridiculing the employee’s views at meetings or encouraging fellow employees to treat the employee poorly.

Second, the majority test accounts for threats of future punitive actions that are likely to deter speech because the communications threaten significant consequences. See *Belcher v. City of McAlester*, 324 F.3d 1203, 1207 (10th Cir. 2003). Though not all threats are likely to deter protected expression, many—including threats of termination, pay cuts, or other serious sanctions by persons able to carry the threats out—are effective means of suppressing employee speech. *E.g.*, *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 779 (9th Cir. 2022) (“It is hardly controversial that threatening a subordinate’s employment if they do not stop engaging in protected [political] speech is reasonably likely to deter that person from speaking.”); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (en banc) (threats by law enforcement officer to wield arrest and detention powers).

2. The majority test is essential to protect disfavored political and religious speech.

The majority adverse-action test is essential to protecting employee expression, particularly disfavored political and religious expression. Consider a few examples.

Start with the case of Professor Allan Josephson. In 2017, Josephson, a professor of psychiatry at the University of Louisville’s School of Medicine, participated in a think-tank panel on the treatment of childhood gender dysphoria. *Josephson v. Ganzel*, 115 F.4th 771, 778–79 (6th Cir. 2024). Critical of the views he expressed, several of Josephson’s superiors embarked on a campaign of threats and harassment, tracking Josephson’s conduct and lobbying officials to terminate his employment. *Id.* at 778–81, 787–88.

Applying the reasonably-likely-to-deter test, the Sixth Circuit held that Josephson’s superiors engaged in adverse actions supporting a retaliation claim by creating a “hostile, humiliating work environment” designed to silence his speech on gender dysphoria and threaten his job.” *Id.* at 787–88. That conclusion was unremarkable, in the Sixth Circuit’s view, because actions designed to threaten a person’s “economic livelihood are likely to deter a person of ordinary firmness from engaging in protected speech.” *Id.* at 788 (citation modified). “[A] credible threat to the nature and existence of one’s ongoing employment is of a similar character to the other recognized forms of adverse action—termination, refusal to hire, etc.—” to give rise to a retaliation claim. *Ibid.* (citation modified).

Next, consider the case of Rod Theis, a school social worker who passively displayed books expressing school-disfavored views on issues of childhood identity. *Theis v. Intermountain Educ. Serv. Bd. of Dirs.*, No. 2:25-CV-00865-HL, 2025 WL 2406871, at *1–3 (D. Or. Aug. 20, 2025). Although school administrators permitted other employees to display various books and other materials that communicated ideological messages, the school

claimed Theis's passive display violated the school's speech code and threatened formal discipline, including termination. Because the Ninth Circuit applies the reasonably-likely-to-deter test, Theis could seek relief before his employer carried out its threats. *Id.* at *5.

That these circumstances arise in the employment context is no surprise. Across the regulatory landscape, disfavored religious and political groups have often invoked the protection of First Amendment retaliation claims after receiving threats from government officials. *E.g.*, *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam) (holding that a religious group stated a First Amendment claim against a municipal official who wrote a letter "contain[ing] an implicit threat of retaliation" against a billboard company displaying the group's disfavored message). Experience demonstrates that the reasonably-likely-to-deter test is indispensable to protect unpopular religious and political speech by public employees.

IV. The Fifth Circuit's test is underinclusive, inevitably chills speech, and provides a roadmap to suppress speech without risk of accountability.

Contrary to the majority rule, the Fifth Circuit has long applied a narrow adverse-action test that inevitably allows employers to suppress speech. That court's test limits public-employee-retaliation claims to a narrow category of employer conduct involving completed acts: "discharges, demotions, refusals to hire, refusals to promote, and reprimands." Pet.19a (quoting *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000)). The test excludes any other employer

conduct—including harassment and threats of punitive action—even when that conduct is reasonably likely to deter employee speech. Pet.19a–23a.

The Fifth Circuit’s treatment of threats demonstrates its test’s underinclusiveness. The court’s test categorically excludes a retaliation claim based on *any* employer threat, even the most coercive. *Breaux*, 205 F.3d at 160 (“[R]etaliatory threats [of termination] are just hot air unless the public employer is willing to endure a lawsuit over a termination.”). But common sense, this Court’s precedents, and the experience of the courts of appeals demonstrate that threats lobbed by employers are *likely* to suppress unpopular employee speech in many cases. See, *e.g.*, *Pickering*, 391 U.S. at 574; *Dodge*, 56 F.4th at 779.

Consider a few threats the Fifth Circuit’s test authorizes. Imagine an elected school-board official who can fire subordinates at will and has recently exercised that power. That official is in a tight reelection race and repeatedly threatens to fire teachers who fail to support the official’s campaign. If that threat results in teachers speaking in support of the official against their wishes, and no firings actually occur, there’s no cause of action. Or consider an agency head who, after carrying out similar threats in the past, threatens to significantly cut an employee’s pay if the employee does not discontinue their criticism of the federal government’s broader budgetary practices. When that employee silences her speech and no pay cut materializes, the employee has no recourse for the First Amendment violation.

Such threats will inevitably chill employee speech in many cases. The Fifth Circuit even recognizes this

point: “some [employment actions] are not actionable even though they have the effect of chilling the exercise of free speech.” Pet.23a (quoting *Breaux*, 205 F.3d at 157). The Fifth Circuit also acknowledged that the specific threats levied at Petitioner—to reduce his pay, terminate his position at a University Center, and reduce his access to valuable university benefits—“could lead a reasonable individual” in Petitioner’s position to “self-censor.” Pet.15a.

Yet in the Fifth Circuit, these highly coercive threats are insufficient to state a claim. The rule “draw[s] [a] blueprint[] showing” employers “how to avoid the First Amendment’s guarantee of freedom[] of speech.” *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 215 (1964) (Black, J., concurring in the judgment). And it invites employers to engage in even the most coercive threats to suppress disfavored speech with no fear of recrimination. No oversight, no accountability, no remedy.

V. The test adopted by the majority of circuits leaves employers with ample room to govern the workplace without undue interference.

There is no sound reason to create a special test for employee-speech cases. The Fifth and Eleventh Circuits have suggested that a reasonably-likely-to-deter test is unworkable. In their view, the majority test would micromanage the workplace, frustrate the public employer’s operations, and “enmesh federal courts in relatively trivial matters.” *Breaux*, 205 F.3d at 157 (citation modified); accord *Stavropoulos v. Firestone*, 361 F.3d 610, 620–21 (11th Cir. 2004) (citing *Breaux*). That’s wrong. The majority rule has been in place for decades, yet neither the Fifth nor Eleventh Circuit has identified administrability

concerns in the courts that apply the reasonably-likely-to-deter test. That’s not surprising.

First, identifying an adverse employment action satisfies only one element of a retaliation claim. Employees must also demonstrate a causal connection between the retaliatory adverse action and protected speech. *Umbehr*, 518 U.S. at 675; *Specht v. City of New York*, 15 F.4th 594, 599–600 (2d Cir. 2021). And the experience of the majority of courts of appeals demonstrates that the causal-connection element often precludes liability for reasonable workplace governance, like otherwise neutral investigations and discipline. *E.g.*, *Couch v. Board of Trs. of Mem’l Hosp. of Carbon Cnty.*, 587 F.3d 1223, 1239–41 (10th Cir. 2009).

Even when causation exists, existing doctrine also provides employers with sufficient bases to defend employment actions “that are necessary for” the employer “to operate efficiently and effectively,” even if those actions burden employee speech. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Under any adverse-action test, employers may control speech that’s “pursuant to” the employee’s “official duties,” *id.* at 421, or not a matter of public concern, *City of San Diego v. Roe*, 543 U.S. 77, 82–85 (2004) (*per curiam*); *Connick v. Myers*, 461 U.S. 138, 143–49 (1983).

And even when an employee speaks as a citizen, employers can still “prove that its interests as employer outweigh even an employee’s private speech on a matter of public concern.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 531 (2022). So contrary to the Fifth Circuit’s concern, employers don’t need a

restrictive adverse-action test to govern the workplace.

Second, courts regularly distinguish between legitimate government conduct and unconstitutional threats that are likely to suppress speech. In other First Amendment contexts, courts have had no trouble differentiating between various forms of legitimate government action—enforcing law, criticizing private speech, and permissible attempts to persuade—and “impermissible attempts to coerce” through threats. *Vullo*, 602 U.S. at 187–88; accord, e.g., *Nieves v. Bartlett*, 587 U.S. 391, 398–408 (2019) (retaliatory arrests). And in most courts of appeals, courts have similarly long discerned between legitimate workplace governance and retaliatory actions likely to deter speech. E.g., *Couch*, 587 F.3d at 1238–43.

Even the Fifth and Eleventh Circuits apply the reasonably-likely-to-deter test to retaliation claims brought by private citizens in the face of potentially legitimate government conduct. *Keenan*, 290 F.3d at 259 (traffic stop and criminal charges); *Bennett*, 423 F.3d at 1254–55 (police activity). That’s so even though the same policy concern could be raised there. There’s no reason those two outlier courts can’t draw the same lines in a public-employment context.

Third, ample practical incentives deter employees from making a federal case out of “relatively trivial matters.” *Breaux*, 205 F.3d at 157. For many employees, lawsuits are slow, stressful, uncertain, and often yield limited financial benefit compared with the time, cost, and emotional toll. Lawsuits can also damage workplace relationships and future job prospects. In many circumstances, when faced with

minor slights, employees will prefer to move on or seek quieter, informal resolutions.

Fourth, courts and employers have significant experience operating under a similar test in the Title VII retaliation context. Though *Burlington*'s Title VII holding is not dispositive of the First Amendment question here, it is instructive because, as the United States explained at oral argument, the test adopted by *Burlington* "is essentially ... the test that this Court applies in the First Amendment context to determine when there's retaliation." Tr. of Oral Argument at 35, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (No. 05-259). That analogous test allows courts to "screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from" protected conduct. *Burlington*, 548 U.S. at 70. The test excludes "those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* at 68. So it's unsurprising that the courts of appeals that apply the reasonably-likely-to-deter test to employee speech claims regularly screen out trivial employer conduct.

As to threats, courts recognize that not all arguably menacing comments are likely to deter a reasonable person from speaking. "Context matters," and whether a threat will deter speech "will often depend upon the particular circumstances." *Id.* at 69.

To determine whether threats are likely to chill speech, courts evaluate the nature and circumstances of the threat, including the consequences contemplated by the threat, the threatener's identity, the threat's clarity or ambiguity, whether the threat was made more than once, and whether the threat can be reasonably carried out. *E.g.*, *Kubala v. Smith*, 984

F.3d 1132, 1140–41 (6th Cir. 2021). “Generally speaking, the greater and more direct” the threatener’s authority, “the less likely” an employee “will feel free to disregard a directive from the official.” *Vullo*, 602 U.S. at 191–92. So repeated, “unambiguous threat[s]” to terminate the recipient’s employment “made by those with the power to carry them out,” are likely to deter speech. *Kubala*, 984 F.3d at 1140–41. But an adverse action is unlikely to arise based on ambiguous, occasional statements, suggesting less severe consequences, made by an alleged threatener that has little power to carry out his threats. *Id.* at 1141–42.

The same is true for employees who recast minor workplace annoyances and routine governance as workplace harassment. An employee must show that the “acts committed by a public employer [are] more than *de minimis* or trivial.” *Snoeyenbos v. Curtis*, 60 F.4th 723, 729–31 (4th Cir. 2023); accord, *e.g.*, *Bart*, 677 F.2d at 625. Applying this test, courts regularly screen out, among other things, occasional verbal reprimands, criticism of the employee’s job performance, and minor slights. *E.g.*, *McKee*, 436 F.3d at 169–71.

Finally, the reasonably-likely-to-deter test enables employers to conduct reasonable workplace investigations and exercise reasonable governance. Throughout most circuits, otherwise neutral investigations based on credible claims of misconduct “will generally not constitute adverse employment action.” *E.g.*, *Couch*, 587 F.3d at 1238–43. Simply put, the majority test permits employers to “take steps to guarantee the accuracy and integrity of [their] practices.” *Id.* at 1243. In many circumstances, those actions will “not deter a reasonable person” from

speaking and “can hardly be considered an adverse employment action.” *Ibid.*

In sum, “the First Amendment prohibits government officials from subjecting individuals to ‘retaliatory actions’ after the fact for having engaged in protected speech.” *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022). And as applied to the employment context, it’s well-settled that “[t]he purpose of protection against retaliation for engaging in protected speech is to stop actions by a government employer that chill the exercise of protected First Amendment rights.” *Dodge*, 56 F.4th at 778–79 (citation modified). Because the reasonably-likely-to-deter test adopted by most courts of appeals fulfills this purpose and protects against all employer actions that chill speech, the Court should grant the petition, resolve the circuit split, and reverse.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JAMES A. CAMPBELL
ALLIANCE DEFENDING
FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176

JOHN J. BURSCH
Counsel of Record
TYLER W. SHANNON
ALLIANCE DEFENDING
FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adflegal.org

MARCH 2025