No. 24-50879

In the
United States Court of Appeals
for the Fifth Circuit

RICHARD LOWERY,
Plaintiff-Appellant,

v.

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-AUSTIN; SHERIDAN TITMAN, IN HIS OFFICIAL CAPACITY AS FINANCE DEPARTMENT CHAIR FOR THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS-AUSTIN; CLEMENS SIALM; JAY HARTZELL,
Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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[1] After former President Hartzell announced he was leaving UT, James E. Davis was named the interim President of UT in February 2025. Clemens Sialm replaced Sheridan Titman during the litigation below in September 2023. *See* Fed. R. App. P. 43(c).

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument is unnecessary for this Court to review and affirm the district court's final judgment, which properly applied binding precedent to each issue in this case. This case does not present unresolved questions about First Amendment rights, academic freedom, or the scope of public employees' right to criticize public officials. Instead, the district court dismissed Lowery's claims following this Court's precedents, under which Lowery has no cognizable First Amendment claim because he has not suffered any adverse employment action.

Appellees will be prepared to present oral argument should the Court decide to hold argument.

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Lowery lacks Article III standing to pursue his First Amendment retaliation and as-applied claims for prospective relief.[2] *See, e.g.*, *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022); *Murthy v. Missouri*, 603 U.S. 43, 70 (2024).

This Court has jurisdiction under 28 U.S.C. § 1291 to review the judgment of the district court regarding the facial challenge to the alleged speech code. *See also* 28 U.S.C. § 1331.

2 "[T]here [is] no need to cross-appeal" to "challenge Article III standing." *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 11 F.4th 345, 351 n.1 (5th Cir. 2021).

ISSUES PRESENTED

1. Did the district court err in following Circuit precedent and rejecting Lowery's invitation to extend *Burlington Northern*'s Title VII definition of an adverse action to First Amendment claims?

2. Would a person of ordinary firmness in Lowery's position self-chill so that he would have an imminent harm traceable to Defendants that would give him Article III standing?

3. Did the district court err here by declining to interpret *Jackson v. Wright* as creating new First Amendment cause of action and by applying the First Amendment retaliation test instead?

4. Lowery made conclusory allegations that Defendants created an unwritten speech code to suppress his speech, but Defendants deny any such code exists. Did the trial court err in concluding Lowery failed to state an unwritten-speech-code claim?

5. Should this Court reverse to review two discovery rulings despite Lowery's failure to show an abuse of discretion and harmful error?

INTRODUCTION

Tenured Professor Richard Lowery sued his department chair and the dean and associate dean of the McCombs School of Business (and later the university president) after he learned that university administrators were concerned about how his public statements were damaging university fundraising. Defendants—through Lowery's confidant Carlos Carvalho counseled that Lowery could reach a wider audience and be more effective if he took a different approach. When Carvalho declined to communicate such a message to Lowery, Mills and Burris took no adverse action against Lowery. Instead, they have annually reappointed Lowery to his Salem Center administrative position and raised his professorial salary.

Lowery sued under the First Amendment, claiming he had chilled his public speech because he feared Defendants would punish him by removing him from his Salem position—the same position to which Defendants had recently reappointed him. The district court eventually dismissed Lowery's chilled-speech claim because Defendants had taken no adverse employment actions against him. The district court recognized that the First Amendment shields public employees from terminations, demotions, or pay cuts, but does not insulate them from criticism. And Lowery alleged nothing that qualifies as an adverse employment action under Supreme Court or Fifth Circuit precedent.

For decades, this Court has required public employees to show that their employer took an adverse employment action against them before they can sue the employer under the First Amendment. *See, e.g.*, *Breaux v. City of Garland*, 205 F.3d 150, 160 (5th Cir. 2000) ("[R]etaliatory threats are just hot air unless the public employer

is willing to endure a lawsuit over a termination."). The Court has maintained the adverse-action standard because it recognizes that requiring employees to show material harm prevents the federal courts from being flooded with ordinary workplace disputes and grievances that they lack the resources to micromanage. Lowery's simmering grievances against colleagues and university administrators are the kind of "interfaculty disputes" that federal courts lack the "resources to undertake to micromanage" when those disputes do not result in termination, demotion, or similar material harms. *Dorsett v. Bd of Tr. for State Colleges & Univs.*, 940 F.2d 121, 123-124 (5th Cir. 1991).

This Court should reject Lowery's invitation to jettison the adverse-action requirement in favor of the lesser standard that has governed Title VII retaliation claims under *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Numerous prior panels have declined to apply *Burlington Northern* to First Amendment claims, and this Court should do the same. While a panel may overturn prior circuit precedent when an intervening Supreme Court decision clearly overrules that precedent, *Burlington Northern*—a Title VII case—did not overrule *Breaux* and the other adverse-action precedents, clearly or otherwise.

STATEMENT OF THE CASE

I. Background about Professor Richard Lowery

Professor Richard Lowery is a tenured Associate Professor of Finance in the McCombs School of Business at the University of Texas at Austin. ROA.2709; ROA.2818. Lowery also serves as an Associate Director at the Salem Center within

McCombs. Lowery's position with Salem is an annual appointment that has been renewed each academic year since 2020-21. ROA.2820-2827.

Lowery alleged that he had a "well-established history of speaking on controversial public affairs topics," ROA.2710, and that he "dissents from the political and academic views that are held by the majority of his peers and superiors," ROA.2710. He has publicly expressed those views, including comments critical of the University and its administration (including Jay Hartzell, UT Austin's former president), *e.g.*, ROA.2710-19. Lowey's speech activities have included participation in podcasts, ROA.2715; providing quotes to media sources, ROA.2714; publishing written commentary, ROA.2711-12, 2714; and posting on the social media platform Twitter, ROA.2715-19.

II. Lowery Begins Chilling His Speech

Lowery asserts that he began to chill his speech in August 2022, by setting his Twitter/X account to "private" and choosing to speak only at closed events. ROA.2730-31. Lowery alleged that university officials—including Defendants McCombs Dean Lillian Mills and McCombs Associate Dean Ethan Burris—asked Professor Carlos Carvalho, Lowery's friend and the Executive Director of the Salem Center, to counsel Lowery to "tone down" his speech, to stop telling donors not to give money to the University, to "work" on speech that was "disruptive to [University] operations," and to ensure "civility." ROA.2722-24. Lowery does not allege that Defendants communicated any of these things directly to him. *E.g.*, ROA.116; *see also*

ROA.2877. Rather, the supposed chill emanated from one meeting in August 2022 that Carvalho—not Lowery—had with Defendants Burris and Mills.

Mills's notes from the meeting and Carvalho's accounts of the meeting diverge in some respects. Carvalho stated that "Mills and Burris claimed that Lowery was 'crossing the line' in his criticism of school officials, to the point where the UT legal department was allegedly concerned about his speech. When [Carvalho] asked them for examples of such speech, Dean Mills pointed to a podcast interview Lowery gave Richard Hanania, a Fellow at the Salem Center. Dean Mills "advised [Carvalho] to 'work with Richard [Lowery]' about his speech." ROA.125-26.

Carvalho further declared that he "declined to pressure Richard Lowery to modify his speech." ROA.125. Then, Carvalho says "the deans' approach shifted to suggestions that Lowery was impeding [Carvalho's] ability to do [his] job, and that Lowery's association with [Carvalho] and the Salem Center was problematic. The deans insisted that something should be done about Lowery, Dean Burris telling, [Carvalho], 'You have the power to have him not be attached to the center.' (Lowery's contract with the center needs to be renewed annually, by both Dean Burris and [Carvalho]). When [Carvalho] again resist[ed] calls to discipline Lowery over his speech, Dean Mills told [him], 'I don't need to remind you that you serve at my pleasure,' and stated that she did not care that [Carvalho] was the one who primarily raised money for the center." ROA.126. In a later August meeting, "Burris asked for [Carvalho's] opinion about [their] previous conversation. [Carvalho] said [Carvalho] had felt threatened, to which Burris responded, 'No, I wouldn't interpret it that way,

[Lowery's] hurting you.'" ROA.126. Carvalho claims future reappointments might be at stake, ROA.126, but Burris denied making any such statement, ROA.2878.

Mills's notes recorded directly after the first August meeting tell a different story. "Mills/Sr Asso Dean 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. "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 also refute a desire to prevent Lowery from expressing his views. After "[Carvalho] revealed that [former] Finance department chair Sheridan Titman said 'Jay and [Mills] want Richard to shut up.' [Burris] and Mills *corrected* the position of [Mills] and Jay that *this is not a position of either of them or UT.*" *Id.* (emphasis added). Rather, Mills and Burris "clarified" the expectation was merely "functional operations between Salem, Civitas, and other centers and institutes in McCombs." *Id.* "Carvalho recommended that any attempt to talk with Lowery would have a higher chance of success coming from Burris, with whom Lowery has no baggage as yet, not Mills or Hartzell." *Id.* Finally, "Mills relayed her expectations for professionalism and reasonable respect for Chain of Command" and "should exercise good judgment and professionalism in resolving issues." *Id.* In other words, if Lowery had a problem, he should "start with internal questions through department chairs, various associate deans, directors." *Id.*

Regardless, the result was that Carvalho told Mills, Burris, and former Defendant Sheridan Titman that he would not counsel Lowery regarding his speech, citing Lowery's First Amendment right to speak his views—as Lowery acknowledges. ROA.2722-24. And Carvalho would have been the only conduit for any expectations expressed to Lowery because Defendants did not directly communicate any expectations to Lowery before or after the August 2022 meeting. *E.g.*, ROA.116 *see also* ROA.2877 ("I don't believe I have had any one-on-one conversations [] with [Lowery], no.").

Lowery also complained that certain faculty and staff members who are not defendants expressed concerns about his speech:

- A faculty member at McCombs sent an anonymous email to the UT compliance office requesting review of Lowery's comments as a guest on the Hanania podcast. ROA.2719-20. Lowery was not immediately made aware of this request, and it was not until discovery commenced in this litigation that he learned of the identity of the anonymous emailer. ROA.2720. The anonymous email was forwarded to Mills and Burris, ROA.2721, who took no action and did not respond to the email. ROA.2832, 2843, 2850.
- About a week after the August 2022 meeting, several other UT employees sent emails to Mills and Titman expressing safety concerns stemming from Lowery's criticisms of another McCombs center. ROA.2717, 2726-27.
- A UT staff employee, Madison Gove, emailed a UT police officer expressing safety concerns related to some of Lowery's Twitter "followers" and requesting an investigation of Lowery's speech. ROA.2728.

But Lowery does not allege that Defendants took any actions against him because of receiving these communications. And Defendants' discovery responses confirm that they did not take any actions against Lowery. ROA.2832, 2843, 2850.

Lowery based his decision to self-chill on three specific fears arising from those August 2022 meetings:

1. "Defendants will not renew his appointment to the Salem Center, costing him the $20,000 annual stipend that comes with that position." ROA.2729.
2. "Defendants will remove his supervisory role at the Policy Research Lab [in the Salem Center], and the opportunities to publish academic research that the Policy Research Lab generates for Lowery." ROA.2729.
3. "Defendants will attempt to label Lowery as lacking civility, being dangerous, violent, or in need of police surveillance." ROA.2729-30.

See also ROA.2730, 2734; ROA.2738-39 (seeking an injunction against Defendants "counseling" Lowery, "labeling his speech," or removing him from his position with the Salem Center).

Lowery made no allegation that his tenured position within the Finance Department in McCombs would be in jeopardy if he continued to speak as he says he wishes. *See generally* ROA.2707-40; ROA.1028-29.

Weeks after the August 2022 Carvalho meetings described above—the events that Lowery claims demonstrate Defendants' intent to silence his speech—Lowery was reappointed to his position at the Salem Center for the 2022-23 academic year. Defendant Burris approved the reappointment in September 2022. ROA.2825. And on September 1, 2022, Lowery received a pay raise of over $7,000 for his Associate Professor position at McCombs. ROA.2853. Lowery does not allege that any other event giving rise to his purported self-chill occurred after August 2022.

III. Lowery Sues Defendants

About five months later, Lowery filed his Original Complaint with a request for a preliminary and permanent injunction. ROA.23.

Defendants sought dismissal of both counts in the Original Complaint, and the district court dismissed the retaliation claim (Count Two in the Original Complaint). The district court explained that the retaliation claim's adverse employment action standard required an "ultimate employment decision[]" and held that Lowery's complaints that Defendants had threatened "to reduce his pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, label[] him, request[] that his speech be placed under police surveillance, or otherwise disciplining him" were "insufficient to establish an adverse employment action for a First Amendment retaliation claim in the Fifth Circuit." ROA.1330 (citations and quotations omitted)). But the district court denied Defendants' motion to dismiss Lowery's chilled-speech claim (Count One), applying the test from *Keenan v. Tejada*, 290 F.3d 252 (5th Cir. 2002). ROA.1331.

While Defendants' motion to dismiss the Original Complaint was pending, Defendant Burris approved Lowery's reappointment to the Salem Center for the 2023-24 academic year, ROA.2827, and former Defendant Titman approved a raise of over $5,000 to Lowery's salary for his tenured teaching position for the 2023-24 academic year, ROA.2855.

IV. Discovery Disputes

A. Privilege Issues

Lowery sought UT's privileged attorney-client communications below and still seeks them here. But Defendants established the applicability of the privilege, so Lowery never received them, even after in camera review.

Amanda Cochran-McCall, the University's General Counsel, explained in her declaration that she provided legal advice to Defendants and former Defendant Hartzell about employment issues, compliance with state law, and pending litigation. ROA.1458. She explained that she had previously given legal advice regarding concerns they had received from inside and outside the University, including legal advice related to Lowery and the First Amendment. *Id.* She stated that in the text chain at issue she was asked to provide additional legal advice. *Id.* And the content of the "talking points" email was her legal advice regarding syllabus inquiries and her input was provided to "ensure any statements made . . . would accurately represent the policies at issue in anticipation of unfounded legal claims, and to ensure statements did not conflict with the law." *Id.*

Lowery's request for these communications was referred to the magistrate judge, who: reviewed Lowery's motion and Defendants' response; reviewed the privilege logs and the record regarding the documents, including the Cochran-McCall declaration; held a hearing on the motion; and reviewed the documents in camera. ROA.2524-25; *see also* ROA.1457-1459. The magistrate concluded "that Defendants

properly asserted the attorney-client privilege as to the communications listed in Defendants Amended Privilege Log." ROA.2525. The district court agreed. ROA.2695.

B. Hartzell Discovery

After Lowery's retaliation claim was dismissed and before Lowery had obtained leave to file his amended complaint, the only live claim was his self-chill claim, and former President Hartzell was not yet a defendant. During that time, Lowery pursued discovery into a new theory that former President Hartzell had engaged in nepotism about his son's acceptance into a UT graduate program.

Lowery sent seven production requests and asked questions in two depositions about Hartzell's son. *See* ROA.2148-53; ROA.2120-25. The requests focused on Lowery's unpleaded theory that Hartzell improperly helped his son gain admission to a UT graduate program. *See generally* ROA.2148-53; *see also* ROA.2109. Nothing in Lowery's original complaint mentioned this supposed incident, focusing instead upon Defendants allegedly "threatening" him over his criticisms of the University. ROA.42; *see also* ROA.38. Moreover, previously conducted discovery confirmed that Defendants were not aware of any allegations regarding nepotism and President Hartzell. Burris testified that he is unaware that President Hartzell has ever sought favors for a family member or friend seeking admission to or employment with UT Austin. ROA.2121. Indeed, the Burris deposition confirmed that Lowery's counsel was "just in the process of investigating these facts and allegations . . . .". ROA.2123.

Defendants opposed discovery into President Hartzell's son by filing a motion for protective order. ROA.2140-46; *see also* ROA.2475-80. The parties' respective

views on the relevance and the burdens of such discovery requests were discussed at length in a hearing before the magistrate judge ruled on the motion for protection. ROA.3341-55; ROA.3369-74. Ultimately, the magistrate ruled Lowery's speculation about Hartzell's son is irrelevant to his self-chill claim, nor as the magistrate judge noted (ROA.3310, 3317, 3404-05) would it have anything to do with the amended complaint's unwritten-speech-code claim. Thus, burdens on Defendants out-weighed Lowery's purported need for discovery about nepotism allegations and Hartzell's son. ROA.3403-05.

V. Lowery Adds an Unwritten-Speech-Code Claim

In March 2024, Lowery filed his First Amended Complaint, which made some changes to the paragraphs in Count One (his self-chill claim) but did not allege that Lowery had any new fears of retaliatory acts. ROA.2707. Lowery, did, however, add a new claim alleging that "UT maintains an unwritten speech code or practice that allows for administrators to counsel or discipline faculty for 'uncivil' or 'rude' speech," ROA.2736. The content of that alleged "unwritten speech code or practice forbids faculty members, such as Richard Lowery, from advocating that donors stop donating to UT or that elected officials defund UT as a way of advocating for policy changes[.]" ROA.2736.

Lowery further alleged that "Defendants, individually, and in concert with each other acted to enforce UT's unwritten speech code or practice against Lowery for his protected speech," ROA.2737. "Defendants also selectively enforced UT's unwritten speech code or practice against Lowery because they disagreed with his

opinions and found his commentary offensive and thought that it offended other, more favored faculty at UT," ROA.2737.

Defendants moved to dismiss the amended claim because "[t]he existence of an unwritten policy is a legal conclusion that needs factual support." ROA.2756. Further, Lowery alleged that it is "UT," not any Defendant, that "maintains an unwritten speech code or practice that allows for administrators to counsel or discipline faculty for 'uncivil' or 'rude' speech." ROA.2758.

Defendants also moved for summary judgment on Lowery's chilled-speech claim because "Lowery's professed fear involved decisions about administrative matters and supplemental pay. Accordingly, even accepting as true that Lowery reasonably feared losing his Salem Center position, that does not amount to an adverse employment action as a matter of law." ROA.2811.

The district court entered an order dismissing Lowery's two remaining claims and finding that the chilled-speech claim would also fail to survive summary judgment. ROA.3136-70.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Lowery's so-called self-chilling claim because it was a retaliation claim for which Lowery had failed to allege a requisite adverse employment action. As a public employee, Lowery cannot claim that his employer unlawfully punished him for protected expressive activity without showing an adverse employment action was taken against him. This Court's precedents limit "[a]dverse employment actions [to] discharges, demotions, refusals to hire, refusals

to promote, and reprimands." *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998) (quotation omitted). Lowery's main fear was losing his Salem Center position and its stipend. But that is like summer teaching employment, which "might seem extremely significant to [the public educator]" but "nevertheless . . . do[es] not rise to the level of a constitutional deprivation." *Dorsett*, 940 F.2d at 123.

Lowrey makes no claim he can meet the correct standard. Rather he claims *Burlington Northern*—a Title VII case—abrogated decades of Fifth Circuit First Amendment precedent. The Supreme Court has not made a statement so clear that shows that Fifth Circuit precedent has been overruled. Indeed, three years ago the Supreme Court again cited the case on which this Circuit precedent was built—*Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

For Article III, though self-chilling can be an injury-in-fact, it must be objectively reasonable. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). And a plaintiff seeking prospective relief needs to show occurring or imminent harm. *Murthy*, 603 U.S. at 70 (2024). Lowery failed to show either after being annually reappointed to the Salem Center.

Lowery claims that the Eastern District of Texas recognized a new type of First Amendment claim in *Jackson v. Wright*, No. 4:21-CV-00033, 2022 WL 179277, at *17 (E.D. Tex. Jan. 18, 2022), *aff'd,* 82 F.4th 362 (5th Cir. 2023) (on standing grounds). It did not. It analyzed a retaliation claim and a *Pickering-Connick* claim. Lowery was not disciplined or fired, so the *Pickering-Connick* test is not applicable. That only leaves Lowery's retaliation claim, which failed because he lacked an adverse employment action.

To state an unwritten-speech-code claim, Lowery needed to plead facts showing the existence of an unwritten speech code because the existence of an unwritten policy is a legal conclusion that needs factual support. *See, e.g.*, *McCauley v. City of Chicago*, 671 F.3d 611, 617-18 (7th Cir. 2011); *see also Kriss v. Fayette Cnty.*, 504 Fed. App'x 182, 187 (3d Cir. 2012). He also pleaded no facts that Defendants enforced the code against him, merely that unspecified UT administrators vaguely threatened to do so. He failed to state such a claim.

Finally, Lowery's discovery complaints are not abuses of discretion, let alone reversible error.

ARGUMENT

I. The district court correctly dismissed Lowery's First Amendment retaliation claim because Lowery did not suffer an adverse employment action.

This Court requires an adverse employment action for a public employee to bring a First Amendment retaliation claim. *See, e.g.*, *Hawkland v. Hall*, 860 F. App'x 326, 331 (5th Cir. 2021); *Pierce v. TDCJ*, 37 F.3d 1146, 1149 (5th Cir. 1994). The district court followed this precedent, holding that Lowery could not bring a retaliation claim against Defendants without allegations or evidence that Defendants took an adverse employment action. *See, e.g.*, *Breaux*, 205 F.3d at 158 ("any criticism, such as [] oral threats or abusive remarks, does not rise to the level of an adverse employment action.").

Trying to circumvent this precedent, Lowery asserts that *Burlington Northern*, silently overturned decades of Supreme Court and Fifth Circuit precedents defining

a material adverse action for First Amendment retaliation. But *Burlington Northern*—a Title VII case—did not purport to change the standard for First Amendment retaliation claims. And Lowery cites no Supreme Court or Fifth Circuit case applying the *Burlington Northern* standard to First Amendment retaliation claims.

The fact that Lowery's suggested development in the retaliation standard has gone unnoticed by the Supreme Court and this Court for nearly two decades is fatal to his argument. The requirement of showing an adverse employment action was the longstanding rule in the Fifth Circuit even before the Supreme Court's decision in *Rutan*, 497 U.S. at 75, confirmed the standard. *See, e.g.*, *Pierce,* 37 F.3d at 1149 n.1 (noting that "*Rutan*'s delineation of the scope of harm actionable under the First Amendment comports with our pre-*Rutan* retaliation cases."). Lowery's theory that *Burlington Northern* silently overruled *Rutan* is belied by *Rutan*'s continued viability. Just three years ago, the Supreme Court cited *Rutan* for its less-than-discharge standard applicable to First Amendment retaliation cases. *Hous. Cmty.*, 595 U.S. at 477.

Moreover, even under the *Burlington Northern* standard, Lowery would still lose. The summary judgment evidence showed Lowery's Salem Center position was and remains secure. His annual appointment was renewed just weeks after the August 2022 events that he says created the threats leading to his self-chill; it was renewed again in 2023, after Lowery sued Defendants; and it was renewed yet again in 2024. Lowery neither suffered any adverse action nor was credibly threatened with an adverse employment action, even under *Burlington Northern*.

A. Longstanding Fifth Circuit precedent recognizes that First Amendment retaliation claims are not for "micromanag[ing] the administration of thousands of state educational institutions."

"To succeed in a First Amendment retaliation claim," "a public employee must show (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *E.g.*, *Hawkland*, 860 F. App'x at 329-30 (quoting *Wilson*, 787 F.3d at 325 (internal quotation marks and citation omitted)). "In the employment context, [the Fifth Circuit's] requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Kennan*, 290 F.3d at 258 n.4 (citing *Colson v. Grohman*, 174 F.3d 498, 511 (5th Cir. 1999)); *see also Colson*, 174 F.3d at 511 (noting that "false accusations, verbal reprimands, and investigations [are] not actionable adverse employment actions"). And "any criticism, such as [] oral threats or abusive remarks, does not rise to the level of an adverse employment action." *Breaux*, 205 F.3d at 158. "[R]etaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over a termination." *Id.* at 160; *see also id.* at 159 ("*Pickering* does not, however, state that a threat of discharge alone will suffice for a First Amendment retaliation claim.").

Rather, Fifth Circuit precedent limits "[a]dverse employment actions [to] discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Benningfield*, 157 F.3d at 376 (quoting *Pierce*, 37 F.3d at 1149). *Pierce* explicitly recognized that

its standard—including *Dorsett*—was in harmony with the Supreme Court's holding in *Rutan*:

> Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands. *Id.* (citing *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990)). The Supreme Court in *Rutan* held that the scope of harm actionable under the First Amendment was broader than actual or constructive discharge from employment. 497 U.S. at 74. Although *Rutan* concerned employment practices relating to political patronage, we have applied *Rutan* to retaliation claims. *See Click v. Copeland*, 970 F.2d 106, 110-11 (5th Cir. 1992); *see also Dorsett v. Board of Trustees for State Colleges & Univs.*, 940 F.2d 121, 123 (5th Cir. 1991) (denying First Amendment claim because alleged retaliatory acts were not actionable).

Pierce, 37 F.3d at 1149-50.

Applied to the university setting, decisions regarding secondary administrative roles are akin to the "teaching assignments, pay increases, and administrative matters" that the Fifth Circuit has refused to include as adverse employment actions. *Harrington v. Harris*, 118 F.3d 359 (5th Cir. 1997); *see also Dorsett*, 940 F.2d at 123 (holding that denial of preferred teaching assignments and summer employment "might seem extremely significant to [the public educator]" but "nevertheless . . . do not rise to the level of a constitutional deprivation"). "[A]cross this nation, interfaculty disputes arise daily over teaching assignments . . . administrative duties . . . and a host of other relatively trivial matters" over which courts do not have the "resources to undertake to micromanage." *Id.* at 123–24.

Lowery's fears fell into two buckets. ***First***, Lowery allegedly feared that his affiliation with the Salem Center would not be renewed, including his role with the Policy Research Lab within the Center, leading to the loss of his stipend and reduced

research opportunities. ROA.2729. To be sure, Defendants deny that such actions were ever threatened. *See* ROA.236, 240, 244; *see also* ROA.2871. But Lowery's professed fear involved decisions about administrative matters and supplemental pay. So, even accepting as true that Lowery reasonably feared losing his Salem Center position, that as a matter of law does not amount to an adverse employment action. *See Dorsett*, 940 F.2d at 123.

Second, Lowery feared that "Defendants will attempt to label Lowery as lacking civility, being dangerous, violent, or in need of police surveillance." ROA.2729-30; *see also* ROA.2730, 2734. In short, Lowery feared Defendants may criticize him for his controversial speech. But "mere accusations or criticism," including "oral threats or abusive remarks," do not qualify as adverse employment actions. *Breaux*, 205 F.3d at 157-58 (citing *Harrington*, 118 F.3d at 366). And even if Lowery feared an *actual* police investigation—rather than the fear of merely being labeled as "in need of police surveillance," ROA.2729-30—that would not qualify as an adverse employment action. *Breaux*, 205 F.3d at 158 (a police investigation was not an adverse employment action); *Colson*, 174 F.3d at 511 (city councilmember's claim that she was subject to criminal investigation in retaliation for her expressive activities was not actionable when plaintiff "was never arrested, indicted, or subjected to a recall election" or even formally reprimanded).

If defendants *actually taking* the actions at issue in *Dorsett* and *Harrington* did not arise to the level of an adverse employment action, then Lowery's alleged fears that similar actions *might* occur cannot support a cognizable self-chill claim under the

First Amendment. *See, e.g.*, *Breaux*, 205 F.3d at 160 ("[R]etaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over termination.").

This Court has been clear: "mere accusations or criticism," including "oral threats," do not qualify as adverse employment actions. *Breaux*, 205 F.3d at 157-58 (citing *Harrington*, 118 F.3d at 366); *Colson v. Grohman*, 174 F.3d 498, 511 (5th Cir. 1999) (adverse employment actions do not include "accusations, verbal reprimands, and investigations").

B. *Burlington Northern* did not eliminate the requirement of a materially adverse action in First Amendment retaliation cases.

Rather than contend with this Court's precedent, Lowery argues that a Title VII case, *Burlington Northern*, replaced decades of Supreme Court and Fifth Circuit precedent defining what constitutes a material adverse action for First Amendment purposes. But that argument itself runs headlong into Fifth Circuit precedent on overruling precedent. "[F]or a Supreme Court decision to override a Fifth Circuit case, the decision must unequivocally overrule prior precedent; mere illumination of a case is insufficient." *Gahagan v. U.S. Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018). And Lowery cannot point to anything in *Burlington Northern* or any subsequent Supreme Court or Fifth Circuit case unequivocally stating that *Burlington Northern* overturned the adverse-employment-action requirement in First Amendment retaliation cases. To the contrary, this Court has observed that, "[i]n *Burlington Northern*, the [Supreme] Court expressly limited its holding to Title VII retaliation claims." *McCoy v. City of Shrevesport*, No. 06-30453, 2007 WL 3101010, at

*5 (5th Cir. July 11, 2007). And Lowery's observation that several Fifth Circuit panels have considered whether to import *Burlington Northern*'s Title VII retaliation standard into the First Amendment context but have all declined to do so, *see* Op.Br.22-23, only confirms that *Burlington Northern* did not unequivocally overruled *Breaux* and the adverse-action precedents.

If *Burlington Northern* upset the paradigm for "adverse actions" in First Amendment retaliation cases, that change has gone unnoticed by the Supreme Court. In *Houston Community College System v. Wilson*, the Court recently explained that "a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an adverse action in response to his speech that would not have been taken absent the retaliatory motive." 595 U.S. 468, 477 (2022) (internal quotes omitted). In *Houston Community*, the Supreme Court stated that "[d]eprivations less harsh than dismissal can sometimes qualify" as adverse employment actions. *Id.* (quoting *Rutan*, 497 U.S. at 75). The *Rutan* case the Supreme Court relied on in *Wilson* is the same *Rutan* case undergirding this Court's precedents that Lowery claims *Burlington Northern* silently overruled. *See, e.g.*, *Pierce* 37 F.3d at 1149-50. But the Supreme Court, in recognizing those less-than-dismissal deprivations, never cited *Burlington Northern*. *See generally id.* Lowery's proposed sea change has gone unnoticed.

Instead, the Supreme Court or its individual justices have cited *Burlington Northern* eighteen times since it was decided, but never in a First Amendment case. And in just the last several years, the Court has had four First Amendment retaliation

cases that address, either in the majority or separate opinion, the "adverse action" requirement for such a claim.[3] None cites *Burlington Northern*.

And it makes sense that the Supreme Court would not. Rather than applying a statutory-interpretive specific test to a Constitutional claim nearly two hundred years older, the Supreme Court has looked to First Amendment jurisprudence itself.[4] In *Houston Community*, the Court cited *Rutan*, 497 U.S. at 75—not *Burlington Northern*—for the proposition that "deprivations less harsh than dismissal can sometimes qualify" as adverse actions means that "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." Compare that language from *Rutan* with this Court's standard limiting "[a]dverse employment actions [to] discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Benningfield*, 157 F.3d at 376 (quoting *Pierce*, 37 F.3d at 1149). They are very similar because this Court's precedents are based on *Rutan*.

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[3] *See Gonzalez v. Trevino*, 602 U.S. 653, 663 (2024) (Alito, J., concurring); *Nat'l Rifle Assn. of Am. v. Vullo*, 602 U.S. 175, 190 (2024); *Hous. Cmty.*, 595 U.S. at 477; *Nieves v. Bartlett*, 587 U.S. 391, 399 (2019).

[4] This Court in *Hamilton v. Dallas County*, 79 F.4th 494, 502 (5th Cir. 2023), rejected the "atextual 'ultimate employment decision' gloss" that it had previously applied to Title VII claims because Title VII includes the "key language," "otherwise to discriminate against" an employee "with respect to [her] terms, conditions, or privileges of employment." *Id.* at 501. The First Amendment does not contain this broad language or similar phrasing. Title VII statutory rights may thus be broader in scope than First Amendment rights when Congress has enacted statutory language beyond the text of the First Amendment. *Contra* Op.Br.27-28.

In further expanding on the nature of adverse actions, the Court in *Houston Community* noted that "to distinguish material from immaterial adverse actions, lower courts have taken various approaches." 497 U.S. at 75. For one standard, the Court cites *Nieves*, quoting the case it reversed for the "ordinary firmness" standard followed by some circuits. The origin of this "ordinary firmness" standard is not Title VII but *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), which in turn cited this Court's pre-*Rutan* precedents. From there, *Bart* proliferated across the circuits. For example, the Sixth Circuit notes the ordinary-firmness standard came from *Bart* and that "*Bart* itself was a First Amendment public employment retaliation case in the Seventh Circuit. The Fifth Circuit used a similar standard in *Pierce v. Texas Dep't of Criminal Justice,* 37 F.3d 1146, 1149–50 (5th Cir.), *cert. denied,* 514 U.S. 1107, (1995)." *Thaddeus-X v. Blatter*, 175 F.3d 378, 397–98 (6th Cir. 1999). If the Sixth Circuit sees similarity in the Seventh Circuit's *Burlington Northern*-related *Bart* standard and this Court's *Pierce* standard, it is hard to imagine how *Burlington Northern* "establishe[d] a rule of law inconsistent with that precedent." *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021).

Turning to the other standard, the Supreme Court cites *Suarez Corp. Industries v. McGraw*, which sets out the test as an "inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts." 202 F.3d 676, 686 (4th Cir. 2000). The Fourth Circuit stated that "courts have required that the nature of the retaliatory acts committed by a public employer be more than *de minimis* or trivial," citing

the Supreme Court's decision in *Rutan* and this Court's decisions in *Benningfield*, *Harrington*, and *Colson*. *Id.* at 686-87.

So while no roads in *Houston Community* lead to *Burlington Northern*, all roads lead to Lowery's fears not being adverse actions.

C. Even if *Burlington Northern* governs, Lowery loses because neither his tenured teaching position, a pay raise, nor his Salem Center position were at stake, which Defendants renewed after Lowery's complaints and before his lawsuit, and annually since.

Even if *Burlington Northern* applied to First Amendment retaliation claims, Lowery would still lose under the under the Title VII retaliation standard because no reasonable person in his position would have chilled his speech out of fear of losing his Salem Center position.

The Eleventh Circuit grappled with the possible conflict between *Burlington Northern* and existing First Amendment retaliation precedent in *Bell v. Sheriff of Broward County*, 6 F.4th 1374, 1377-78 (11th Cir. 2021). *Bell* addressed two conflicting opinions within the Eleventh Circuit. *Stavropoulos* aligns with the Fifth Circuit, where an adverse action is one that "involve[s] an important condition of employment," and listed as examples "discharges, demotions, refusals to hire or promote, and reprimands." *Bell*, 6 F.4th at 1377 (citing *Stavropoulos v. Firestone*, 361 F.3d 610, 618 (11th Cir. 2004), *abrogated as to Title VII standard by Burlington Northern*). By contrast, *Bailey* applied the equivalent of the *Burlington Northern* standard. *Id.* at 1377-78 (citing *Bailey v. Wheeler*, 843 F.3d 473, 477, 480-81 (11th Cir. 2016)).

Bell recognized that the case could be resolved without deciding the issue. Citing both this Court's decision in *Breaux* and an opposing "ordinary firmness" standard from the Sixth Circuit, *Bell* held that "a public employee's suspension with pay pending an investigation does not constitute adverse employment action for purposes of a First Amendment retaliation claim." *Bell*, 6 F.4th at 1378. Here, rather than being suspended and investigated, Lowery has instead been reappointed to the Salem Center and given three raises—including one shortly before filing this lawsuit. ROA.2825 (2022-23 reappoint before lawsuit); ROA.2827 (2023-24 reappointment); ROA.2853, 2855 (pay raise history).

Lowery's remaining cases are in accord. Lowery cites *Brandon v. Sage Corporation*, in which a panel of this Court did "not reject the possibility that a realistic, drastic pay cut threat might deter someone from supporting a discrimination charge in certain circumstances." 808 F.3d 266, 271 (5th Cir. 2015). But because "a reasonable fellow supervisory employee would have waited to receive confirmation on whether the *threat was official* or would have followed the company's grievance process," instead of "giving immediate credence to [defendant]'s comments . . . no adverse employment action occurred." *Id.* (emphasis added). Here, Lowery heard about the supposed "threat" from Carlos Carvalho, not Defendants, and could not have known whether the purported threat was "official." Even if any threat was official, it was to Carvalho's own position, not Lowery's. Regardless, whatever

immediate credence Lowery gave the alleged threat should have evaporated a few short weeks later when he received a reappointment to Salem and a pay increase.[5]

Lowery's out-of-circuit precedent supports Defendants. In *Dodge v. Evergreen Sch. Dist. #114*, the Ninth Circuit explained that comments directly to the employee "that he needed to use 'better judgment'" did not constitute adverse action. 56 F.4th 767, 779 (9th Cir. 2022). *See* ROA.2114 (Mills telling Carvalho that Center directors should use "good judgment" in university communications). Rather it was only the "threat against [plaintiff's] employment" that constituted an adverse action under the Ninth Circuit's *Burlington*-esque test. *See id.* at 779-80. Lowery never claimed to fear that his employment as a tenured professor was ever in danger, *see* ROA.2818; nor was it communicated to Lowery that his Salem Center position was in danger, *see*, *e.g.*, ROA.2871. And again, as Lowery was seeking prospective relief, even if this vague so-called threat created apprehension in the weeks between, that did not give him standing to seek injunctive relief after he was reappointed to the Salem Center. *See supra* Part I.

Finally, Lowery's Sixth Circuit case, also applying a *Burlington* standard, declined to hold that "two instances here, [defendant] telling [plaintiff] not to attend political functions and how to vote, involve no retaliation or threat of retaliation." *Kubala v. Smith*, 984 F.3d 1132, 1140 (6th Cir. 2021). Rather, "[t]hreats of retaliation

[5] Lowery's district court case does not help him, either. There the least significant action was leave without pay for a year. *McNeill v. Tyson Fresh Meats, Inc.*, No. 2:23-CV-041-Z, 2023 WL 8532408, at *6 (N.D. Tex. Dec. 8, 2023). Lowery's situation, with repeated reappointments and pay raises, is not remotely comparable.

in the case law have been clear. What [Lowery] asserts is too ambiguous." *See id.* Further, Judge Boggs helpfully observes that Sixth Circuit First Amendment law, which follows *Burlington*, is consistent with the Supreme Court's case in *Rutan*, where "the Supreme Court extended [a firing case] to include not only firings but also promotion, transfer, recall, and hiring decisions." *Id.* Again, this casts further doubt that analyzing Lowery's claim under *Burlington* or *Breaux* (or the other dozen or so Fifth Circuit cases) makes a difference.

In short, Lowery offers *no* case that the claimed-of (non-)actions here were material adverse actions. Accordingly, the Court can sidestep the *Burlington* question and affirm under either standard.

II. Lowery lacks Article III standing because the criticism alleged failed to rise to the level that would chill a person of ordinary firmness.

Even when a plaintiff claims First Amendment chill, "Article III standing retains rigor . . ." *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 754 (5th Cir. 2010). No doubt "government action that chills speech without prohibiting it can give rise to a constitutionally cognizable injury." *Zimmerman v. City of Austin*, 881 F.3d 378, 389-90 (5th Cir. 2018). But below, Lowery advocated for, and the district court adopted "relaxed standing requirements" that failed to adhere to Article III's rigor. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408–09 (2013) ("Relaxation of standing requirements is directly related to the expansion of judicial power[.]").

Relying on a case about *facial pre-enforcement* challenges to *laws and rules* that punish potentially protected conduct, *see, e.g.*, ROA.1321-22, ROA. 1177 ((Response

to MtD) (citing *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020)), the district court adopted a standing theory ill-fitted for a First Amendment retaliation claim that ignores facial challenges are different. *See Speech First,* 979 F.3d at 335 (distinguishing facial and as-applied challenges). "[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id.*

But setting aside Lowery's unwritten speech code claim, *see infra* Part III, Lowery does not complain of statutes, regulations, or rules. Rather, Lowery complains of retaliation-based conduct of officials more akin to an as-applied challenge or a threat of prosecution claim, so the credible threat of prosecution cannot be presumed. But Lowery does not allege any action was taken against him, merely his fear that one would be. In such cases, a plaintiff must do more than assert "subjective chill." *Clapper*, 568 U.S. at 418. Anything else falls out of line with the general rule that "allegations of chilled speech or self-censorship must arise from a fear of prosecution that is not 'imaginary or wholly speculative." *Zimmerman*, 881 F.3d at 390 (citing *inter alia Clapper* at 416). That means, unlike the facial challenge to the policies in *Speech First*, Lowery cannot sidestep the need to allege and show a threat of enforcement as explained in *Susan B. Anthony List*, 573 U.S. at 158–59.

In *Driehaus*, the Supreme Court described the necessary threat of enforcement as "credible" and "substantial." 573 U.S. at 158-59. It distilled from its precedents several signs of a substantial threat. *Id.* at 158-61. Some signs involve past enforcement; others concern the purported enforcer. Not one is present here.

Start with past enforcement. A strong sign of future enforcement is that a threat has been enforced against the plaintiff, a closely related party, or others for similar conduct. *Id.* at 159-60. Here, Lowery does not allege that any Defendant previously enforced any threat against anyone. Lowery does not point to other incidents that make any alleged threats to his Salem Center position "credible." *See generally* ROA. ROA.2707-40. The consequence or threat that Lowery says he feared the most—losing his Salem Center position—was effectively dispelled several weeks after the August 2022 meeting, and months before he sued.[6] *See* ROA.2825. And Lowery was again reappointed in 2023 and 2024.

For another, courts consider what the enforcer has said about enforcement plans. *Driehaus*, 573 U.S. at 161, 165. During an August 2022 Carvalho meeting, Defendants actually dispelled the notion that "Jay and [Mills] want Richard to shut up.' [Burris] and Mills *corrected* the position of [Mills] and Jay that *this is not a position of either of them or UT.*" ROA.2114 (emphasis added). And though statements made in litigation are hardly dispositive, they do matter. *See, e.g.*, *Natl. Shooting Sports Found. v. Atty. Gen. of New Jersey*, 80 F.4th 215, 221 (3d Cir. 2023) (Bibas, J.) (considering Attorney General's disclaimed interest in prosecution of plaintiff). From before and

[6] The standing analysis might be different if Lowery had sought damages for these weeks of uncertainty. *Murthy*, 603 U.S. at 59 ("If the plaintiffs were seeking compensatory relief, the traceability of their past injuries would be the whole ball game. But because the plaintiffs are seeking only forward-looking relief, the past injuries are relevant only for their predictive value."). Regardless, a person of "ordinary firmness" would not wither at mere criticism from a colleague passed on by a third party, especially after the disavowal that Lowery was to "shut up." ROA.2114.

then throughout litigation, Defendants disclaimed any "threats" were made or intended to be perceived. *See* ROA.236, 240, 244, 249; *see also* ROA.2871.

Again, that statement is not merely lip service or voluntary cessation of conduct from a litigation defensive crouch—Defendants reappointed Lowery without so much as a whisper of dissatisfaction to Lowery himself. *See* ROA.2825; *see also* ROA.116; ROA.2877.

In contrast, a clear example of standing is *Jackson v. Wright*, 82 F.4th 362, 369 (5th Cir. 2023). Like the plaintiff in *Jackson*, a UNT professor, Lowery sought prospective relief, not damages. *Compare id. with* ROA.2738. That means Lowery needed to allege—and subsequently provide proof of[7]—a "continuing (*i.e.*, ongoing) or 'imminent' future injury to establish standing." *Jackson*, 82 F.4th, at 369. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). In *Jackson*, that continuing injury was having previously been "and continu[ing] to be banned by UNT from any continuing involvement with [a] Journal." *Id.* And Jackson also stated a future injury—that UNT was in the process of "eliminat[ing] resources previously provided to [a] Journal and [a] Center" with which Jackson had been closely involved. *Id.*

[7] Because this case ended beyond the pleading stage, and on summary judgment, the Court should arguably hold Lowery to more than the pleading standard. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("[P]laintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation.") (cites omitted).

But this case is unlike *Jackson* and more like *Murthy*. Lowery could show no past harms, "this failure to establish traceability for past harms—which can serve as evidence of expected future harm—'substantially undermines [the plaintiffs'] standing theory.'" *Id.* at 70 (quoting *Clapper*, 568 U.S. at 411). That leaves claims of future harm alone. But when Lowery sued in December 2022, Defendants had already reappointed Lowery to the Salem Center in September 2022—weeks after the August 2022 meeting—so Lowery's theory "must rely on a 'speculative chain of possibilities' to establish a likelihood of future harm traceable" to Defendants. *Id.* (quoting *Clapper*, 568 at 414). That speculative chain would be that Lowery would have to make future statements that would need to call for disruption of university services, such as fundraising. The Defendants would have then needed to observe that disruption in university services and decide to do something about it. The Defendants would then need to again talk to Carvalho to again talk to Lowery. Carvalho then would have needed to talk to Lowery—despite his past refusal, ROA. ROA.2722-24. And this threat must have lingered until Fall 2023 when Lowery's reappointment at the Salem Center was once again renewed. Lowery "cannot satisfy his burden with such conjecture." *Murthy*, 603 U.S. at 70. He, accordingly, has "failed to demonstrate likely future injury at the hands of the [Defendants]—so the injunction [request] against those [Defendants] cannot survive." *Id.*

With no credible threat of future enforcement, that leaves Lowery's allegations about how he says he *felt*. But Lowery's feelings are not enough to satisfy the exception to general rule against self-inflicted injury for First Amendment chill. *See Zimmerman v. City of Austin*, 881 F.3d at 389-90. That exception is narrow, and

"[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Lowery's subjective perception of a threat in Defendants' alleged statements of mild criticism does not create a cognizable cause of action under *Laird*. In other words, Lowery does not merit an injunction on mere feelings.

The district court should have rejected Lowery's lawsuit for his retaliation claims and the respective injunctive request for lack of standing and dismissed without prejudice as to those claims.

III. The district court correctly recognized Lowery's "chilled-speech" claim as a First Amendment retaliation claim.

Lowery argues that the district court erred in treating his "chilled speech" claim as a First Amendment retaliation claim, citing the district court's decision in *Jackson v. Wright*, 2022 WL 179277, at *17.[8] *Jackson* involved two claims. One, a retaliation claim, invoked *Breaux*. *Id.* The second claim alleged "an unconstitutional stifling of speech" and relied on *Buchanan v. Alexander*, 919 F.3d 847, 853, *cert. denied*, 140 S. Ct. 432 (2019). *Id.* at *18. That second claim relied on the *Pickering-Connick* standard, under which "a professor must show he or she was (1) 'disciplined or fired for speech that is a matter of public concern, and (2) [his or her] interest in the speech

[8] This Court did not address whether the plaintiff in *Jackson* sufficiently stated a claim, merely that the plaintiff—who was currently banned from his Journal and Center—had Article III standing. 82 F.3d at 369. Lowery is incorrect to suggest that this Court created a new substantive claim on a purely jurisdictional appeal. *See id.* at 366.

outweighed the university's interest in regulating the speech.'" *Jackson*, 2022 WL 179277, at *16 (quoting *Buchanan*).

Lowery was not disciplined or fired, so the *Pickering-Connick* test isn't applicable. Nor did *Buchanan* recognize any freestanding chilled-speech claim. The *Buchanan* "stifling of speech" claim involved a professor who was fired from her tenured professorship for "violations of LSU's policies and the Americans with Disabilities Act." *Buchanan*, 919 F.3d at 850-51. The professor brought both an as-applied and a facial challenge to LSU's policies that were the basis for her firing. *Id.* at 853-54. The as-applied challenge failed because "the use of profanity and discussion of professors' and students' sex lives were clearly not related to the training of Pre-K–Third grade teachers," which meant that Buchanan's speech was not a matter of public concern. *Id.* at 853 (applying the first step of the *Pickering-Connick* test). That only leaves the possibility that Lowery was merely repackaging his retaliation claim that has been discussed above. That is exactly what the district court concluded in dismissing Lowery's claim. *See* ROA.3149-50.

Lowery points to Defendants' statements indicating they wanted Lowery to change his tone or the content of his speech. *Of course* Defendants wanted to *persuade* Lowery to see things their way. But the dividing line between persuasion and impermissible First Amendment retaliation is whether it "could be reasonably understood to convey a threat of *adverse government action* in order to punish or suppress the plaintiff's speech." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 191 (2024) (emphasis added); *see also Speech First, Inc. v. Killeen*, 968 F.3d 628, 641 (7th Cir. 2020) (What matters is the distinction between attempts to convince and attempts to

coerce."); *cf. Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1016 (D.C. Cir. 1991) ("[W]hen the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass the [intermediary] threatens anyone's First Amendment rights") (cited by *Vullo*, 602 U.S. at 190-91). But as explained above there was no credible or cognizable threatened adverse action or sanction against Lowery. *See supra*, Parts I and II.

Indeed, Defendants' suggestions that Lowery should teach more popular classes and engage in debate with those he disagreed with "falls well short of []coercion." *See Killeen*, 968 F.3d at 641 (invitations for voluntary action did not count as coercion) (distinguishing *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir 2015) (cited by *Vullo*, 602 U.S. at 190)). Rather, Defendants were merely exercising their own First Amendment rights in criticizing their colleague. And criticism—even in the form of condemnation—is not enough. *Deeren v. Anderson*, 72 F.4th 229, 235 (7th Cir. 2023) ("[W]e will not afford one party his right to free speech while discounting the rights of the other party.").

Lowery's judicial estoppel and law-of-the-case arguments are likewise unavailing. Defendants never backed away from *Kennan v. Tejada*, like Lowery claims. Lowery cites Defendants' motion to dismiss briefing, *see* Op.Br.35 (citing ROA.2751-52), which cites *Kennan* four times. But Defendants cited *Kennan* for the proposition that, "[i]n the employment context, [the] requirement of an adverse employment action services the purpose of weeding out minor instances of retaliation." 290 F.3d 252, 259 n.4 (5th Cir. 2002). That proposition is consistent with *Breaux*, *Pierce*, *Dorsett*,

and other cases cited by Defendants. The district court in no way abused its discretion in declining to impose judicial estoppel.

Lowery also invokes "law of the case," but that doctrine does not apply. *See Alpha/Omega Ins. Services, Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) ("The law of the case doctrine, as formulated in this circuit, generally precludes reexamination of issues of law or fact *decided on appeal*[.]"). That's why courts look to whether matters were "fully briefed to the appellate court." *Id.* The district court's ruling was not inconsistent with its previous motion to dismiss ruling, for the same reasons judicial estoppel does not apply. In any event, "the law-of-the-case doctrine does not operate to prevent a district court from reconsidering prior rulings." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010). "A court has the power to revisit prior decisions of its own ... in any circumstance...." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). "It is [] clear, that the rule [of law-of-the-case] yields to adequate reason." *Zarnow*, 614 F.3d at 171. The need to follow binding precedent from this Court is an adequate reason. *See* ROA.3148.

IV. Lowery failed to state a viable unwritten-speech-code claim because he failed to allege sufficient facts of either the existence of such a policy or its enforcement against him.

After the district court dismissed Lowery's retaliation claim, Lowery amended his complaint to add a new challenge to a purported unwritten speech code. ROA.2707. Defendants sought dismissal of the amended complaint. ROA.2745. The district court applied the standard that after accepting "all well-pleaded facts as

true," ROA.3144, dismissal is appropriate when the plaintiff failed to plead "'enough facts to state a claim to relief that is plausible on its face.'" ROA.3145 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). And "'[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" ROA.3145 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The district court accepted Lowery's factual allegations as true (while expressing skepticism that Lowery had "properly alleged the existence of an unwritten speech code," ROA.3157), and determined that Lowery had "failed to adequately allege [his speech-code] claim" because he "failed to sufficiently allege that he was disciplined or terminated pursuant either to his speech or the University's alleged unwritten policy prohibiting his speech." ROA.3157 (citing *Buchanan v. Alexander*, 919 F.3d at 853). Rather Lowery was never disciplined for his speech, but he was reappointed to his Salem position and continued to receive annual raises. ROA.3157-58. And after noting that Lowery's facial challenge was not "clearly alleged," the district court construed it as an overbreadth challenge. ROA.3158-60. Ultimately, the court held that Lowery failed to "sufficiently allege[] a facial or as-applied First Amendment challenge to any unwritten speech code or practice," so it dismissed the claim. ROA.3160. The Court should affirm that judgment.

A. The district court correctly recognized Lowery's speech-code claim as an attempt to rehabilitate his dismissed retaliation claim.

Lowery's bare assertion that the University maintained an unwritten speech code that it selectively enforced only against Lowery was an attempt to relitigate the retaliation claim that the district court had previously dismissed. Lowery failed to even plausibly plead facts showing the existence of any unwritten policy. *See infra* Part IV.C. And he failed to plead facts showing that he was subjected to such a policy. *See infra* Part IV.B. Thus, the Court should affirm the judgment dismissing the unwritten speech code claim raised in Lowery's amended complaint.

B. Lowery failed to allege sufficient facts to support a claim that any unwritten speech code was applied to him.

The district court correctly held that Lowery failed to allege sufficient facts that an unwritten speech code was enforced against him. ROA.3157, 3160.

The district court accepted as true Lowery's assertion that an unwritten speech code exists. ROA.3157. But it determined that Lowery failed to "adequately allege this claim," *id.*, because Lowery had not alleged facts sufficient to plausibly imply that Defendants created it or enforced it against him. Lowery's amended complaint alleged that "UT," not any named Defendant, "maintains an unwritten speech code or practice that allows for administrators to counsel or discipline faculty for 'uncivil' or 'rude' speech." ROA.2736. But UT was not a defendant, and Lowery's amended complaint never alleged any specific action by any Defendant to create or enforce that purported unwritten speech code. ROA.2735-36.

Lowery made the conclusory allegation that "Defendants, individually and in concert with each other, acted to enforce UT's written speech code or practice against Lowery." ROA.2737. But he never explained *how* Defendants, either jointly or individually, enforced any such code. Lowery never alleged that any Defendant disciplined or even counseled him regarding his speech. He alleged that Defendants Mills and Burris asked Carlos Carvalho if *he* would counsel Lowery, but acknowledges that Carvalho refused to do so. ROA.2723. Similarly, Lowery alleged that Sheridan Titman told Carvalho, "We need to do something about Richard," ROA.2722, but he never alleged that former Defendant Titman counseled Lowery, disciplined him, or took any adverse action. Even if Lowery had alleged that a Defendant counseled him about his speech, that would not create a First Amendment retaliation claim. *See Breaux*, 205 F.3d at 157-58 (holding that "mere accusations or criticism," including "oral threats or abusive remarks," are not adverse employment actions).

Lowery's brief confirms that no such enforcement ever took place. His fundamental complaint is that his colleagues did not like what he had to say. Op.Br.41 (claiming that he "sufficiently alleged that [Defendants] acted against him because they *deemed* some of his public commentary to be 'uncivil,' 'offensive,' 'unmannerly,' 'factually inaccurate,' or 'rude') (emphasis added). And throughout this section of his brief, Lowery can muster only the complaints that:

- Defendant Mills discussed with others her beliefs regarding Lowery's speech, Op.Br.42;
- Defendant Mills expected Salem Center personnel to cooperate "positively or neutrally with other UT institutes," *id.*; and

- Defendant Burris and former defendant Titman expressed to others their beliefs regarding Lowery's tweets, *id.*

What Lowery calls "undue official attention," *id.* at 44, is a far cry from any actionable discipline or termination. Lowery cannot establish a First Amendment claim because no Defendant took any adverse employment action against him because of his opinions. Lowery cannot bypass that fatal flaw with a conclusory allegation that Defendants "enforced" a policy against him when no Defendant even spoke to him about his speech, much less took any adverse employment action against him.

C. Lowery failed to allege sufficient facts to support his claim that any unwritten speech code exists.

The existence of an unwritten policy is a legal conclusion requiring factual support. *See, e.g.*, *McCauley*, 671 F.3d at 617-18; *see also Kriss*, 504 Fed. App'x at 187. But Lowery has never alleged facts to support the existence of an unwritten policy prohibiting "uncivil" or "rude" speech. Instead, he complains that Defendants and others criticized his speech. Lowery has never alleged that he has been disciplined for his speech or that any Defendant has accused him of violating a UT or McCombs speech policy, written or unwritten. And his allegation that UT does not enforce its purported unwritten policy against "other faculty members," ROA.2736; Op.Br.43, instead confirms that what Lowery describes as enforcement of a "policy or practice" against "rude or uncivil speech" is merely instances of Defendants and others discussing Lowery's speech with persons other than Lowery while (1) not discipling Lowery and (2) reappointing Lowery to the Salem Center and giving annual raises for his tenured faculty position.

Lowery alleges that Associate Dean Burris discussed "the importance of civility" with Carvalho in an August 2022 meeting after Lowery issued several public tweets criticizing the GSLI program and its leadership, including one that referred to his GSLI McCombs colleagues as "shameless and awful." ROA.2718, 2723-34; Op.Br.43. But Lowery does not allege that Burris disciplined him, asked Carvalho to discipline him, or accused Lowery of violating any UT or McCombs policy. Similarly, Lowery alleges that non-Defendant Sheridan Titman told non-Defendant Laura Starks: "I don't think rude comments are acceptable." ROA.2727; Op.Br.43. But Lowery does not allege that Titman disciplined Lowery, asked Starks to do anything to Lowery, or accused Lowery of violating any UT or McCombs policy. Thus, even taking Lowery's allegations as true, the Burris and Titman statements *that were not made to Lowery* and expressing a preference for civility in the workplace does not establish that Defendants maintain an unwritten speech code or practice that exposed Lowery to discipline for 'uncivil' or 'rude speech.'" Op.Br.40.

An unwritten policy exists only to the extent that it is enforced or otherwise made known, and an unwritten policy that is allegedly enforced only against a single person is hardly a policy. For a governmental employee like Lowery, whether statements allegedly made or actions allegedly done to him in response to his speech violate his First Amendment rights depend on, among other things, whether the employee has suffered an adverse employment action; otherwise, federal courts will be flooded with complaints about "relatively trivial matters" and wind up "micromanag[ing] the administration of thousands of state educational institutions." *Dorsett*, 940 F.2d at 123-24. Lowery should not be permitted to skirt the government-

employee retaliation standard simply by stating the unsupported legal conclusion that an "unwritten speech code exists." To do so would permit any plaintiff to transform an unsuccessful retaliation claim into a claim that the defendant maintains an "unwritten speech code," applicable only to him, with a simple sentence.

Defendants have never argued that a policy cannot exist unless it is reduced to writing. But there must be an actual policy. Lowery was required to plead facts that, if true, would support the existence of an established speech code. He conspicuously has not done so. For Lowery to seek to receive the benefit of skirting well-established Fifth Circuit precedent for the retaliation standard, he needed to show factual support for the existence of an established speech code.

Defendants themselves have not invoked a policy. Accordingly, this case is different from *Buchanan*, where LSU invoked the University's sexual harassment policies to terminate a professor. 919 F.3d at 851-52. It is likewise distinguishable from *Powell v. Ryan*, where officials removed a religious evangelist from the Iowa State Fair "based on two unwritten [] rules." 855 F.3d 899, 901-02 (8th Cir. 2017). In those cases it made sense to review plaintiffs' claims as challenges to unwritten policies because the defendants invoked those policies as the basis for their actions. Here, Defendants never claimed their alleged actions were the enforcement of policy or that a policy exists. Lowery thus seeks to evade the retaliation standard by recasting his allegations about events that allegedly happened to him (or that he feared will happen to him) as the product of an unwritten speech code.

In sum, Lowery alleges that Defendants and others complained about his speech, but they never disciplined him or concluded that his speech violated any UT

or McCombs policy. That is not enough to infer that Defendants maintain an unwritten speech policy that they enforce uniquely against him. Dismissal of the unwritten speech code claim can thus also be affirmed on the alternate ground that Lowery failed to plead sufficient facts to plausibly show the existence of an unwritten speech code.

V. Lowery's complaints regarding discovery matters do not warrant reversal of the district court's final judgment for the purpose of reviewing a few documents in camera.

Discovery rulings are reviewed for an abuse of discretion, district courts have "wide discretion in determining the scope . . . of discovery," and appellate courts affirm those rulings unless they are "arbitrary or clearly unreasonable." *JP Morgan Chase Bank, N.A. v. DataTreasury Corp.*, 936 F.3d 251, 255 (5th Cir. 2019) (citation omitted). The party challenging the discovery ruling bears the burden to prove both the abuse of discretion and prejudice (i.e., the ruling "affected the substantial rights of the appellant." *Crosby v. Louisiana Health Service and Indem. Co.*, 647 F.3d 258, 261 (5th Cir. 2011). Discovery decisions "should be reversed only in unusual and exceptional cases." *JP Morgan*, 936 F.3d at 255.

Lowery challenges two discovery matters. First, he complains that only the magistrate judge and not the district court also reviewed documents in camera. Op.Br.46-53. Second, he complains that he was not permitted to conduct discovery on a pet nepotism theory. Op.Br.54-57. Neither ruling was "unusual" or "exceptional" warranting reversal of the final judgment; rather, they were the routine sort of rulings that district courts make in exercising their "wide discretion in

determining the scope . . . of discovery." *JP Morgan*, 936 F.3d at 255. And in any event, Lowery cannot establish that he was prejudiced by the rulings.

A. The Court should not reverse the final judgment for the purpose of reviewing a few documents in camera.

Lowery challenged Defendants' privilege assertion regarding communications with the University's general counsel. The magistrate judge reviewed (1) a text string that included former President Hartzell, in house counsel and (2) an email circulating "talking points" that had been prepared with input from counsel. The dispute was referred to the magistrate judge, who: reviewed Lowery's motion and Defendants' response; reviewed the privilege logs and the record regarding the documents, including a declaration from in house counsel; held a hearing on the motion; and reviewed the documents in camera. ROA.2524-25; *see also* ROA.1457-1459. Ms. Cochran-McCall explained in her declaration that she provided legal advice to Defendants and former Defendant Hartzell about employment issues, compliance with state law, and pending litigation. ROA.1458. She had previously given legal advice regarding concerns they had received from inside and outside the University, including legal advice related to Lowery and the First Amendment. *Id.* She stated that in the text chain at issue she was asked to provide additional legal advice. *Id.* And the content of the "talking points" email was her legal advice regarding syllabus inquiries and her input was provided to "ensure any statements made . . . would accurately represent the policies at issue in anticipation of unfounded legal claims, and to ensure statements did not conflict with the law." *Id.*

In light of this declaration, as well as the magistrate judge's in camera review of the documents, it is true that: (1) the magistrate judge's determination that the documents were privileged was not clear error requiring reversal by the district court when Lowery appealed the ruling and (2) the magistrate judge's order (relying specifically upon the declarations made by the General counsel which were and are part of the record) made clear the basis for his ruling.

Lowery appealed, and the district court applied the clearly erroneous standard. ROA.2697-98 (explaining that district courts review a magistrate judge's discovery orders "under the clearly erroneous or contrary to law standard," which is "highly deferential") (citing *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995); 28 U.S.C. § 636; Fed. R. Civ. P. 72(a)). The district court overruled the issue on appeal, explaining that "[g]iven [the magistrate judge's] thorough review of the withheld documents [including in camera review and the declaration of the General Counsel], the Court finds that [Lowery] has failed to identify a clear error that would require the Court to reverse." ROA.2699-70.

The district court was not required to re-evaluate the documents in camera, nor should this Court be compelled to do so. *See, e.g.*, *United States v. Hamilton*, 991 F.2d 797 (6th Cir. 1993). Lowery's complaint that "the district court erred in denying Lowery access to this evidence—without even testing defendants' privilege claims in camera," Op.Br.47, would turn the district court's "highly deferential" review into a de novo review any time a magistrate judge makes an in camera evaluation of privilege. Lowery's argument, Op.Br.47-52, ignores the Cochran-McCall declaration, which provided detail to confirm for the magistrate judge and the district court

that the withheld documents are privileged. The Court need not conduct its own in camera review, *contra* Op.Br.53, before affirming the district court's final judgment.

Finally, another review of the documents would make no difference here. Even if these documents were not privileged and should have been produced in redacted form, *see* Op.Br.49, 51, 53, Lowery was not prejudiced because they did not relate to his self-chill claim or to the subsequently added unwritten-speech-code claim.

B. The Court should not reverse the final judgment for the purpose of imposing irrelevant and burdensome discovery on Defendants and former President Hartzell.

Lowery seeks reversal of the district court's final judgment so that he may continue to pursue burdensome and irrelevant discovery from Defendants and former President Hartzell. The district court correctly recognized that the discovery was not relevant to the case and was unduly burdensome. That ruling was not arbitrary or clearly unreasonable, and it did not prejudice Lowery. *Cerda v. Blue Cube Operations, L.L.C.*, 95 F.4th 996, 1004 (5th Cir. 2024) ("A trial court enjoys wide discretion in determining the scope and effect of discovery, and it is therefore unusual to find an abuse of discretion in discovery matters."). There is thus no basis for the Court to reverse the judgment to reopen discovery.

After Lowery's retaliation claim was dismissed and before Lowery had obtained leave to file his amended complaint, the only live claim was his self-chill claim, and former President Hartzell was not yet a defendant. Lowery pursued discovery into a new theory that former President Hartzell had engaged in nepotism about his son's acceptance into a UT graduate program. Defendants opposed discovery into

President Hartzell's son by filing a motion for protective order. ROA.2140-46; ,ROA.2475-80, and the parties fought over the relevance, ROA.3341-55; ROA.3369-74. Ultimately, Lowery's speculation about Hartzell's son is irrelevant to his self-chill claim, nor as the magistrate judge suggested (ROA.3310, 3317, 3404-05) would it have had anything to do with the amended complaint's unwritten-speech-code claim. Thus, its harassment of President Hartzell and his son and the burdens on the Defendants outweighed any need that Lowery had for the discovery. ROA.3403-05. This ruling was well within the court's discretion.

Lowery's self-chill claim lacked factual basis. Lowery alleged that he set his Twitter account to private (ROA.38) because, of purported "threats," he "reasonably fears that if he continues to offer public commentary that is critical of the UT Administration and its policies Defendants will not renew his appointment to the Salem Center, costing him the $20,000 annual stipend . . ." ROA.39-40.

These alleged bases for Lowery's decision to self-chill had nothing to do with President Hartzell's son. Yet Lowery sent seven production requests and asked questions in two depositions about Hartzell's son. *See* ROA.2148-53; ROA. 2120-25. The requests focused on Lowery's new, unpleaded theory that Hartzell improperly helped his son gain admission to a UT graduate program. *See generally* ROA.2148-53; *see also* ROA.2109. But nothing in Lowery's original complaint mentioned this supposed incident, focusing instead upon Defendants allegedly "threatening" him over his criticisms of the University. ROA.42; *see also* ROA.38, 53.

Previously conducted discovery confirmed that Defendants were not aware of any allegations regarding nepotism and President Hartzell. Burris testified that he is

unaware that President Hartzell has ever sought favors for a family member or friend seeking admission to or employment with UT Austin. ROA.2121. Indeed, the Burris deposition confirmed that Lowery's counsel was merely fishing for the purpose of investigating unalleged theories and opinions. ROA.2131. But "[p]arties . . . have no entitlement to discovery to develop new claims or defenses that are *not already identified in the pleadings*." *Samsung Elecs. Am., Inc. v. Yang Kun Chung*, 321 F.R.D. 250, 280-81 (N.D. Tex. 2017) (quote omitted, emphasis added).

Lowery justified his request for discovery regarding President Hartzell's son by suggesting that it would become relevant if he was granted leave to amend his complaint. "But [Lowery] has the matter backwards—by seeking discovery on these issues prior to pleading them, he would force [Defendants] to produce documents and discovery responses while robbing [them] of the ability to seek an early disposition of the viability of the [claims] through an opposition to his motion to amend or a motion to dismiss or to strike." *Id.* at 280-81. Neither was he entitled to conduct the fishing expedition that his counsel acknowledged in the Burris deposition as a precursor for amending the complaint. Rather, "[t]he role of discovery . . . is to find support for properly pleaded claims, not to find the claims themselves." *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 392 (5th Cir. 2009).

Importantly, the truth of Lowery's allegations about UT is not material to Lowery's self-chill claim. Whether any self-chilling on Lowery's part was objectively reasonable due to threatened retaliation would not turn on the truth of any of Lowery's statements or his beliefs. Instead, the issues before the district court on that

claim were the elements of a First Amendment retaliation claim. *See supra* Part I. Truth of his speech is not an element.

Nor did Defendants put the accuracy of Lowery's criticisms at issue. *Contra* Op.Br.55-56. The reason Defendants referred to Lowery's "[p]ublic statements defaming leaders and sabotaging fundraising efforts" was to note that those statements were "imped[ing] University operations," not to establish that Lowery's statements were actually defamatory. ROA.224. Whether Lowery's statements are false does not affect whether his public appeals to stop funding the university are disruptive to the university's operations. *See id.* (arguing that "Lowery has no protected right to make statements that intentionally seek to undermine university operations, including its fundraising efforts"). Moreover, Defendants' point that Lowery's statements were impeding University operations had nothing to do with Lowery's newly hatched nepotism allegation, raised nearly a year after Defendants' PI response.

It was thus within the magistrate judge's and the district court's discretion to determine that good cause existed to grant protection from this irrelevant and burdensome discovery.

Lowery never sought reconsideration of this ruling after he amended his complaint to add the unwritten-speech-code claim and Hartzell as a Defendant, so he should be foreclosed in this appeal from arguing that he was denied discovery that was relevant to that claim. But even if he had sought reconsideration of that ruling, Defendants were entitled to seek dismissal of the added claim before engaging in discovery on it. *Chung*, 321 F.R.D. at 280-81. The district court would not have abused its discretion if it had denied such a request before dismissing the amended

complaint. Lowery had no right to seek discovery to harass former President Hartzell and his son just to confirm or deny what Lowery thinks of President Hartzell, because even his new speech-code claim had nothing to do with Lowery's allegation about Hartzell or his son.

C. Lowery fails to explain how these rulings would constitute reversible error.

Finally, "[e]ven if a district court abuses its discretion, the reviewing court will not overturn its ruling unless it substantially affects the rights of the appellant." *Cerda*, 95 F.4th at 1004. Neither Lowery's arguments about privilege nor the Hartzell discovery even makes the effort to show that the discovery ruling ultimately affected the district court's judgment. The Court can dismiss these arguments on that basis alone. *See, e.g.*, *Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.*, 591 F.3d 458, 469 (5th Cir. 2009) ("The burden of proving substantial error and prejudice is upon the appellant."). That's because neither ruling would make a difference to Lowery losing under the law because each loss is based on facts under his control.

For his retaliation claim, he would know if he suffered an adverse action. He did not. Neither what Defendants' lawyer said to Defendants affect that, nor would his burdensome discovery into his nepotism claim, the truth of which was never at issue. His chilled-speech claim lost for similar reasons. And discovery is for already pleaded claims, not to investigate potential future claims, so the discovery denials could not have affected his losses on inadequate pleading or lack of an adverse action. *See, e.g.*, *id.* at 469-70.

CONCLUSION

The Court should vacate the judgment in part and remand with instructions to dismiss the case in part, for lack of subject matter jurisdiction because Lowery lacked and continues to lack standing for his supposed First Amendment retaliation claims. For the facial challenge to the unwritten speech code, and alternatively for his retaliation claims if there is standing, the Court should affirm because the district court correctly applied binding Fifth Circuit precedent and dismiss Lowery's claims.

Respectfully submitted,

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