No. 25-927

In the Supreme Court of the United States

RICHARD LOWERY, *Petitioner*

v.

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

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

BRIEF OF *AMICI CURIAE* PROTECT THE FIRST FOUNDATION, THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, THE NATIONAL COALITION AGAINST CENSORSHIP, AND THE CATO INSTITUTE SUPPORTING PETITIONER

GENE C. SCHAERR
Counsel of Record
HANNAH C. SMITH
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

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QUESTION PRESENTED

The question presented is:

Whether a public employer's threats against an employee can suffice to establish a First Amendment retaliation claim if those threats would dissuade a reasonable employee from speaking on a matter of public importance.

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICI CURIAE*[1]

The petition should be granted because it presents an important and recurring question about the scope of the First Amendment's protections to public employees: whether threats against a public employee give rise to First Amendment retaliation claims if the threats would chill a reasonable public employee's speech on a matter of public importance. As the petition shows (at 8-9), most circuits agree that threats alone can be sufficient if a silenced employee shows "that a reasonable employee would have found the challenged action"—the threat—"materially adverse." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 68 (2006). The Fifth Circuit here, by contrast, requires more and does not recognize threats alone as adverse employment actions even if "they have the effect of chilling the exercise of free speech." App.23a (citation omitted). This unique disadvantage that the Fifth Circuit heaps upon public employees who are "speaking as citizens about matters of public concern" should be rejected. *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006).

The lower court's failure to protect public employees' free speech rights is particularly troubling to *amici* Protect the First Foundation, the Foundation for Individual Rights and Expression, the National Coalition against Censorship, and the Cato Institute.

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici curiae* or their counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief.

Amici (described in the appendix) are non-profit organizations dedicated to defending the rights of Americans—including public employees. While *amici* take different approaches when defending First Amendment rights, they are united in their efforts "to ensure that citizens are not deprived of fundamental rights by virtue of" their government jobs. *Connick* v. *Myers*, 461 U.S. 138, 147 (1983).

Amici emphasize that the issues presented in this case are not isolated. Courts across the country are consistently faced with cases where public employers threaten their employees' jobs and livelihoods because of the employees' exercise of their First Amendment right to speak on matters of public importance. And until this Court weighs in on the issue, public employees in those circuits that do not recognize threats alone as adverse employment actions—no matter how coercive the threat—are left functionally unprotected so long as their employer stops short of "discharges, demotions, refusals to hire, refusals to promote, and reprimands." App.22a (quoting *Breaux* v. *City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000)).

Such a burdensome requirement should be rejected to prevent irreparable harm to public employees. It ignores this Court's repeated recognition that "a threat of adverse government action" can suppress speech just as much as the adverse action itself. *National Rifle Ass'n of Am.* v. *Vullo*, 602 U.S. 175, 191 (2024) (discussing *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67-68 (1963)). This Court should grant the petition to prevent public employers in the Fifth Circuit and elsewhere from silencing their employees through coercive threats.

STATEMENT

Petitioner Richard Lowery, a professor at the University of Texas at Austin, regularly speaks on issues of public concern, including critical race theory and affirmative action. App.2a-3a. In response, university officials pressured Lowery to modify his speech and threatened, if he did not, to strip Lowery of his position at the Salem Center, a center for public policy study that Lowery helped build. App.5a. Worse, university police opened a "threat mitigation investigation" into Lowery. App.5a-6a. Based on this pressure and those threats, Lowery reduced his online public presence. *Ibid*.

Lowery sued his employer claiming that it chilled his speech by retaliating against him because of his unpopular participation in public debate. App.6a. Defendants moved to dismiss, and the district court dismissed his claims. It found that the chilled-speech claim was "in essence a First Amendment retaliation claim," for which the defendants' threatened employment actions were insufficient to support relief under Fifth Circuit precedent. App.81a-82a.

The Fifth Circuit affirmed for the same reason. App.35a. In the process, it explained that it saw "no reason to displace the Fifth Circuit's long-settled, 'narrow view of what constitutes an adverse employment action.'" App.22a (quoting *Breaux*, 205 F.3d at 157). Consequently, adverse employment actions in the Fifth Circuit remain limited to "discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Ibid.* (quoting *Breaux*, 205 F.3d at 157).

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. The Proper First Amendment Standard for Determining Whether a Public Employee Suffered an Adverse Employment Action is a Recurring Issue of National Importance that Splits the Circuits.

As the petition persuasively shows (at 7-11) whether actions short of ultimate employment decisions qualify as adverse employment actions is an issue that splits the circuits. And the proper resolution of this question implicates a surprising number of cases, as shown by even a cursory review of First Amendment retaliation claims brought in just the last two years.

One of those is the Sixth Circuit's recent decision in *Josephson* v. *Ganzel*, 115 F.4th 771 (6th Cir. 2024). There, Dr. Josephson, a professor of psychiatry at the University of Louisville School of Medicine, took interest in the ways that children with gender dysphoria are treated. *Id.* at 777. After he testified as an expert in lawsuits involving the issue and shared his views during a panel discussion sponsored by the Heritage Foundation, *id.* at 777-778, his comments proved unpopular with certain faculty at the medical school. They immediately began to create a hostile environment "designed to silence his speech on gender dysphoria and threaten his job with the Medical School." *Id.* at 787. Ultimately, the school decided not to renew his contract. *Ibid.*

The Sixth Circuit rightly found that the termination decision itself, made by some defendants

but not others, was "a traditional example of an adverse action." *Ibid.* But it also found that Josephson's claims against other defendants could proceed even though those defendants had only threatened him by monitoring his behavior, encouraging others to terminate him, and ominously saying he might be "leaving soon." *Id.* at 787-788. And although those defendants actively threatened Josephson's employment status, thereby making work unbearable for Josephson, the case against each of them would have been over before it started if Louisville were in the Fifth Circuit.

Similarly, in *Burch* v. *City of Chubbuck*, the Ninth Circuit considered First Amendment retaliation claims brought by the city's Public Works Director who answered directly to the mayor. 146 F.4th 822, 828 (9th Cir. 2025). After the director's relationship with the mayor soured, the director began advocating changes to the city's governmental structure that would have resulted in the mayor's having less authority over the city's day-to-day affairs. *Id.* at 828-830. The mayor responded by asking the director to resign and by asking the city council—in the director's presence—to remove him. *Id.* at 837.

The Ninth Circuit acknowledged that these threats of termination were adverse employment actions because they were "reasonably likely to deter employees from engaging in constitutionally protected speech." *Ibid.* (quoting *Coszalter* v. *City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003)). And the court found the mayor's actions enough to establish an adverse employment action even though he "was not successful in removing" the director. *Ibid.* And while the director

was ultimately unsuccessful in showing that his speech caused the adverse action, *Burch* still establishes that threats alone *can* constitute adverse employment actions in First Amendment retaliation cases in the Ninth Circuit.

Cahoon v. *School District of Flambeau*, a case out of the Western District of Wisconsin, is another recent example. 737 F. Supp. 3d 668 (W.D. Wis. 2024). That case arose after Cahoon, at the request of law enforcement, gave a statement to a police officer regarding an investigation into a school district administrator's alleged official misconduct. *Id.* at 675. Shortly thereafter, Cahoon learned that the administrator called for his termination because of his cooperation with the investigation. *Id.* at 675-676. Several months later, after Cahoon was terminated, he brought retaliation claims. *Id.* at 672. The court concluded that the employee's claims could continue to trial with the threats being the adverse actions because, the court concluded, "threats to fire an employee can be sufficiently adverse to deter a person of ordinary firmness from exercising his First Amendment rights." *Id.* at 681.

In each of these recent cases, the Fifth Circuit's narrow understanding of what constitutes an adverse employment action would have resulted in the premature foreclosure of certain claims. There can be no question, then, that the situs of the dispute on this question can be outcome determinative. And as shown by the recent cases discussed here—together with those cases identified by petitioner—the proper standard for determining what constitutes an adverse

employment action in First Amendment retaliation cases is a recurring question.

II. Public Employees Will Suffer Irreparable Harm if Their Public Employers Can Threaten to Punish Them for Their Speech Without Accountability.

While most circuits have correctly answered this recurring question, that is no answer to public employees living in the Fifth and Eleventh Circuits.

For public employees in those circuits, the First Amendment offers no protection—no matter how sharply their employer threatens them—if the employer never actually carries out the threat. Indeed, in the Fifth Circuit, that is the rule "even though" the court acknowledges that, at times, threats can "have the effect of chilling the exercise of free speech." App.23a (quoting *Breaux*, 205 F.3d at 157).

That narrow understanding of what constitutes an adverse employment action in the Fifth and Eleventh Circuits has gone on long enough. In other contexts, this Court has recognized that the First Amendment can be violated when "[t]he mere potential for the exercise of [a] power casts a chill" on a person's willingness to engage in protected speech. *United States* v. *Alvarez*, 567 U.S. 709, 723 (2012). That same rule should apply to a government employer's power to terminate, demote, or otherwise harm a public employee. If a government employer has such a power, then the employer imposes a First Amendment harm when she threatens to use it to dissuade public employees from participating in public debates. Otherwise, at least in the Fifth and Eleventh

Circuits, citizens will be "deprived of fundamental rights by virtue of working for the government" if the government merely threatens to punish an employee for her speech but never follows through. *Connick*, 461 U.S. at 147.

No less here than in *Alvarez*, the "First Amendment cannot permit" the government to "chill" its employees' speech on matters of public concern "if free speech, thought, and discourse are to remain a foundation of our freedom." 567 U.S. at 723. As this Court recently reiterated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mahmoud* v. *Taylor*, 606 U.S. 522, 569 (2025) (quoting *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 19 (2020) (per curiam)); *accord Mirabelli* v. *Bonta*, 607 U.S. —, 2026 WL 575049, at *3 (2026) (per curiam).

To prevent those ongoing irreparable harms to public employees in the Fifth and Eleventh Circuits, this Court's intervention is necessary to resolve the split now.

CONCLUSION

A credible threat of discipline can be just as effective at stifling public employees' protected speech as actually carrying out the threat. The petition should be granted to provide the lower courts with necessary guidance on the proper standard governing First Amendment retaliation claims.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
HANNAH C. SMITH
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

March 9, 2026

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LIST OF *AMICI CURIAE*

Protect the First Foundation.[1] Protect the First Foundation (PT1), is a nonpartisan group of U.S. citizens who advocate for protection of First Amendment rights before Congress, state legislatures, administrative bodies, courts, and in the public arena. PT1 stands up for people from across the ideological spectrum, including people who hold views it disagrees with and even disavows.

Foundation for Individual Rights and Expression.[2] The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases implicating expressive rights, without regard to speakers' views.

National Coalition against Censorship.[3] The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups. NCAC was founded in 1974 in response to this Court's landmark decision *Miller* v. *California*, 413 U.S. 15 (1973), which narrowed First Amendment protections for sexual expression and opened the door to obscenity prosecutions. The

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[1] https://www.protect1st.org/about.html.

[2] https://www.fire.org/about-us.

[3] https://ncac.org/about-us.

organization's purpose is to protect freedom of thought, inquiry, and expression and to oppose censorship in all its forms. NCAC engages in direct advocacy and education to support free expression rights of authors, readers, publishers, booksellers, teachers, librarians, artists, students, and others. NCAC has long recognized—and opposed—attempts to censor or limit access to speech, including great works of literature and art, under the guise of labeling it as obscene, pornographic, or sexually explicit. It therefore has a longstanding interest in assuring the continuance of robust First Amendment protections for all. The positions advocated in this brief do not necessarily reflect the views of NCAC's member organizations.

Cato Institute.[4] The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

[4] https://www.cato.org/about.