

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.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent university officials tried to counsel an employee (Petitioner Lowery, a tenured professor) about certain remarks harshly critical of university administration, primarily by asking a professor who supervised Lowery in a secondary academic post to counsel him. The supervisor declined, ending that counseling attempt. The university officials have repeatedly disavowed any supposed threat to Lowery. And he has annually been reappointed to his secondary academic position and received pay raises associated with his tenured faculty position. Yet Lowery later claimed he began censoring his speech because he perceived a threat to his secondary academic role arising from the indirect counseling effort.

A unanimous Fifth Circuit panel held that, on the alleged facts here, Lowery has no First Amendment retaliation claim because Respondents took no “adverse employment action” against him. The Fifth Circuit denied rehearing en banc without dissent.

The questions presented are:

1. Whether this Court should grant review to opine on what governmental actions are sufficient to trigger a First Amendment retaliation claim, where there is no clear or meaningful circuit split on the issue and Lowery would lose under any standard.
2. Whether Lowery lacks standing to pursue his claim, and whether the case may become moot.

PARTIES TO THE PROCEEDING

Respondents are four official-capacity defendants: Lillian Mills, in her official capacity as Dean of the McCombs School of Business at the University of Texas at Austin; Ethan Burris, in his official capacity as Senior Associate Dean for Academic Affairs of the McCombs School of Business at the University of Texas at Austin; Clemens Sialm, in his official capacity as Finance Department Chair for the McCombs School of Business at the University of Texas at Austin; and James E. Davis, in his official capacity as President of the University of Texas at Austin. The following persons—in their official capacities—were previously named in this case while serving as predecessors to certain Respondents: Jay Hartzell, in his official capacity as then-President of the University of Texas at Austin; and Sheridan Titman, in his official capacity as then-Finance Department Chair for the McCombs School of Business at the University of Texas at Austin. Respondents or their predecessors were defendants in the district court and appellees in the Fifth Circuit.

Petitioner Richard Lowery was plaintiff in the district court and appellant in the Fifth Circuit.

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INTRODUCTION

Lowery seeks review by alleging the circuits are divided over what governmental employment actions qualify as sufficiently “adverse” for a First Amendment speech-retaliation claim. But the circuits simply use distinctly-worded formulations of the same basic inquiry, such that any differences in the case outcomes result from their different facts rather than disagreements about the legal standard. There is no considered split or confusion warranting review—certainly not on these facts, where Lowery’s retaliation claim fails by any measure. Given the additional realities that Lowery lacks standing and the case may soon become moot, this case is wholly uncertworthy.

Lowery is a tenured professor in UT-Austin’s McCombs Business School who, beginning in 2020-21, also has received annual appointments to a self-funded center within McCombs called the Salem Center for Policy. In 2022, Lowery made public statements that were disruptive to University and McCombs operations, including urging donors to stop donating, calling visiting speakers “f***ing communists,” and describing supporters of another McCombs center as “shameless and awful.” Lowery alleges he self-chilled his speech thereafter, primarily due to a meeting that McCombs Deans Mills and Burris (two Respondents here) had with Lowery’s Salem Center supervisor, Carlos Carvalho. The deans asked Carvalho to counsel Lowery to “tone down” his “disruptive” speech and stop discouraging donors from supporting UT. This indirect attempt at counseling Lowery went nowhere: Carvalho expressly declined to counsel Lowery about his speech and, as Lowery

acknowledges, the deans never communicated with Lowery directly. Respondents subsequently and repeatedly disavowed that any threat was made. A few weeks later, Burris reappointed Lowery to his Salem Center position and approved a pay raise for Lowery's tenured position—moves repeated annually through the current (2025-26) academic year.

Yet Lowery sued, alleging retaliation. The district court dismissed Lowery's retaliation claim and, following discovery, both dismissed and granted summary judgment on another claim deemed "in essence" a retaliation claim. The district court held that Lowery failed to allege, or provide evidence of, any adverse employment action. The Fifth Circuit affirmed on both claims. It held that Lowery's allegations of perceived, indirect threats, including those related to his Salem Center position, are not "sufficiently adverse" to support a First Amendment retaliation claim; indeed, "his contract was renewed and his pay increased." When Lowery sought rehearing en banc, the full court unanimously denied that request, too.

Lowery's pitch for this Court's review is that the Fifth Circuit supposedly represents the short end of an alleged lopsided split over what counts as "sufficiently adverse" employment action. But in reality, there is no clear or meaningful conflict. Lowery admits that, outside the Fifth and Eleventh Circuits, the circuits' various framings of the adverse-action inquiry reflect "[m]inor variations" and are "[i]n practice...about the same." Pet.9-10. And on close scrutiny, that's true for all circuits, as the Eleventh Circuit recently exemplified in melding together various formulations. See *Joyner v. City of Atlanta*, 170 F.4th

1320, 1338 (11th Cir. 2026). The Fifth Circuit here, while ruling that the standard for Title VII retaliation from *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) did not displace all its precedent on First Amendment retaliation claims, allowed that *Burlington* may be “illuminating” for such claims, suggesting it may not even view its precedent as inconsistent with *Burlington*. Pet.App.20a. And practically, the circuits’ applications of their formulations have produced consistent results in assessing materiality in various fact-specific situations. Indeed, Lowery’s case would come out the same under any articulated standard, making this a poor vehicle to resolve any supposed circuit split.

This Court is aware of the minor differences among circuits in the First Amendment speech-retaliation context, having noted (without criticism) the various “lenses” used. *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477-78 (2022). Lowery has identified *no* case in which the differently-framed standards would yield a distinct outcome. There is at least no considered, developed conflict, as *no* decisions engage in the analysis this Court would undertake if review were granted, including of how First Amendment principles and history would bear on choosing a particular formulation. And the Fifth Circuit’s “lens[]” is an appropriate one, in line with this Court’s First Amendment retaliation precedent.

The decision below was therefore correct. Lowery’s contrary view, allowing constitutional actions whenever a public employee allegedly perceives a “threat” in employee-counseling attempts, ignores key governmental interests long credited by this Court.

Public employees enjoy speech rights, but public *employers* must be able to engage with employees to manage their institutions and maintain an effective and efficient workplace. If First Amendment retaliation claims are available for the allegations here—*indirect, attempted* counseling and *perceived-yet-disavowed*-oral threats—that will frustrate the operation of state agencies, especially universities. Litigation will become a recurring tool for waging college-campus disagreements, and federal courts will be overburdened with micromanaging faculty disputes. As Judge Jerry Smith penned for the unanimous Fifth Circuit panel below, “[w]e must...abjure the opportunity to become the Federal Faculty Lounge Police.” Pet.App.31.

Serious obstacles to reaching and resolving Lowery’s issue also caution against review. For example, Lowery lacked standing to bring his claim, and new facts identified in an attached declaration show this case may soon become moot because the Salem Center will close. At minimum, these and other threshold issues weigh sharply towards denial. So, too, does this case’s complicated procedural history, which obscures which facts are relevant on certain issues.

STATEMENT OF THE CASE

I. Factual background.

A. Lowery, a tenured professor in UT-Austin’s McCombs School of Business, also is an associate director at the affiliated Salem Center for Policy, where he has been appointed annually since 2020-21. ROA.25, 2709, 2820-27. In 2022, Lowery made numerous public statements harshly criticizing UT-Austin policies, colleagues, and officials (including then-

president Hartzell). ROA.26-34, 2710-19. For example:

- Lowery tweeted against UT-Austin’s fundraising efforts: “If you like the work I am doing, please support it by NOT GIVING MONEY TO UNIVERSITIES. If you are a person of means please support me by not giving large amounts of money to universities.” ROA.268; Pet.App.4a-5a.
- At another McCombs academic center, Lowery tweeted against “left-wing activism” and “called its supporters ‘shameless and awful.” Pet.App.4a; ROA.33, 2718.
- Another tweet called speakers invited to campus “f***ing communists” who support murdering children. ROA.34, 2719.
- Lowery claimed on a podcast that part of Hartzell’s job was “lying to Republican office holders in Texas.” ROA.30, 2715.
- Later claiming to have Hartzell in mind, Lowery wrote about “self-interested administrators’ who disadvantage ‘people of the same identity profile as their own children’ by implementing affirmative action while at the same time shielding ‘their children’ from that disadvantage.” Pet.App.3a; ROA.143.
- Lowery criticized UT-Austin’s implementation of the Civitas Institute, a newly-formed academic entity at UT-Austin, because it did not

match his vision. Pet.App.3a. He claimed university administration “hijacked’ the project.” Pet.App.3a.

B. Lowery alleges he began chilling his speech in August 2022 by setting his Twitter/X account to private and speaking only at closed events. ROA.41, 2730-31. In late July or early August, former defendant (then-department chair) Sheridan Titman had asked the Salem Center’s then-Executive Director Carvalho if they could “do something” about Lowery or ask him to “tone it down.” Pet.App.4a. Titman also suggested in an email that Lowery try communicating more collegially with faculty colleagues. Pet.App.5a.

But Lowery primarily claims he self-chilled due to Respondents Dean Mills and Associate Dean Burris asking Carvalho on August 12, 2022 to “counsel” Lowery about his speech that was “crossing the line,” “impeding the operations of the school and the ability to fundraise,” and “factually inaccurate and disruptive to operations.” Pet.App.5a; ROA.35-36, 2722-24. According to Lowery’s allegations and Carvalho’s declaration, Carvalho “declined to pressure Richard Lowery to modify his speech,” after which Burris allegedly stated Carvalho need not keep Lowery at the Salem Center, and Mills suggested she could remove Carvalho from his Salem post. Pet.App.5a; ROA.125-26. Carvalho repeated he wouldn’t interfere with Lowery’s speech. ROA.126. According to Mills’ contemporaneous notes, she/Burris “stated that continued critiques of the origins, current operation and chosen director of Civitas Institute are impairing the desired functional relationship, in addition to impeding the

operations of the school and the ability to fundraise.” ROA.2113. Also:

“Mills asked Carvalho to counsel Lowery regarding making comments that are factually inaccurate and disruptive to operations. Carvalho thinks he has no effective way to persuade [Lowery] to stop the public comments that are factually inaccurate and disruptive to operations[.]”

ROA.2114.

Mills’ notes refute that Respondents sought to prevent Lowery from expressing his views. After “[Carvalho] revealed that...Titman said ‘[Hartzell] and [Mills] want Richard to shut up,’” Burris and Mills corrected that misperception, stating that was “not a position of either of them.” ROA.2114. Instead, Mills and Burris sought only to maintain “functional operations between Salem...and other centers and institutes in McCombs.” ROA.2114.

In another August meeting, Carvalho told Burris he felt threatened in the prior discussion, “to which Burris responded, ‘No, I wouldn’t interpret it that way, [Lowery’s] hurting you.’” ROA.126. Carvalho also claimed that Burris later said Lowery’s future re-appointments might be at stake, ROA.126, but Burris denied making any such statement, ROA.2878.

Lowery’s suit also complained of non-party faculty and staff expressing concern over Lowery’s speech. E.g., ROA.37-39, 2719-20, 2726-28. Yet Lowery did not allege Respondents took any actions against him in response to those complaints, and discovery later confirmed they did not. ROA.2832, 2843, 2850.

Lowery allegedly self-chilled over three primary fears: (1) Respondents might not renew his Salem Center appointment (with a \$20,000 stipend); (2) Respondents might remove his research position at the Center's research lab; and (3) Respondents may label Lowery and his speech as uncivil, dangerous, or in need of surveillance. ROA.2729-30. Lowery did not allege any fears over his tenured faculty position. See ROA.23-48, 2707-40.

C. As Lowery acknowledges, Carvalho refused to counsel Lowery about his speech. ROA.35-36, 125-27, 2722-24. And Lowery does not allege that Mills and Burris communicated directly with him; instead, the supposed chill emanated from Carvalho relaying the August 12 conversation to Lowery.

Respondents also repeatedly, in multiple ways, disavowed any threat. As Lowery's pleadings admit, ROA.36, 2724, 2825, Burris reappointed Lowery to his Salem Center position for the 2022-23 academic year just weeks after the August 2022 meeting—on the standard timeline, compare ROA.2825 (September 2022 reappointment), with ROA.2823 (September 2021 reappointment). And evidence showed Respondents raised his 2022-23 pay for his tenured faculty position by over \$7,000, again on the usual timeline. ROA.2853 (2022 pay raise on same date as 2021). Lowery has annually been reappointed to his Salem Center position and received raises for his tenured position. E.g., Pet.App.6a,65a; ROA.2827, 2855.

The complaints and evidence also show that Respondents *expressly* disavowed making any threat. That includes Carvalho's declaration, ROA.36, 126; Mills' contemporaneous meeting notes, ROA.2113-14,

3018; Titman’s declaration, ROA.249; and Mills’ and Burris’ declarations and depositions, ROA.2858-59, 2861-63, 2866-68, 2871, 2878.

II. Proceedings below.

A. Lowery sued in February 2023, advancing two claims: “chilling of free speech,” and First Amendment retaliation. ROA.23-44. Respondents moved to dismiss both for lack of standing and failure to state a claim. ROA.670-87. The district court found Lowery met the “somewhat relaxed” First Amendment standing threshold based on the pleadings. Pet.App.45a-53a. But it dismissed the retaliation claim under 12(b)(6), while leaving the chilled-speech claim. Pet.App.57a-61a.

In the same order, the district court found no “evidence that [any Salem Center] threat is imminent or currently impaired to warrant preliminary injunctive relief.” Pet.App.64a. And “because Plaintiff was reappointed to his position after the alleged threats were made and before he chose to self-censor, the [c]ourt finds that he is not experiencing any ongoing or imminent harm....” Pet.App.65a.

B. Discovery continued, including Mills’ and Burris’ depositions in which they repeated their disavowals of any threats. ROA.2871, 2878. Lowery added an “unwritten speech code” claim to his chilled-speech claim. ROA.2735-38. Respondents moved to dismiss both claims and for summary judgment on the chilled-speech claim. ROA.2745-59, 2798-814.

The district court granted all that relief.¹ Pet.App.76a-98a. The court rejected the chilled-speech claim as “in essence a First Amendment retaliation claim,” both dismissing it under 12(b)(6) and granting summary judgment on it. Pet.App.81a-84a, 94a-98a.

C. The Fifth Circuit affirmed, holding Lowery met the “not hard to sustain” standing threshold for his “functionally identical” retaliation and chilled-speech claims, Pet.App.13a-15a (quotes omitted), but upholding their dismissal on the merits, Pet.App.15a-23a. The court noted the chilled-speech claim “proceeded to summary judgment” but still “rises and falls with [Lowery’s] retaliation claim.”² Pet.App.18a. Lowery “admit[ted]” that First Amendment retaliation requires an adverse employment action, so the court analyzed “how adverse” such an “action needs to be.” Pet.App.18a. And it held that Lowery’s claims of perceived, indirect threats related to his Salem Center position, or to monitoring or labeling his speech, fail to constitute “sufficiently adverse” actions. Pet.App.22a-23a. The court disagreed that *Burlington*’s Title VII holding overruled the circuit’s prior First Amendment precedent, but suggested that *Burlington* may be “illuminating’ with respect to retaliation claims.” Pet.App.20a.

¹ Lowery no longer presses his dismissed unwritten-speech-code claim.

² Respondents refer to these two claims together as Lowery’s retaliation “claim.”

Lowery sought en banc review. The Fifth Circuit denied the petition with no noted dissent. Pet.App.101a.

REASONS FOR DENYING THE PETITION

The Fifth Circuit’s unanimous decision implicates no conflicts or confusion warranting review. There is no clear or meaningful split on the First Amendment adverse-action standard. The circuits merely use different words to assess materiality, with any differences in outcomes turning on distinct factual circumstances instead of the legal standard’s framing. That’s presumably why this Court in *Houston Community College* noted, without apparent concern, the different “lenses” through which courts view materiality. And nothing about the few factbound “threats” cases creates a split or calls for different treatment.

Even if the adverse-action standard were an issue worth reviewing, the Court should allow more percolation because no cases meaningfully analyze the various formulations and what best aligns with First Amendment principles. The Court also should await a case in which the issue is outcome-determinative; here, Lowery’s claim flunks any standard.

Nor do the Fifth Circuit’s decision or framework conflict with this Court’s First Amendment retaliation cases—or even *Burlington*. This Court’s precedent recognizes that public employers have a significant interest in managing employee speech that interferes with government operations or employee performance. The employment actions here—indirect criticism and counseling attempts that were disavowed as threats, followed by reappointments and raises—are

not adverse actions under any precedent. Nor could such allegations be deemed sufficient without opening the floodgates to constitutional claims that would undermine the operation of public agencies.

Finally, vehicle problems abound, including significant standing and mootness challenges. Review is unwarranted.

I. This case does not implicate any clear or meaningful circuit conflict.

Lowery asserts a 10-2 split over what counts as adverse employment action for First Amendment retaliation claims. Pet.7-10. Lowery’s superficial take is wrong and exaggerates the circuits’ linguistic differences. Regardless, Lowery’s claim cannot satisfy any circuit’s standard.

A. There is no conflict or confusion.

The cases Lowery touts as diverging do not reflect a clear split. Instead, they show the circuits use different words to assess materiality in various fact-specific situations. There’s certainly no *meaningful* split, because the results are the same across circuits. Lowery has identified no case that would come out differently under another circuit’s precedent or any set of facts on which the phrasing of the standard determined the outcome. That is especially true for the “threats” scenario on which Lowery premises review.

1. Lowery’s asserted split is at most semantic. The circuits use different words for the same job: to sort “material from immaterial adverse actions.” *Hous. Cmty. Coll.*, 595 U.S. at 477. But no clear conflict is lurking.

Lowery counts ten circuits using *Burlington*-like formulations that ask whether actions would deter a reasonable employee. Pet.7-10. Originating from *Bart v. Telford*, 677 F.2d 622, 628 (7th Cir. 1982)—not *Burlington*—those circuits ask which “actions of lesser severity [than dismissals] merit being deemed ‘adverse’ for purposes of a retaliation claim.” *Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999); see also, e.g., *Alston v. Spiegel*, 988 F.3d 564, 577 (1st Cir. 2021); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000).

To answer that question, even within those ten circuits, “variations in phraseology exist”—as Lowery admits. Pet.9. Some ask whether the action would “deter a person of ordinary firmness.” *Specht v. City of New York*, 15 F.4th 594, 604 (2d Cir. 2021). Others refer to reasonable employees or other variants. Pet.9. Lowery brushes all these differences aside because, despite using different words, “[i]n practice...these standards are about the same.” Pet.10.

Yet the same is true for the Fifth and Eleventh Circuits that Lowery erroneously labels “outliers.” The Fifth uses a category-by-category approach, compiling a list of actions that are sufficiently “adverse” rather than stating a universal test. See, e.g., *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (“discharges, demotions, refusals to hire, refusals to promote, and reprimands”). But, contrary to Lowery’s depiction of an unalterable list, an “employee could establish a deprivation by showing that his employer altered an important condition of employment.” *Click v. Copeland*, 970 F.2d 106, 111 (5th Cir. 1992) (quotes omitted). And the Fifth Circuit has expanded its list

at times, for example to include transfers without pay decreases. *Id.* at 110. This approach to materiality is consonant with the circuits Lowery describes as built on *Burlington*. See, e.g., *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999) (pre-*Burlington* case explaining Fifth Circuit requires “something more than the trivial” to show First Amendment retaliation). No wonder the Fifth Circuit suggested below that *Burlington* may be “illuminating” for First Amendment retaliation. Pet.App.20a.

Similarly, the Eleventh Circuit requires that a “public employee asserting a First Amendment retaliation claim must show that the employer’s action involved an important condition of employment,” which “includes discharges, demotions, refusals to hire or promote, and reprimands.” *Joyner v. City of Atlanta*, 170 F.4th 1320, 1338-39 (11th Cir. 2026) (quotes omitted). That mirrors the Fifth Circuit precedent just described. In *Joyner*, the Eleventh Circuit cited *Burlington* in the same breath and explained: “[n]otwithstanding any semantic differences...the Title VII and First Amendment standards for adverse actions are ‘consonant.’” *Id.* And it cited *Stavropoulos v. Firestone*, 361 F.3d 610, 619 (11th Cir. 2004), which Lowery calls “*Breaux*-like” for its similarities to Fifth Circuit adverse-action precedent. Pet.10.

Lowery’s alleged “split” between *Breaux* and *Burlington*, then, is not one the circuits would recognize. The Fifth and Eleventh Circuits assess materiality from category-to-category (and case-to-case), but the circuits are simply using different words to perform a similar analysis. That *Joyner* could harmonize its “*Breaux*-like” standard with *Burlington* highlights

that the alleged differences are linguistic, not substantive. 170 F.4th at 1138. No conflict arises simply because the circuits “have taken various approaches” and “lenses” to accomplish the same goal of “distinguish[ing] material from immaterial adverse actions.” *Hous. Cmty. Coll.*, 595 U.S. at 477-78.

2. There is certainly no *meaningful* split. All circuits agree that materiality matters and the standard must be higher for government employees. And in application, the circuits reach the same results on similar facts. Lowery points to no cases holding otherwise.

Labeling the Fifth Circuit’s distinct standard for *government employees* as “curious[],” Pet.18, Lowery ignores that “a governmental employer may impose certain restraints on the speech of its employees...that would be unconstitutional if applied to the general public.” *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004); see also *infra* Part II. Unsurprisingly, other circuits agree that public employees “may be required to tolerate more than average citizens, before an action taken against them is considered adverse.” *Thaddeus-X*, 175 F.3d at 398; see also, *e.g.*, *Douglas v. Reeves*, 964 F.3d 643, 648 (7th Cir. 2020).

The circuits, then, agree on a materiality threshold for government employees, such that trivial actions cannot give rise to a First Amendment retaliation claim. See, *e.g.*, *Hill v. Lappin*, 630 F.3d 468, 472-73 (5th Cir. 2010); *Suarez Corp.*, 202 F.3d at 685; *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003). And all circuits agree that some actions less than termination qualify. See, *e.g.*, *Pierce v. Tex. Dep’t of Crim. Just.*, 37 F.3d 1146, 1149 (5th Cir. 1994); *Couch v. Bd. of Trustees of Mem’l Hosp. of Carbon*

Cnty., 587 F.3d 1223 (10th Cir. 2009). That is unsurprising when “history suggests” and “contemporary doctrine confirms” as much. *Hous. Cmty. College*, 595 U.S. at 477; see also *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (“de minimis level of imposition with which the Constitution is not concerned.”).

More granularly, the circuits *also* agree on *specific actions* that count as adverse:

- Demotions. *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999); see, e.g., *Matrisciano v. Randle*, 569 F.3d 723, 730 n.2 (7th Cir. 2009); *Dye v. Off. of the Racing Comm’n*, 702 F.3d 286, 303 (6th Cir. 2012).
- Punitive transfers. *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999); see, e.g., *Specht*, 15 F.4th at 605; *Bergeron v. Cabral*, 560 F.3d 1, 8 (1st Cir. 2009).
- Pay reductions. *Pierce*, 37 F.3d at 1149; see, e.g., *Dye*, 702 F.3d at 303.
- Formal reprimands. *Harris*, 168 F.3d at 220; see, e.g., *Coszalter*, 320 F.3d at 976.

The circuits also agree on what does *not* count. The Fifth Circuit has said “mere accusations or criticism,” “investigations,” and “false accusations” are not enough. Pet.App.22a (quoting *Breaux*, 205 F.3d at 157-58). Other circuits agree. E.g., *Alston*, 988 F.3d at 577 (“bad-mouthing”); *Joseph v. Leavitt*, 465 F.3d 87, 90-91 (2d Cir. 2006) (paid administrative leave during investigation); *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) (“criticism, false accusations, or verbal reprimands”); *Suarez*, 202 F.3d at 686 (“criticism,

false accusations, or verbal reprimands”); *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 779 (9th Cir. 2022) (“criticism or ‘bad-mouthing’”); *Couch*, 587 F.3d at 1243 (investigations).

Lowery fails to identify any conflict or confusion over the First Amendment adverse-action standard. The speech-retaliation cases all apply some materiality threshold to different facts, but the outcomes have been consistent. Lowery has yet to identify a particular set of facts that would come out differently in different circuits.

3. Given this depth of agreement, Lowery at times narrows his pitch for review (and asserted conflict) to “threats” versus “completed” actions, e.g., Pet.i, 7-14, but there is no clear or meaningful split even on that question. Set aside that no “threat” is presented here. See *infra* Part I.C. Most cases Lowery cites for his alleged conflict do not involve threats, and the few relevant cases fail to create a meaningful split.

First, notwithstanding some broad language in *Breaux*, the Fifth Circuit does not appear to have absolutely foreclosed that *any* “employer threats, no matter how credible or severe,” can ever be enough. Pet.i. In *Breaux* itself, the “oral threats” were circumspect. See 205 F.3d at 154 (offer to avoid discharge if plaintiffs recanted allegations that polygraph showed they lied). And, in holding the threat there not actionable, the Court noted the absence of any additional negative action or consequence and that the threat itself did not “alter[] any important conditions of...employment,” *id.* at 159-60 & n.16. Pre-*Breaux*, the Fifth Circuit held that a public school could not legally threaten a secretary “with discharge for putting her

child in private school, even if she was never fired.” *Fyfe v. Curlee*, 902 F.2d 401, 404 (5th Cir. 1990). Additionally—and though *Breaux* purported to distinguish it (205 F.3d at 159-60)—the Fifth Circuit also held that “threaten[ing] Click with discharge...alone would implicate...First Amendment rights.” 970 F.2d at 109.

Second, the only other “threats” decisions cited by Lowery are similarly fact-specific and entirely consistent. Pet.12. In *Dodge*, the Ninth Circuit reached two distinct conclusions about two threats. For threat one, “Dodge’s supervisor[] told him...he needed to use ‘better judgment’” then “called him a racist, a bigot, a homophobe, and a liar[.]” 56 F.4th at 779. The Ninth Circuit held this was *not* enough. *Id.* But threat two—“a threat against [Dodge’s] employment” such that he *needed* his union representative—cleared the threshold. *Id.* at 780; see also *Reges v. Cauce*, 2025 WL 4724209, at *7, *9 (9th Cir. 2026) (university was “free to ask” plaintiff to remove parody statement, but it did not “meaningfully dispute” that withholding raise, making written, direct threat, and issuing formal reprimand constituted “adverse” action). In *Kubala*, the Sixth Circuit held that “telling [plaintiff] not to attend political functions and how to vote[] involve[d] no retaliation or threat of retaliation.” *Kubala v. Smith*, 984 F.3d 1132, 1140 (6th Cir. 2021). Both *Dodge* and *Kubala* require direct threats— “[t]hreats of retaliation in the case law have been clear,” *id.*—just like the Fifth Circuit’s holdings that direct threats of discharge are enough, *Click*, 970 F.2d at 109; *Fyfe*, 902 F.2d at 404.

In sum, Lowery’s “threats” issue identifies only a few factbound cases and no split. There is no conflict or confusion warranting review.

B. At minimum, percolation is needed on the issue of the correct standard.

Lowery claims his alleged split is so entrenched and longstanding that there would be no “benefit from further development at the circuit level.” Pet.17. That is incorrect and ignores what it would take for this Court to resolve the merits of what adverse-action test to apply for First Amendment retaliation cases. The circuits have not seriously and consciously addressed that issue, instead applying distinctly-worded formulations without analysis. For example, no circuit has carefully compared this Court’s First Amendment retaliation cases and *Burlington*, thoroughly analyzed whether imposing *Burlington*’s Title VII retaliation standard would be appropriate outside the context of Title VII’s statutory language, or compared the variously worded tests to discuss which articulation is most consistent with First Amendment principles. If certiorari were granted, the parties’ merits briefs would be the first to flesh out—and this Court would be the first to analyze and decide—the many considerations involved in deciding on a test for First Amendment retaliation. There is no conflict warranting review, but even if there were, percolation is needed.

1. The vast majority of circuits have applied their adverse-action formulations to First Amendment retaliation claims without openly pondering it.

First, for courts applying *Burlington*’s Title VII standard, most offer no analysis for using it in the

First Amendment context, or summarily state that the Title VII and First Amendment adverse-action standards are similar or identical. See, e.g., *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 227 (2d Cir. 2006); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 697 n.12 (4th Cir. 2018); *Hellman v. Weisberg*, 360 F. App'x. 776, 779 (9th Cir. 2009); *Hook v. Regents of Univ. of Cal.*, 394 F. App'x 522, 535 (10th Cir. 2010). The courts have not explained *why* they deem the tests interchangeable.

Second, more circuits apply tests with no basis in Title VII precedent, drawing instead from this Court's First Amendment precedent in *Rutan* and *Pickering* or, most commonly, from the Seventh Circuit's *Bart v. Telford* and its "person of ordinary firmness" standard. 677 F.2d at 625. See *supra* Part I.A.1. Those cases had no reason to analyze Lowery's issue.

For these reasons, few circuits have compared *Burlington* or Title VII to the First Amendment and carefully analyzed what test should apply. At most, circuits mention the tests are "consonant" and cite cases that describe the standards as the same or similar. E.g., *Couch*, 587 F.3d at 1237-38; *Joyner*, 170 F.4th at 1338-39. A Ninth Circuit case, *Coszalter*, predates *Burlington* but briefly explains relying on Title VII and False Claims Act cases to support its First Amendment retaliation analysis. 320 F.3d at 976. More recently, *Joyner* explains that *Burlington*'s materiality requirement "makes sense not only in Title VII retaliation cases but also in First Amendment retaliation cases" because for both "[t]heir purpose is not to get the judiciary bogged down in refereeing workplace squabbles," like the one here. 170 F.4th at 1320.

That is all the help this Court would have from the circuits if it were to grant review.

2. Lowery’s request for review on this issue is especially problematic because he frames it as a simple choice between *Burlington’s* Title VII standard or the First Amendment. No circuit has analyzed the distinctions between Title VII and the First Amendment, what adverse-action formulation aligns with First Amendment principles, or other relevant issues.

For example, Lowery is wrong to say there is “no good reason” for a higher adverse-action threshold for First Amendment claims. Pet.15. A number of good reasons are obvious. See also *infra* Part II.B (further analyzing issue).

First, Title VII is statutory and the First Amendment is constitutional, meaning Congress is always free to dial up or down Title VII’s retaliation protections (which *Burlington* merely construes), but courts interpreting constitutional provisions write in more permanent ink. And deciding that issue would be a novel undertaking. This Court’s analysis of what universal test to apply under the First Amendment would turn on its text, history, and tradition—see, *e.g.*, *Hous. Cmty. Coll.*, 595 U.S. at 474-82—an analysis *no* circuit has offered, and neither Lowery nor his amici have bothered to undertake.

Second, there are competing legitimate interests in First Amendment retaliation claims, unlike for Title VII retaliation claims. This Court has long recognized that a government employer has “legitimate interests in regulating the speech of its employees that differ significantly from [the government’s] interests

in regulating the speech of people generally.” *Connick v. Myers*, 461 U.S. 138, 156-57 (1983). Governmental employers are entitled to run their institutions and manage employees. See, e.g., *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994). The speech rights of other employees affected by Lowery’s attacks on university programs should also be considered. In contrast to these valid competing interests, an employer accused of violating Title VII has no legitimate interest in discriminating.

Third, the higher volume of potential claims arising under the First Amendment, versus Title VII, also justifies a higher threshold to avoid overburdening courts. That’s particularly true because the EEOC uniquely gatekeeps Title VII retaliation claims. See *Fort Bend Cnty. v. Davis*, 587 U.S. 541, 543 (2019).

Fourth, answering which test applies here requires determining how that test intersects with First Amendment standing. See *infra* Part III.A.2.

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Lowery’s pitch for review represents a shallow treatment of a deeper issue. Review without further percolation would make the Court the first to confront many complex issues in deciding the issue presented.

C. Lowery loses under any standard.

Lowery cannot satisfy *any* standard for adverse employment action. That means this factbound case does not implicate the asserted split and is a poor vehicle, see *infra* Part III, but also illustrates the absence of any material conflict or certworthy issue.

1. Whether looking to only the pleadings or also the summary-judgment evidence, Lowery's claim flunks any circuit's adverse-action threshold.

Looking solely at the pleadings, Lowery does not present an actionable claim (threats or otherwise). Lowery alleges he self-chilled after Carvalho told him that Respondents asked Carvalho to "counsel" Lowery about his speech that was impeding university operations. Pet.App.5a; ROA.35-56, 2722-24. Lowery admits Carvalho refused to counsel Lowery. Pet.App.5a; ROA.35, 2722. This *indirect* counseling attempt (which went nowhere) and criticisms are the bulk of the claimed "threats." See ROA.35-36, 2722-24. And Lowery based his decision to self-chill primarily on fears relating to the Salem Center, despite that Respondents had "just renewed Lowery's annual appointment[.]" ROA.36, 2724. The complaints also showed Defendants disavowed any threat. ROA.36, 2724. Even from the pleadings, there's no discernable threat.

Piling on, the summary-judgment evidence shows Respondents' additional disavowals and the absence of any threats. It shows Lowery's multiple Salem Center reappointments (occurring on the standard timelines) and tenured-position pay raises. See ROA.2823, 2825, 2827, 2853, 2855. And Respondents otherwise disavowed any alleged threats, including in contemporaneous meeting notes, ROA.2113-14, 3018, and declarations and depositions, ROA.249, 2858-59, 2861-63, 2866-68, 2871, 2878.

2. At every stage, Lowery's claim failed under any retaliation standard. Lowery does not explain his contention otherwise, simply quoting statements by the courts below on standing. Pet.16-17. He is wrong.

First, Lowery's reliance on standing statements is misguided. The lower courts' standing analyses were erroneously limited to the pleadings, whereas the merits—and indeed a proper standing analysis—must consider the evidence, which the lower courts found decidedly refuted Lowery's position. See *infra* Part III.A. Lowery's argument also improperly conflates standing with the merits. See, e.g., *Meese v. Keene*, 481 U.S. 465, 480 n.14 (1987); see also *infra* Part III.A. Lowery's only counter is that this Court should set the bar so low that everyone with standing wins on the merits, which is untenable.

Second, Lowery loses under *Burlington*, which asks if an *objectively reasonable* employee would have found the challenged actions *materially* adverse. 548 U.S. at 68. Lowery alleges only indirect remarks and criticisms—conveyed by his ally Carvalho, not Respondents. See *supra* Part I.C.1. Those counseling attempts admittedly went nowhere, and “his contract was renewed and his pay increased.” Pet.App.23a. The summary-judgment record shows more reappointments, pay raises, and disavowals of any threats. See *supra* Part I.C.1. No *reasonable* employee would refuse to take “yes” for an answer, but Lowery chose litigation for his own purposes.

Third, Lowery also loses under his own “threat” cases. Pet.12. In *Dodge*, a supervisor telling an employee “he needed to use ‘better judgment’” was not an adverse action, nor were insults like “racist,” “bigot,”

“homophobe,” or “liar.” 56 F.4th at 779. Here, no Respondent called Lowery such names, and the indirect attempted counseling concerned Lowery’s disruptions. In *Dodge* it was only the direct “threat against [plaintiff’s] employment” that counted as adverse, *id.* at 779-80, quite unlike here. The alleged statements here are more analogous to those in *Kubala*, which recognized that, to be actionable, “[t]hreats of retaliation” must be “clear,” not “ambiguous.” 984 F.3d at 1140.

Finally, Lowery obviously loses under Fifth Circuit precedent—and he doesn’t claim otherwise. But that is consistent with how every circuit would resolve this case. There is no divergence.

II. The decision below is correct.

The Fifth Circuit’s holding that Lowery has not suffered an “adverse employment action” under the First Amendment is consistent with all relevant precedent from this Court.

A. The Court’s First Amendment retaliation cases strongly support the decision below.

1. The Court’s modern government-employee speech-retaliation jurisprudence, from *Pickering* onward, focuses on balancing the competing interests of individuals’ free speech “and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). *Pickering* involved termination, so adverse action was obvious, and the balancing favored the fired teacher because the speech at issue jeopardized no significant governmental interests. *Id.* at 564, 570-73. But the

Court made clear that legitimate state interests include maintaining “discipline” and “harmony among coworkers,” and ensuring an employee’s speech does not interfere with “proper performance of his daily duties” or “with the regular operation of the school[] generally.” *Id.* at 570, 572-73. Subsequent cases applying *Pickering*’s balancing test likewise entrench the importance of the government’s interests, as employer, to avoid interference with regular public operations and to maintain effective employees and efficient workplaces. See, e.g., *Connick*, 461 U.S. at 143, 149 (“common-sense realization that government offices could not function if every employment decision became a constitutional matter”); see also *Rankin v. McPherson*, 483 U.S. 378, 384, 388 (1987); *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386-87, 389-90 (2011).³

In *Rutan*, the Court held that First Amendment retaliation claims are viable for governmental actions short of termination. *Rutan v. Repub. Party of Ill.*, 497 U.S. 62, 73-75 (1990). The Court considered, but held not significant there, the governmental interests at stake. *Id.* at 74-75. Without expressing a specific test, the Court ruled that employment decisions like “promotion, transfer, recall, and hiring decisions,” when made for retaliatory reasons, are “significant penalties” under the First Amendment. *Id.* at 65, 73-75, 79.

³ The government’s interests as employer are heightened compared to those in cases involving speakers in public spaces. E.g., *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 675-76 (1996).

Recently, the Court reaffirmed the adverse-action requirement for First Amendment retaliation claims. *Hous. Cmty. Coll.*, 595 U.S. at 477 (citing *Nieves v. Bartlett*, 587 U.S. 391, 399 (2019)). And the Court reaffirmed that “[d]eprivations less harsh than dismissal’ can *sometimes* qualify” as adverse actions. *Id.* (emphasis added) (quoting *Rutan*, 497 U.S. at 75). The Court recognized that some adverse actions (like terminations) are “easy to identify,” while others are not, and of course “no one would think that a mere frown from a supervisor constitutes a sufficiently adverse action.” *Id.* The Court then recognized that “lower courts have taken various approaches” “to distinguish material from immaterial adverse actions.” *Id.* at 477-78. But instead of picking one of “these lenses,” and without suggesting any inconsistency, the Court held that the category at issue—verbal censure of one member of an elected board by its other members—was insufficiently adverse under the First Amendment on those facts. *Id.* at 477-80. That was primarily because the plaintiff, “an elected official,” was “expect[ed]” to “shoulder a degree of criticism,” and the “only adverse action at issue...is itself a form of speech from [the plaintiff’s] colleagues” (raising valid competing interests). *Id.* at 478-79.

In sum, the Court’s First Amendment precedent recognizes the significant governmental interests in exerting some control over employee speech that interferes with effective public operations or workplaces. And the Court acknowledged, without evident concern, the various formulations to assess the materiality of governmental action challenged as “adverse.”

2. The Fifth Circuit’s decision here, and its underlying approach, are fully consistent with this First Amendment precedent.

Lowery’s speech implicated legitimate governmental interests, given the (intended) disruptive impact on university fundraising, fellow university employees, and other university operations (such as impeding collaboration between McCombs centers). E.g., ROA.2113-14, 2722-24. Yet as to Respondents, Lowery primarily alleges *indirect attempts at counseling* about more effective ways to speak on campus issues—i.e., statements made to a third party in meetings he didn’t attend—and supposed *criticisms*, all of which he claims as perceived threats about a secondary academic position *to which he was promptly reappointed as expected*. See *supra* pp. 1-2, 6-9, 23-25. The counseling attempts went no further, Respondents expressly disavowed any perceived threat, and Lowery received regular reappointments and pay raises. See *supra* pp. 1-2, 6-9, 23-25. Nothing approaching the “significant penalties” imposed on the employees in *Rutan* has occurred, or were ever threatened or imminent, as the district court recognized from the outset. Pet.App.64a-65a. There was no adverse employment action.

Moreover, the Fifth Circuit’s adverse-action approach has been recognized as consistent with *Rutan*. See, e.g., *Pierce*, 37 F.3d at 1149-50 & n.1. It assesses whether particular employment actions are adverse category by category (and case by case) rather than purporting to apply a universal formulation. See *supra* Part I.A. Lowery’s claims that the Fifth Circuit

has kept *Rutan*'s list "exclusive," counts only "completed" employment actions, and disallows *any* "threats" from qualifying, are not accurate. See *supra* Parts I.A.1 & I.A.3. Especially given this Court's recent approval of *Rutan*, Lowery's attack on the Fifth Circuit's *Rutan*-based approach is flawed.

Lowery's attack also ignores the significant competing concerns. No doubt, public employees like Lowery have important speech rights. But so do co-employees affected by his public attacks on university programs. And public employers like Respondents must be able to run their agencies effectively, including the need to counsel employees about the ramifications of their speech without giving rise to litigation over misperceived threats. If indirect counseling attempts and mere criticisms are now actionable in federal court for any employee who perceives a threat, that will incentivize more litigation and discovery. It will impair the operation of public entities, especially universities. And it will throw the courthouse doors open to all manner of faculty-administration disagreements, overburdening federal courts and forcing them into micromanaging universities and other public employers. This Court's precedent wisely protects against those outcomes.

B. Lowery advocates, and some of his amici support, adopting for First Amendment retaliation cases the *Burlington* standard enunciated for retaliation claims under Title VII.

For one thing, the *Burlington* standard is not clearly distinct from other adverse-action formulations and does not produce meaningfully different results. See *supra* Part I.A. Nor would the *Burlington*

standard lead to a different outcome here. No *objectively reasonable* person could view the acts here—indirect counseling attempts and criticism, allegedly raising fears about a secondary academic post, followed by repeated reappointments to that post, pay raises, and disavowals of any threats—as *material* adverse action. See *supra* Part I.C. The Fifth Circuit’s suggestion that *Burlington* may be “illuminating” for First Amendment retaliation cases confirms that point. Pet.App.20a. So there is no error relating to *Burlington*, and nothing to review.

If *Burlington*’s Title VII standard were different from other formulations, however, there are good reasons *not* to import this statutory retaliation standard to replace the Court’s First Amendment retaliation jurisprudence. Few circuit opinions have seriously explored this issue, but several distinctions leap out. See also *supra* Part I.B.

First, Lowery is right that the First Amendment is constitutional and Title VII is statutory, but wrong about what follows. In *Burlington*, this Court was interpreting a statute’s text, leaving the policy decision to Congress. 548 U.S. at 59, 61-63. And that statute was purposefully broad because it was a secondary retaliation provision that Congress wrote expansively, extending it to employer actions that affect employees outside of work, to ensure full enforcement of Title VII’s core discrimination ban. *Id.* That is materially different than for First Amendment retaliation, where this Court must interpret distinct constitutional text, considering history and other factors relevant in constitutional interpretation. Protecting free speech is

unquestionably important, but not the only consideration.

Second, First Amendment retaliation cases balance competing interests not in play under Title VII. For example, the government as employer must maintain efficient operations and an effective workforce, so not all employee speech is protected. E.g., *Lane v. Franks*, 573 U.S. 228, 236-37 (2014). First Amendment retaliation cases also frequently involve other employees' speech rights. Such competing legitimate interests call for a sensitive balancing reflected not only in the *Pickering* test, but also in *Rutan's* and *Houston Community College's* adverse-action analysis, and cannot turn merely on a plaintiff's report of self-chill. All that differs from Title VII retaliation cases, where an employer accused of retaliating against an employee for making Title VII claims has no legitimate interest in discriminating. Competing legitimate interests are thus present only in the First Amendment context, warranting a higher threshold.

Third, volume matters. The First Amendment protects all citizens and many kinds of speech, while Title VII covers only a subset of speech and a smaller class of potential plaintiffs (employees). The greater potential volume of First Amendment retaliation cases further justifies a higher adverse-action threshold than for Title VII, to avoid overburdening courts.

For these and other reasons, the Court should reject Lowery and his amici's invitations to scrap prior First Amendment retaliation precedent and replace it with *Burlington*—or, as the Institute for Justice suggests, with nothing at all. Those undertheorized proposals are not worthy of review.

III. This is an inadequate, or distinctly poor, vehicle to address Lowery’s issue.

Even if addressing the First Amendment retaliation adverse-action standard were certworthy, this case is decidedly the wrong vehicle.

A. Lowery lacks standing.

Article III standing is a threshold jurisdictional question that this Court must confirm before reaching the merits. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); see *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998). Respondents have challenged Lowery’s standing, ROA.681-83, and again raise this impediment to review, see Sup. Ct. R. 15.2.

1. Lowery lacks standing for the only thing he asks for—prospective injunctive relief—which requires showing a threatened future injury that is “certainly impending,” not merely speculative. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013). A plaintiff “request[ing] forward-looking relief must face a ‘real and immediate threat of repeated injury.’” *Murthy v. Missouri*, 603 U.S. 43, 57-58 (2024). Past injuries, if any, “are relevant only for their predictive value.” *Id.* at 59. Nor can a claim survive where the named officials have formally disavowed the challenged conduct. *Nat’l Shooting Sports Found. v. Att’y Gen. of N.J.*, 80 F.4th 215, 220-22 (3d Cir. 2023).

The Fifth Circuit found standing by analyzing only the face of the complaint, wrongly treating Lowery’s allegations as true. Pet.App.14a-15a. The district court made the same mistake when it accepted Lowery’s allegations for standing but, tellingly, denied preliminary relief based on evidence that Lowery had

twice been reappointed and given raises. Compare Pet.App.51a-53a with Pet.App.64a-65a & n.4. This was never a pure pleading issue: Respondents lodged a fact-based 12(b)(1) attack, supported by sworn declarations from Mills, Burris, and Titman disavowing any threat to Lowery’s pay, affiliation, research, or speech, and showing Lowery was given a raise and reappointed to the Salem Center before he sued. ROA.680, 691-702. By the time the district court finally disposed of this case and the Fifth Circuit analyzed standing, the record also contained Respondents’ disavowals at depositions, contemporaneous notes confirming earlier disavowals, and continued Lowery reappointments and pay raises—which the courts below incorrectly overlooked in their standing analysis. ROA.2871, 2878, 2823-27, 2853, 2855.

Standing must be measured “with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The record here is the opposite of “certainly impending” harm, and self-censorship in the face of disavowed, unrealized threats cannot supply it. *Clapper*, 568 U.S. at 414, 416.

2. The serious standing deficiency here raises another thorny issue unaddressed below: how standing and the adverse-action inquiry intersect in First Amendment retaliation law. On Lowery’s view, standing and the merits collapse into one. Lowery claims that Article III injury-in-fact in a First Amendment self-chill case requires an objective showing that the challenged conduct would chill a reasonable person’s speech. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). And he must press such a loose version of the *Burlington*

“reasonable employee” standard that would make it indistinguishable from the injury-in-fact inquiry. E.g., Pet.7-10. Indeed, Lowery *literally* equates these in seeking review, treating the lower courts’ standing findings (erroneously based on allegations only) as determinative on the merits (notwithstanding the evidence). Pet.16-17.

Lowery’s position wrongly conflates the merits and standing, which this Court’s precedent has long warned against. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 227 (2003); *Bond v. United States*, 564 U.S. 211, 219 (2011); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 & n. 1, (1970); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624, (1989). It would mean that any plaintiff with standing *also* prevails on this merits question, which would effectively eliminate the adverse-action requirement altogether.

Compounding the difficulty, this Court’s self-chill cases pull in competing directions: *Laird* and *Meese* require objective harm beyond subjective apprehension, while *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 746-47 (2011), and *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), have been more amenable to standing based on self-chill alone—an unresolved tension Justice Thomas has flagged. *Speech First, Inc. v. Whitten*, 145 S. Ct. 701, 702 (2025) (Thomas, J., dissenting from denial of cert.). Resolving the standing-merits intersection would therefore also require the Court to address this internal tension. Standing represents an intractable barrier to review here.

B. The case will likely soon be moot.

If Lowery ever had standing for the prospective relief sought, it rested predominantly on his self-chilling from fears over *the Salem Center*: that his appointment there would not be renewed, and that he would lose his related stipend and research position at the Center’s research lab. E.g., ROA.39-40, 2729-30, 2902. This is what Lowery cited in resisting dismissal for lack of standing. ROA.1257-59. Outside the Salem Center, Lowery’s only claimed fears—about “labeling” or “surveillance,” Pet.App.23a—are so vague and speculative they could not support a justiciable controversy. See, e.g., *Clapper*, 568 U.S. at 412-13.

But prospective relief related to the Salem Center will likely soon be impossible: the Center “will not exist or operate” after August 2026 “due to the Center’s failure to raise sufficient funding to continue operating in the future.” App.A3. As Carvalho was preparing to leave UT-Austin in 2025 (while this case was on appeal), he indicated the 2025-26 academic year would be the “last” for the Salem Center—which is “self-funded” and thus dependent on donations—because it “had not raised sufficient donations to continue beyond that academic year.” App.A2. Carvalho communicated this to the Center’s staff (Lowery is associate director). App.A2-A3. Burriss followed Carvalho’s recommendation to continue faculty appointments, including Lowery’s, for 2025-26, but there will be no Center-related opportunities after the Center ceases to exist in August 2026. App.A2-A3.

For these reasons, any supposed fears related to Lowery’s Salem Center roles and pay—the harms his Petition emphasizes, Pet.i, 3-4, 16-17—have been

overtaken by events unrelated to Lowery’s accusations against Respondents. Additionally, two of four UT-Austin officials whom Lowery originally sued (Titman and Hartzell) are no longer in those roles, and Respondent Mills will be succeeded as McCombs Dean on July 1, 2026. See “Bradley Staats Appointed Dean of McCombs School of Business,” UT News (Apr. 30, 2026) (<https://tinyurl.com/38tp8jya>). That means, in a case seeking purely prospective relief over an alleged “personal campaign to silence him,” ROA.1073, three of four UT-Austin officials he sued will have left or be in different roles before this case is fully briefed—in addition to the centerpiece of his claimed “threat” (the Salem Center) no longer existing after August 2026.

“[A]n actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (quotes omitted). “No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute ‘is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.’” *Id.* at 91 (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)). Lowery has pressed this as an actual controversy, despite Respondents’ repeated disavowals and his reappointments and pay raises, based on the Salem Center. But with the Salem Center closing, “it is absolutely clear that the challenged conduct”—alleged “threats” to Lowery’s Salem Center position—“cannot reasonably be expected to recur.” E.g., *id.* at 97 (quotes omitted). Lowery’s other allegations would leave him “rely[ing] on theories of Article III injury that would fail to establish standing in the first

place.” *Id.* at 96. Respondents raise this potential issue, with the Burris declaration, based on their Rule 15.2 obligations and “continuing duty to inform the Court of any development which may conceivably affect the outcome” (and “*without delay*”). E.g., Sup. Ct. R. 15.2; *Bd. of License Comm’rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (quotes omitted).

The Salem Center’s ending undercuts Lowery’s requested relief and alleged “adverse” action on the merits. The prospect of mootness alone warrants denial and counsels heavily against review.

C. The issue is not determinative or cleanly presented.

The Court should at least deny review because, for several reasons, the legal issue posed is not—or not cleanly—presented by the decision and facts below.

First, the question of which First Amendment adverse-action formulation applies is not outcome-determinative because Lowery loses under any version. See *supra* Part I.C. The decision below is correct under this Court’s First Amendment precedent, similar to how this Court resolved *Houston Community College* without needing to choose one formulation. See *supra* Part II. Lowery misrelies on the lower courts’ *standing* statements to suggest the issue is determinative here, but those ripped-from-context statements do not support review and only underscore how central standing would be if certiorari were granted. See *supra* Parts I.C, III.A. Because resolving the issue posed is not determinative here, the Court would be providing an academic answer rather than resolving this dispute, making this an exceedingly poor vehicle.

If the issue is worth addressing, notwithstanding the lack among the circuit courts of any apparent confusion or clamoring for guidance, the Court should await a case in which the articulation of the adverse-action requirement would make a difference.

Second, the presence of required threshold questions—themselves factbound and complicated—counsels sharply against review. Standing and mootness represent substantial challenges here, rendering Lowery’s issue irrelevant or at least secondary. See *supra* Parts III.A–B. And Lowery seeks review on the premise that this case involves “threats,” but his premise is hotly disputed (and flawed) and must first be decided. The record shows no “threat” was made about Lowery under this Court’s analogous precedent, especially after Respondents’ disavowals. See, e.g., *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 191, 194 (2024). At minimum, these threshold questions make this a remarkably poor candidate to address Lowery’s issue.

Third, this case’s unique procedural history makes it an unsuitable vehicle. Lowery’s retaliation claim was dismissed under 12(b)(6). Pet.App.57a-61a. Yet his chilled-speech claim proceeded through limited discovery to summary judgment before being resolved *as a retaliation claim*. Pet.App.18a-23a, 81a-84a, 94a-98a. And the standing inquiry for this Court requires considering *all* record evidence. This unusual posture muddies which facts and evidence are relevant from issue to issue, representing a significant vehicle problem. And if this complexity means the Court somehow must artificially decide Lowery’s *merits* issue while ignoring certain known facts in the record, that goes beyond a vehicle problem to being a justiciability concern

about advisory opinions. The unusual procedural posture provides an additional compelling reason to deny review.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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June 2, 2026

APPENDIX

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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.*,

Respondents.

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

Declaration of Respondent Ethan Burris

1. My name is Ethan Burris. I am Senior Associate Dean for Academic Affairs for the McCombs School of Business at the University of Texas at Austin.
2. I make this declaration under penalty of perjury. The statements set forth herein reflect the testimony I would provide in open court if called to testify.
3. As Senior Associate Dean for Academic Affairs for the McCombs School of Business, I have an administrative role in academic centers attached to the McCombs School, including the Salem Center for Policy.

4. Carlos Carvalho, who was then the Salem Center's director, was preparing to leave the University of Texas at Austin in June 2025 to accept the position of President at the University of Austin. Carvalho had an exit interview on May 6, 2025, attended by Carvalho, Anitesh Barua (Chair of the Department of Information, Risk, & Operations Management in the McCombs School), Rob Richardson (McCombs Human Resources Director), and me. At that meeting, Carvalho, Richardson, and I discussed the logistics of Carvalho's upcoming departure, including the future of the Salem Center.

5. During the meeting, Carvalho indicated that he expected the 2025-26 academic year would be the last year the Salem Center would exist because the Center had not raised sufficient donations to continue beyond that academic year. Donations are necessary for self-funded centers like the Salem Center to continue operations. The Salem Center had sufficient funds to operate for the 2025-26 academic year following Carvalho's departure, but Carvalho recommended that it continue in its final year without an executive director to replace him. Carvalho stated that he had communicated the upcoming closure of the Salem Center to the Center's staff.

6. Following Carvalho's recommendation, I did not appoint an executive director for the Salem Center to replace Carvalho. I made the remaining annual faculty reappointments to the Salem Center for the 2025-26 academic year, including Richard Lowery's appointment as associate director.

7. The 2025-26 academic year is coming to a close this summer and the Salem Center has not, during this academic year, received donations sufficient to enable it to continue operating through the 2026-27 academic year. The Center therefore will not exist or operate in the 2026-27 academic year. Lowery's administrative appointment in the Salem Center will end on August 15, 2026, the last day of UT Austin's 2025-26 academic employment year. I expect the Salem Center will cease operations on that date or shortly thereafter in the latter part of August 2026.

Under 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed on May 28, 2026.

/s/ *Ethan Burris*
Ethan Burris