

No. 25-927

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IN THE  
**Supreme Court of the United States**

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RICHARD LOWERY,

*Petitioner,*

*v.*

LILLIAN MILLS, DEAN OF THE  
MCCOMBS SCHOOL OF BUSINESS AT THE  
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

*Respondents.*

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

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**REPLY BRIEF FOR PETITIONER**

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**REPLY BRIEF**

The University of Texas (UT) administrators' emphatic protestations that there is no meaningful circuit split here are belied by the key authorities. Likewise, the record below plainly contradicts their assertion that the standard used to determine whether an action is sufficiently adverse was not outcome determinative here—it was. The Fifth Circuit, unlike almost every other circuit, holds that threats of adverse employment actions are never enough, so long as those threats are not implemented.

Indeed, UT implicitly concedes that the split exists, because it predicts that adoption of a more forgiving standard used in other circuits would force the Fifth Circuit to police too many faculty employment disputes. If the standards are already identical, as UT asserts, then adopting a new standard would have no effect.

Defendants also attempt to manufacture mootness by announcing the future dissolution of the Salem Center just as this petition is pending. But Lowery's claims encompassed all threats to his career, and were not limited to his secondary employment with the center.

UT also re-argues standing, an issue that was twice decided below in Lowery's favor. There is no good reason to re-visit those holdings.

**I. This case presents an obvious circuit split on whether employer threats are sufficient for an actionable First Amendment retaliation claim.**

UT erroneously asserts that there is no meaningful conflict here. In *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000), the Fifth Circuit squarely held that “any criticism, such as [the defendant’s] oral threats or abusive remarks, does not rise to the level of an adverse employment action.” *Id.* at 158. The *Breaux* Court went on to hold that “[a]s the law stands now, retaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over termination.” *Id.* at 160. This holding doesn’t equivocate on threats or leave the door open.

The panel opinion in our case subsequently re-affirmed *Breaux*’s standard for assessing an adverse action, holding that Lowery’s allegation that UT retaliated against him by “threatening” various adverse actions was insufficient—“none of Lowery’s allegations is sufficiently adverse.” App. 22a-23a.

UT now strains to align the Fifth Circuit’s standard for adverse employment actions with those of its sister circuits, even going so far as to suggest that threats might sometimes qualify as viable adverse actions. But the two pre-*Breaux* cases UT cites discuss threats only in passing. *Click v. Copeland*, 970 F.2d 106, 109-10 (5th Cir. 1992) involved a retaliatory transfer to a less prestigious work position. So did *Fyfe v. Curlee*, 902 F.2d 401, 404-05 (5th Cir. 1990). And in its own briefing to the Fifth Circuit, UT repeatedly argued that threats alone were not enough. 5th Circuit Resp. Brief (ECF No. 39) at 16, 18, 20.

Indeed, *Breaux* explicitly rejected the proposition that *Click* ever provided that threats of termination alone could suffice. 205 F.3d at 159. *Breaux* also interpreted *Fyfe* as concerned with retaliatory transfers, not threats alone. *See id.* at 159 n.16.

And the *Breaux* court similarly downplayed language in *Pickering v. Bd. of Education*, 391 U.S. 563, 574 (1968) stating that “even the threat of discharge can be a potent means of chilling the exercise of constitutional rights.” The *Breaux* court focused instead on the fact that the *Pickering* plaintiff had not just been threatened, but was in fact discharged for speech critical of the school board. 205 F.3d at 159. Because *Pickering* outlawed retaliatory dismissals, the *Breaux* court incorrectly reasoned that it was not necessary to outlaw threats of dismissal, characterizing them as “just hot air.” 205 F.3d at 160. This reasoning was contrary to human nature because most public employees cannot afford to risk termination over whistleblowing or extramural speech on a matter of public concern—nor should they be required to.

In any event, *Breaux* evidently sought to shut the door on the proposition that threats of adverse actions could ever suffice. If a threat of termination alone is insufficient, then threats of lesser adverse actions, such as docked pay, demotions, or a punitive job posting must also be insufficient.

This point is further buttressed by the reality that two years after *Breaux*, the Fifth Circuit applied a more permissive *Burlington Northern*-like test to First Amendment claims brought by ordinary citizens. *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002) (holding that

the second element of citizens' retaliation claim is that "the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity[.]").

The *Keenan* court explicitly distinguished the bulk of the Fifth Circuit's First Amendment retaliation cases which "involve an employment or other contractual relationship between the plaintiffs and government officials[.]" *Id.* The court noted that in "the employment context this court's requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Id.* at 258 n.4.

Making this distinction between public employees and citizens would have been superfluous if the standards were functionally the same. The Fifth Circuit demands that public employees allege more retaliation than an ordinary citizen in order to have a viable claim. Indeed, the circuit openly acknowledges that its employment-context standard provides that "some things are not actionable even though they have the effect of chilling the exercise of free speech." App. 23a (quoting *Breaux*, 205 F.3d at 157).

Although UT suggests on the one hand that the Fifth Circuit's standard does not really conflict with that adopted by most circuits, it also argues that allowing Lowery's claims of threats to survive a motion to dismiss would lead to a new flood of employment litigation. It is difficult to reconcile those arguments. Apparently then, the standard used to measure adversity indeed matters and even UT, in the end, at least tacitly acknowledges that the Fifth Circuit's standard differs materially from most other circuits.

It is also obvious that, unlike the Fifth Circuit, other circuits do allow threats of adverse employment actions to underpin viable claims, even if the threats have not been implemented.

For example, in *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 778 (9th Cir. 2022), the Ninth Circuit applied its reasonably-likely-to-deter test for evaluating whether an adverse employment action occurred. The court noted that even minor acts of retaliation might qualify and encompassed “the insinuation or threat” that some adverse action may follow. *Id.* at 779. The plaintiff in that case was a public-school teacher who wore, or displayed, a MAGA hat at several training events, eliciting the principal’s ire. *Id.* at 773-74. In holding that a triable issue existed as to whether he was subject to an adverse employment action, the court noted that the principal went beyond criticizing the plaintiff’s political views when she suggested “that disciplinary action could occur if she saw Dodge with his hat again by referencing the need for union representation[.]” *Id.* at 779. In *Dodge*, there was neither a direct threat of disciplinary action, nor a specific form of discipline threatened—yet the Ninth Circuit held the claim actionable.

Similarly, in another recent Ninth Circuit case, a teaching professor parodied the University of Washington’s (UW) recommended “land acknowledgement” for course syllabi with his own version, referencing Locke’s theory that property rights are acquired through labor. *Reges v. Cauce*, No. 24-3518, 2025 U.S. App. LEXIS 35243, at \*7, \*14 (9th Cir. May 14, 2026). The UW administration reacted swiftly. *Id.* at \*16-20. Although the university did not fire the professor, the Ninth Circuit held that

UW’s “ensuing conduct—which included opening a lengthy disciplinary investigation (during which a merit pay increase was withheld), reprimanding Reges, and *threatening* him with further discipline—plainly qualifies as adverse employment action under our precedents.” *Id.* at \*25-26 (emphasis added).

The standard used by the Ninth Circuit is obviously different than the Fifth Circuit’s standard. The Sixth Circuit supplied another example in *Kubala v. Smith*, 984 F.3d 1132, 1139-40 (6th Cir. 2021), where it applied a deter-a-person-of-ordinary-firmness standard and noted that “threats alone” can constitute an adverse action. There, the court ultimately concluded that the alleged threats were insufficient to deter a person of ordinary firmness because they involved mere bullying behavior, such as telling the plaintiff not to attend political functions and how to vote; and also a management-connected lawyer’s suggestion to change the plaintiff’s job classification to offer him civil-service protection (a suggestion the court plausibly found non-threatening). *Id.* at 1142. But *Kubala* does not hold that a supervisor’s threats must be delivered directly to the subordinate by the supervisor. On the contrary, it posits that “a threat by proxy in no way shields the principal when other evidence reveals a threat.” *Id.* at 1141.

While UT may dispute the nature of its deans’ threats by proxy toward Lowery, at the motion to dismiss stage Lowery is entitled to have any factual disputes and inferences drawn in this favor.

In summary, Lowery alleged that a member of the President’s Office used an anonymous complaint as a

pretext to ask Dean Mills and Associate Dean Burris to handle Lowery's speech as a "personnel issue." EROA.3013. A week later, the deans met with Carlos Carvalho and discussed the need to rein in Lowery's speech. EROA.3015-3016. Dean Mills's own notes of that meeting indicate that she emphasized that institute directors "serve at her pleasure," expressed her requirement for cooperation amongst UT institutes and "reasonable respect" for UT's "Chain of Command." *Id.* This was not an exchange of views in the marketplace of ideas.

Carvalho's declaration, which must also be credited at this stage, likewise sets forth the deans' threats to Lowery's Salem Center affiliation. EROA.125-127. A short time after this meeting, Lowery's department chair emailed Lowery that his speech was causing problems and that it would be in his "interest to come up with a class for the Spring that is likely to be popular[,]" a statement that Lowery interpreted as meaning he might face "a loss of pay or other disciplinary consequences if [he] continued criticizing [UT's Sustainability Institute] and its events." EROA.116. Lowery went dark shortly after this and stopped tweeting and publicly criticizing UT. EROA.118-119.

Carvalho further declared that at a follow-up meeting two months later, Associate Dean Burris indicated that he "must approve Lowery's compensation," and that although he had just approved Lowery's annual appointment to the Salem Center, he might not do so in the future. EROA.126.

Unsurprisingly, the deans have already testified that their goal in meeting with Carvalho and talking to

him about Lowery’s speech was to get Lowery to speak differently or not at all. EROA.2977:3-9, 3008:22-3009:11. It appears then that UT administrators obtained exactly what they set out to obtain: Lowery’s silence.

It is of course to be expected that the parties advance different interpretations of these events, some of which remain contested. But Lowery’s retaliation claim was adjudicated on a motion to dismiss and he is entitled to have all reasonable inferences drawn in his favor. *NRA of Am. v. Vullo*, 602 U.S. 175, 181 (2024).

What mattered here is that even crediting Lowery’s version of events, he alleged only threats of adverse actions, which the Fifth Circuit almost uniquely holds is insufficient to support a First Amendment retaliation claim. App. 23a. *Cf.* “If UT fires Lowery for his speech . . . a § 1983 action would be appropriate.” App. 31a. But not if UT only threatens him. Understandably, Lowery wasn’t interested in testing whether UT would follow through with disciplinary action. In ten other circuits, Lowery’s plausible allegations would almost certainly have survived a motion to dismiss.<sup>1</sup>

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1. Defendants suggest that the Eleventh Circuit has clarified its standard recently in *Joyner v. City of Atlanta*, 170 F.4th 1320, 1338 (11th Cir. 2026), but that case does not in fact align the Eleventh Circuit with its ten sister circuits or hold that threats may qualify as an adverse employment action. Rather, *Joyner* limited that sufficient adversity to completed actions that alter “important conditions of employment” such as firings or demotions. *Id.* at 1339. And *Joyner* depended heavily on an earlier case, *Akins v. Fulton County*, which held that “threats of suspension and job loss” are not adverse actions. 420 F.3d 1293, 1301 (11th Cir. 2005). And even if *Joyner* had changed the Eleventh Circuit’s standard, that would only make the Fifth Circuit even more of an outlier.

## II. Defendants have not borne their burden of proving that Lowery's claims are moot

UT also alleges that Lowery's claims may soon be moot because the Salem Center is slated for closure later this summer. While Lowery does allege that UT used his Salem Center affiliation as a pressure point to silence him, his claims of adverse action were never limited to his center stipend or affiliation.

In his First Amended Complaint, Lowery alleged that he reasonably feared not only that Defendants would eliminate his Salem Center affiliation, but that they would "take other adverse actions." FAC at 23-24 (WDTX ECF No. 126) (EROA.2729-2730). Lowery alleged that Defendants threats to "reduce Lowery's pay . . . or *otherwise discipline him*" were designed to silence him. FAC at 28, 31 (emphasis added) (EROA.2734, 2737). His complaint also alleged that Burris warned Carvalho that Burris must approve Lowery's compensation. FAC at 18 (EROA.2724); *see also* EROA.126.

Lowery's claim for relief similarly requested an injunction and declaratory relief preventing UT from threatening Lowery for protected speech (or implementing those threats) by, among other things, reducing his pay, removing his job responsibilities or engaging in "any other adverse employment action." FAC at 32-33 (EROA 2738-2739).

Similarly, in his declaration, Lowery stated that he "interpreted Titman's reference to needing to have a popular class to imply that [Lowery] might face a loss of pay or other disciplinary consequences if [Lowery]

continued criticizing [UT's Sustainability Institute] and its events." EROA.116. Lowery also declared that his use of Twitter wasn't "worth the risk to [his] career." EROA.119.

Both the district court and the Fifth Circuit opinions discussed Lowery's annual pay raises for his tenured faculty position, which were separate from his Salem Center stipend and unrelated to his Salem Center position. App. 6a, 65a n.4, 84a, 88a, 97a. Those courts tended to view his pay raises as evidence that Lowery had not been subject to retaliation, but Lowery has steadfastly maintained that those raises were only approved and re-approved after he began self-censoring. EROA.118-121, 2825, 2853. UT was, in effect, buying his continued silence and threatening to remove future discretionary raises if he resumed his prior speech.

It is also a rather strange coincidence that UT would announce the dissolution of the Salem Center just as this petition was pending. This Court should view with skepticism UT's late-breaking and self-serving attempt to manipulate this Court's jurisdiction.

"A case does not automatically become moot when a defendant suspends its challenged conduct and then carries on litigating for some specified period." *FBI v. Fikre*, 601 U.S. 234, 243 (2024). It is UT's "burden to establish that it cannot reasonably be expected to resume *its* challenged conduct." *Id.* (cleaned up). Nothing prevents UT administrators from renewing their non-Salem Center related threats to Lowery's employment after this litigation has concluded. Defendant Burris, or his successor, could for example, again threaten not to

approve future raises if Lowery resumes his unwelcome social-media posting or public criticism.

Since the outset of this case, Lowery has alleged that UT has threatened him with adverse employment actions unrelated to his Salem Center position, so potential relief remains to be granted, even if the center is eventually dissolved.

UT also claims mootness because some of the Defendants in the caption have moved on to other roles. But Lowery has brought only official-capacity claims for prospective relief. FAC at 3 (EROA.2709). “Suits against state officials in their official capacity therefore should be treated as suits against the State. Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation.” *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *see also* Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d).

Officials may come and go, but that does not moot an official-capacity lawsuit. The civil rules address—and easily resolve—this common occurrence in public university-related litigation.

### **III. The Fifth Circuit and the District Court both correctly held that Lowery had standing**

The Fifth Circuit and district court both found that Lowery had standing to bring his retaliation claims. App. 9a-15a; App. 45a-53a. The Fifth Circuit noted that since he had stopped tweeting altogether in response to the perceived threats, Lowery’s “self-chilling is thus an ongoing injury.” App. 14a. The Fifth Circuit also held that

“Lowery’s decision to self-censor is reasonable” because he had alleged “several sanctions (both informal and formal) that he would face if he continued to speak his mind on public issues[.]” App. 15a.

Standing has already been thoroughly and repeatedly litigated and UT raises no good reason to revisit standing again. UT alleges that the courts below failed to consider evidence of Lowery’s pay raises, but both courts referred to those pay raises, an occurrence that no party disputes, even if they draw different conclusions from those raises. App. 6a, 65a n.4.

UT cites no authority for the proposition that pay raises or post-filing disavowals automatically vitiate standing or that a district or appellate court must resolve all factual disputes in order to reach standing. Both parties sought to fortify their claims with declarations and other evidence in this case. And the Fifth Circuit’s opinion discussed some of the very evidence which Defendants wrongly assert was overlooked, before it found that Plaintiff had met his burden of proving standing “with the manner and degree of evidence required at the successive stages of the litigation.” App. 6a, 9a. The lower courts rightly concluded that Lowery had standing to bring his claims for prospective relief.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 12, 2026