No. 22-1712

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEPHEN R. PORTER, PH.D,

Plaintiff – Appellant,

v.

BOARD OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY; W. RANDOLPH WOODSON, in his official capacity; MARY ANN DANOWITZ, in both her official and individual capacities; JOHN K. LEE, in both his official and individual capacities; PENNY A. PASQUE, in both her official and individual capacities,

Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Honorable Terrence W. Boyle, District Judge

BRIEF AMICUS CURIAE OF ELIZABETH WEISS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT FOR REVERSAL

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IDENTITY AND INTERESTS OF AMICI CURIAE

Pursuant to Local Rule 29(4), Amici hereby state that no party's counsel authored this brief in whole in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person contributed money that was intended to fund preparing or submitting this brief.

Amici hereby state that they have the consent of all parties to file this amicus brief.

Elizabeth Weiss

Elizabeth Weiss is a tenured professor of anthropology at San Jose State University. Professor Weiss's department and other university officials have retaliated against her in response to her academic publications regarding Native American reburial laws and her views relating to race and equity. She is represented by Pacific Legal Foundation in an ongoing First Amendment retaliation lawsuit in the Northern District of California that shares some important issues with this matter.

Professor Weiss has an abiding commitment to academic freedom, and she fears that colleges are descending into a climate hostile to this

fundamental value. She writes to explain through her own experience the importance of allowing First Amendment retaliation claims to survive to discovery.

Pacific Legal Foundation

Pacific Legal Foundation (PLF) is a non-profit public interest law firm that litigates nationwide to defend individual rights. In addition to other issues, PLF runs a freedom-of-thought project that litigates free speech issues, including First Amendment retaliation cases on behalf of college faculty who face hostility for their academic and political viewpoints on divisive topics like equity and social justice. PLF writes to encourage the Fourth Circuit to employ liberal standards for adverse action and causation in assessing First Amendment retaliation claims.

INTRODUCTION

In one of the first known instances of retaliation for speech on campus, the University of Paris in 1206 hounded the Aristotelean thinker Amalric of Bène for teaching pantheism, the belief that God is everything.[1] Upon finding him guilty of heresy, the University forced

[1] Jacob Mchangama, *Free Speech: A History from Socrates to Social Media* 45 (2022).

Amalric to recant his views in front of his fellow academics.[2] Legend says his humiliation at this indignity precipitated his death.[3] His persecutors took a more direct route with his followers—they simply burned them.[4] We live in more civilized times, but that hardly means universities no longer persecute heretics. They just employ subtler methods. This case is about how courts should confront such methods.

The stories of Professor Elizabeth Weiss and Professor Stephen Porter exemplify the subtler ways by which modern universities continue to enforce orthodoxy and penalize dissent on campus. Increasingly, departments isolate, sideline, and strip resources from professors with unpopular views, all the while maintaining that these retaliatory campaigns have nothing to do with the viewpoints of their targets. Because of the vital importance of maintaining a vibrant and intellectually diverse campus community, courts should be alert to possible subterfuge and quick to open the courthouse and the doors of discovery to professors alleging retaliation claims.

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[2] *Id.*

[3] 1911 Encyclopaedia Britannica, Amalric, of Bena.

[4] *Id.*

ARGUMENT

The freedom of speech is "nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Academic freedom is a "special concern of the First Amendment" as a "transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

Hence, this case touches on issues that transcend the grievances of Professor Porter, as substantial as those are. The degree to which courts tolerate slow-burn retaliation disguised with flimsy excuses will have a real impact on our institutions of higher learning. The stakes are high: "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The various subtle ways that universities isolate, sideline, and strip resources from professors with unpopular views creates precisely the "atmosphere of suspicion and district" that the Supreme Court warned against. To better safeguard freedom of thought

as the hallmark of our universities, this Court should hold that Professor Porter's complaint has sufficiently alleged a First Amendment claim.

I. The Campus Environment Has Grown More Hostile to Dissenting Views Over the Last Decade.

A wave of hostility toward free expression has washed over campus culture during the last decade. Courts should review First Amendment retaliation claims on campus with this broader climate in mind.

Universities have come a long way since Amalric of Bène, but free speech hostility on campus persists. And it has worsened significantly over the last decade and especially since protests over racial injustice erupted in 2020.

This sad trend is evident in the increase in university retaliation against professors for protected speech. For instance, in 2020 and 2021 more than one hundred professors were targeted for ideological reasons and more than 60% were sanctioned in some way.[5] By contrast, in 2015 there were only 30 such attacks.

[5] Foundation for Individual Rights and Expression, Report: At least 111 professors targeted for their speech in 2021 (Mar. 2, 2022), https://www.thefire.org/report-at-least-111-professors-targeted-for-their-speech-in-2021/.

Beyond Professor Weiss's and Professor Porter's cases discussed in detail below, examples of professors targeted for protected speech abound. Recent and well-publicized incidents include Ilya Shapiro's administrative leave from Georgetown for his opposition to race-based Supreme Court nominations,[6] the firing of tenured Princeton professor Joshua Katz for his criticism of anti-racist initiatives,[7] and UCLA Professor Gordon Klein's administrative leave for his refusal to grade minority students more leniently than their peers.[8] These and other publicized incidents of retaliation against professors impose a "pall of orthodoxy" that chills faculty from expressing unpopular views.[9]

This trend is also visible in the growing frequency of speaker disinvitations and general illiberal attitudes toward speech in the

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[6] Lauren Lumpkin, *Georgetown Law official resigns, had been cleared in probe into tweets*, Wash. Post (June 6, 2022).

[7] Anemona Hartocollis, *Princeton Fires Tenured Professor in Campus Controversy*, NY Times (May 23, 2022). Princeton made the unlikely excuse that they were actually firing him over an inappropriate relationship with a student that had occurred 15 years before and had already been resolved through prior university action. Apparently it was mere coincidence that Princeton's retaliation began days after he published a controversial article.

[8] George Will, *A college teacher vs. the woke mob*, Wash. Post (Oct. 13, 2021).

[9] *Keyishian*, 385 U.S. at 603.

campus community. Attempts to cancel speaker invitations because of the speaker's viewpoints were once an uncommon phenomenon. However, the trend began to increase around 2013 and then exploded around 2015.[10] Now demands to cancel guest speakers are commonplace and frequently successful. For instance, in April 2022, Harvard canceled a speech by feminist professor Devin Buckley about British Romanticism because she's a board member of the Women's Liberation Front, which Harvard claims has transphobic views.[11]

Unfortunately, even when administrators stand up against calls to disinvite a speaker, the growing anti-speech culture bubbles up through the campus community's response. In March of this year, over a quarter of Yale Law School's student body disrupted a bipartisan event about the importance of free speech, which included shout downs, threats of violence, and other aggressive behavior.[12] The administration took no

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[10] *See* Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind* 48 (2018). The Foundation for Individual Rights and Expression maintains a "Campus Disinvitation Database" at shorturl.at/dHJ18.

[11] Dr. Devin Buckley Deplatformed by Harvard, Women's Liberation Front (Apr. 21, 2022), *available at* shorturl.at/KNPW7.

[12] *See* Yaron Steinbuch, *Yale law students disrupt bipartisan free speech panel, trigger police escort*, NY Post (Mar. 17, 2022).

action. And in February 2017, the University of California Berkeley campus exploded with violence when 1,500 protesters, including students and Berkeley staff, surrounded the building where Trump supporter Milo Yiannopoulos was scheduled to speak, destroying property and beating bystanders.[13] The administration did nothing.

These incidents are reflections of a broader retreat from a free speech climate on campus. For example, survey data show that most college students believe the climate on campus encourages self-censorship, and this perception is growing.[14] In recent years, more students have begun to support violence as a valid means of suppressing controversial speech.[15] Increased political homogeneity among both students and professors likewise raises the stakes for political outsiders who speak up.[16]

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[13] Lukianoff & Haidt, *supra* note 10, at 82.

[14] Knight Foundation & Gallup, *Free Expression on Campus: What College Students Think About First Amendment Issues* 15 (2017), *available at* shorturl.at/NOX05. *See also* Sean Stevens, *The Skeptics Are Wrong Part 2: Speech Culture on Campus is Changing*, Heterodox: The Blog (Mar. 11, 2018) (synthesizing data from various studies).

[15] *See* Lukianoff & Haidt, *supra* note 10, at 85.

[16] Lukianoff & Haidt, *supra* note 10, at 110, 112 (describing the decline in viewpoint diversity and increase in political uniformity among faculty

College administrators have proven highly sensitive to the illiberal attitudes toward speech exhibited by vocal students and faculty. Many of the actions that administrators have taken against faculty—including in the cases of Professors Weiss and Porter discussed below—were responses to demands from students and the public.[17] The increasingly hostile climate toward controversial speech on campus makes it much more likely that professors with minority views are likely to be chilled when their university takes action against them.

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and students since 2012). *See also* Knight Foundation & Gallup, *supra* note 14, at 16–17 (concluding that political conservatives are less able to express their views than political liberals).

[17] *See, e.g.*, Divya Kumar, *UCF denounces professor's Twitter posts on race; petition calls for his firing*, Tampa Bay Times (June 5, 2020). The school administrators later caved to these demands. Annie Martin, *UCF fires professor accused of racist tweets for classroom 'misconduct,'* Orlando Sentinel (Jan. 29, 2021). *See also* Eugene Volokh, *UCLA Lecturer Gordon Klein Suing UCLA Over Controversy Related to E-Mail Rejecting Student Request for Exam "Leniency" for "Black Students,"* Volokh Conspiracy (Sept. 29, 2021).

II. Professor Weiss's Experience Demonstrates the Need for Liberal Standards for Allowing a Retaliation Claim to Move Beyond a Motion to Dismiss.

A. Professor Weiss, like Professor Porter, has suffered from slow-burn retaliation.

Professor Weiss is San Jose State University's only physical anthropologist.[18] She studies bones and holds great respect for what they can teach about humanity and our past. As a scientist, Professor Weiss does not believe that ideology, left or right, should taint objective study of the world. She speaks out against movements in her field that would threaten the impartiality of scientific endeavors.

Her unflinching candor has sometimes offended university officials and colleagues. In recent years, they have embarked on a stealth campaign to gradually isolate her and cut her off from resources and opportunities. Her story demonstrates why courts must be vigilant in guarding against retaliation by slow burn, often disguised as reasonable university action.

Professor Weiss has consistently resisted the infusion of ideological biases and influences into the realm of scientific inquiry. In her own field

[18] For more on Professor Weiss's story and ongoing litigation, *see Weiss v. Perez*, No. 5:22-cv-00641-BLF (N.D. Cal. filed Jan. 31, 2022).

of osteology, she has criticized laws requiring that laboratories relinquish skeletons to tribes claiming them as ancestors, claims often relying on religious tradition and folklore as evidence of lineage. She has also resisted racialist ideas popular in her field, such as an idea proposed in her university system that non-Native American professors and staff should not be allowed to participate in Native American studies programs. Recently, she's written in rebuttal to the ideologically driven notion that anthropologists and archaeologists should not deign to presume the gender of a skeleton or historical figure.[19]

As with Professor Porter, Professor Weiss's department does not like what she has to say on these topics. Like the slow cranking of a vice, university officials have clamped down over time. Their squeeze began to tighten in 2020 when a controversy erupted on Twitter over Professor Weiss's recent book, "Repatriation and Erasing the Past."

The book argues that the Native American Graves Protection and Repatriation Act (NAGPRA) is unlawful and unwise. NAGPRA requires that laboratories turn over skeletal remains to alleged tribal

[19] Elizabeth Weiss, *There's no such thing as a nonbinary skeleton*, Spiked (Aug. 10, 2022).

descendants, removing them from the realm of scientific study. NAGPRA often allows tribes to rely on tradition and religious belief as evidence in determining whether the tribes are entitled to certain remains. The book argues that this policy is contrary to scientific objectivity and progress and violates the Establishment Clause by favoring Native American religious beliefs.

Publication of the book triggered a Twitter uproar. An open letter condemning the book as racist wound its way through the Twittersphere gathering signatures, including from several of Professor Weiss's colleagues. A growing online chorus began to pressure the university to retaliate. Before long, university officials obliged. They did so, however, through a series of adverse actions dipped in a veneer of neutrality.

First, when Professor Weiss defended her book on a listserv that had been open to faculty members to promote their publications and other content of interest to the Anthropology department, Weiss's department chair determined that this was an inappropriate use of the forum and shut down the ability of faculty members to share without his approval.

Her chair then responded to the controversy by hosting a speaker series on "topics having to do with inequity and bias in the social sciences." Professor Weiss, who had felt that the event was one-sided, proposed a counter-speaker series called "Combating Cancel Culture: Why Diversity of Thought Matters." The chair claimed the department did not have resources for her series. When Professor Weiss offered a solution to this problem, the chair suddenly "remembered" a rule requiring approval by a standing committee in the department, a rule that had never been used before and which he did not use in approving his own speaker series. After springing this dusty rule on Professor Weiss, the chair actively sought to persuade the standing committee not to support the event. The chair would later crow to other college officials that Professor Weiss's minority viewpoint had "really limited her capacity to do things or demand resources from the department."

In that same meeting with college officials, the department chair openly slandered Professor Weiss and threatened future action against her. The department chair called Professor Weiss a racist and claimed her book bordered on "professional incompetence," despite it surviving peer review and being accepted by a reputable publisher. He accused her

of professional incompetence, which is a basis for revoking tenure, because of her viewpoint, not the quality of her work. After lamenting that she was tenured, he threatened to nonetheless take action should Professor Weiss attempt to teach her views on NAGPRA to her students.

It did not take long for the university to find a pretext to continue its campaign against Professor Weiss. After a COVID-induced absence, Professor Weiss had returned to the laboratory. Excited to be back, she posted a photo on Twitter of herself holding one of the skulls in the university's skeletal collection with the comment, "So happy to be back with some old friends."[20] Anthropologists and archaeologists have often taken and published photographs posing with skeletal remains. Nonetheless, outrage once again ensued.

The provost of the university—who has no experience with human remains—hammered out a shrill letter to the university community claiming the photograph had "evoked shock and disgust from our Native and Indigenous community on campus and from many people within and outside of SJSU." He also claimed that Professor Weiss had violated

[20] https://twitter.com/eweissunburied/status/1439350813713862661?lang=en

ethical and legal standards by publishing the photo and by handling a skull without gloves. Professor Weiss, supported by declarations from prestigious anthropologists around the country, defended herself by pointing out that holding remains without gloves is standard practice and that images posing with remains are an appropriate and traditional practice.

Nonetheless, the university rushed to adopt a directive governing access to the skeletal collection, requiring pre-approval for research and forbidding photography, among other things. This directive quietly removed Professor Weiss from her longstanding position as curator for the skeletal collection, placing other more ideologically orthodox professors with no experience in managing skeletal collections in charge. Unsurprisingly, these professors have categorically barred Professor Weiss from accessing the skeletal collection she once curated. One of these professors made clear in an internal email that she wanted to bar Professor Weiss from research because of her "scientifically racist publications," *not* because she somehow posed a threat to the remains.

Professor Weiss, the only physical anthropologist at the university and the only regular researcher of the skeletal collection, was uniquely

impacted by the directive. Nonetheless, the university attempted to justify its rationale for cutting off Professor Weiss from research and removing her from her post as curator by claiming that California law required it. California's state version of NAGPRA requires universities to inventory remains to determine what parts of the collection are protected by law and then to consult with tribes on how the remains are handled during that inventory process. But consultation with the tribes had already occurred by the time Professor Weiss had taken her photograph, and the tribes had never before urged the university to ban photography or require use of gloves.

The university has continued to sideline and starve out Professor Weiss. Barred from researching legally protected Native American remains, Professor Weiss asked permission to study x-rays of the Native American remains stored in the curation facility. Suddenly, the university and the tribes claimed for the first time that these x-rays were "sacred objects" and denied her the chance to study them. Professor Weiss asked for permission to study non-Native American remains unprotected by NAGPRA. Internal emails show that the department chair and the professors assigned as gatekeepers for the facility conspired to find ways

to deny her access to these as well, since NAGPRA did not offer a convenient excuse. Unable to find a neutral rationale to hide behind and after months of dragging their feet, they finally agreed to move these unprotected remains out of the curation facility so Professor Weiss could access them. But they stored them in a classroom where classes are in session Monday through Thursday. As Professor Weiss's husband quipped to the media, if she asked for a pencil at this point, they'd claim it as a sacred object just to keep it from her.[21]

B. Professor Weiss's experience demonstrates why courts should recognize liberal standards for First Amendment retaliation against faculty.

Professor Weiss, represented by Pacific Legal Foundation, sued San Jose State University officials in early 2022. Unfortunately, the university persuaded the federal district court to dismiss the case for failure to state a claim, though the Court granted leave to amend.[22] Professor Weiss currently faces another motion to dismiss on her

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[21] Elizabeth Weiss, *Indigenous Activists Are Targeting My Research. My Own University Is Helping Them*, Quillette (Aug. 18, 2022).

[22] Some but not all of Professor Weiss's allegations were dismissed on the grounds that the tribe was a required but unjoinable party under Federal Rule of Civil Procedure 19.

amended complaint. Professor Weiss's experience is instructive as this Court considers the proper standards for First Amendment retaliation.

i. Courts should consider the cumulative effect of adverse actions and the prevailing context.

When considering whether adverse employment action achieves materiality, courts should look at the whole pattern of adverse actions. The threshold for material adverse action is not high. Adverse action is material "if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine v. Rector & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). As the Ninth Circuit has recognized, this means that an injury "no more tangible than a chilling effect on First Amendment rights" will do the trick, and any "harm that is more than minimal will almost always have a chilling effect." *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009). The Ninth's low bar fits with the Supreme Court's own dividing line between "trivial" and "material" adverse action in the context of Title VII's anti-retaliation provision. In *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), the Supreme Court described non-material adverse actions as "those petty slights or minor annoyances that often take place

at work and that all employees experience." On the other hand, adjusting an employee's job duties, even when the new job duties still fit within the job description, can suffice as material. *Id.* at 70. The bar for materiality is meant to be low to better protect First Amendment rights.

Courts should consider adverse actions together rather than as isolated incidents that must each independently reach the materiality threshold. A pattern of abusive behavior forms part of the "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *White*, 548 U.S. at 69 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998)). Beyond even the localized pattern of adverse actions, courts should exercise "careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81. As the Supreme Court has noted, a smack on the bottom by a football coach as his player heads onto the field is simply not the same as a manager doing it to his personal secretary in an office setting. *Id.*

These contextual factors are especially vital to assessing First Amendment retaliation in the university context. For over a century,

tenure has protected faculty from termination for the expression of unpopular viewpoints.[23] Indeed, it can be said that "[t]enure is the chief guarantor of the intellectual freedom that makes it possible for faculty members to pursue new ideas and to teach concepts in the sciences and humanities that fly in the face of conventionally accepted wisdom."[24] Tenure and the nature of academia fortunately protects professors from some of the most blatant adverse actions typical in most employment settings, such as termination or giving hourly employees a bad schedule. But tenure loses much of its value if professors may retain "tenure" but otherwise be shunned, alienated, and excluded for engaging in research that dares to "fly in the face of conventionally accepted wisdom." Hence, in the university context, courts should be alert to more subtle or indirect adverse actions that form a pattern of undercutting academic freedom.

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[23] Michael Bérubé & Jennifer Ruth, *The Humanities, Higher Education, and Academic Freedom* 115–16 (2015) ("With the erosion of the professionalism once institutionalized by the tenure system . . . the university community has not blossomed into a vibrant democracy but reverted to the kind of demeaning and resentful culture typical of patronage systems.").

[24] Benjamin Ginsberg, *The Fall of the Faculty* 156 (2011).

Other trends in academia exacerbate this danger to academic freedom. Academic institutions have increasingly become bureaucratized as administrative hires dramatically outpace the growth of faculty.[25] Indeed, at many campuses bureaucrats outnumber faculty by at least a 2:1 ratio.[26] These bureaucrats frequently lack an academic background and have little regard for academic freedom or the First Amendment.[27] Many of these bureaucrats are hired to focus on "diversity"[28] which has led to increasing crackdowns of any views that challenge diversity, equity, and inclusion mandates or offend anyone.[29] Professors are

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[25] *Id.* at 200.

[26] The Rise of Universities' Diversity Bureaucrats, The Economist: The Economist Explains (May 8, 2018), https://www.economist.com/the-economist-explains/2018/05/08/therise-of-universities-diversity-bureaucrats.

[27] Dan Berrett, *The Fall of the Faculty*, Inside Higher Ed. (July 14, 2011), https://www. insidehighered.com/news/2011/07/14/fall-faculty (interview with Benjamin Ginsberg) (discussing the shift away from part-time academic deans to full-time administrators without academic experience).

[28] For instance, University of California, Berkeley has around 175 officials who are classified as "diversity officials." The Rise of Universities' Diversity Bureaucrats, The Economist, *supra* note 26.

[29] *See* Daniel M. Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 Cath. U. L. Rev. 515 (2021).

increasingly asked to comply with modern-day loyalty oaths demanding ideological conformity.[30] These bureaucrats are sophisticated actors capable of taking subtle retaliatory actions that undermine the careers and academic freedom of all those who think differently.

Both Professor Weiss's and Professor Porter's experiences underscore the need for a holistic look at adverse actions. While many of Professor Weiss's experiences may each be material adverse action, a holistic approach that looks at the chilling effect resulting from the whole behavior pattern makes clear that the university surpassed the materiality threshold. Her university denied her access to research, publicly maligned her, changed her work responsibilities, and cut her off from department resources. All these actions, taken together, result in much more than "petty slights or minor annoyances." *White*, 548 U.S. at 68.

Professor Porter faced an orchestrated campaign not unlike Professor Weiss. First, defendants placed in Porter's personnel file an email from a department head leveling an unsubstantiated accusation of

[30] *See id.*

bullying behavior.[31] They reported an email in which Porter expressed concern about the integrity of a black faculty hire to the provost for equality and opportunity and the vice provost for faculty affairs.[32] Defendants then began to repeatedly pressure Professor Porter to leave the Higher Education Program Area, which would cut him off from resources and job opportunities.[33] Pressure ultimately became a threat of removal based on claims that Porter was ill-mannered.[34] Defendants also tried to badger Professor Porter into defending himself to faculty and students about his criticism of the "woke" policies of a totally different institution on his personal blog.[35]

Defendants then finally removed Professor Porter from the Higher Education Program Area and attempted to force him to teach an extra course.[36] As a practical matter, his removal from the program area isolated him from the Higher Education doctoral program. Defendants

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[31] J.A. 14 ¶ 32.

[32] J.A. 15–16 ¶ 40.

[33] J.A. 16, 19 ¶ ¶ 41, 56.

[34] J.A. 20 ¶ 64.

[35] J.A. 21–22 ¶¶ 67, 74.

[36] J.A. 23 ¶ 78.

also excluded him from the Diagnostic Advisement Procedure process for Ph.D. students, undermining his ability to work with his Ph.D. advisees effectively.[37] The exclusion from this procedure later became the pretext for excluding Professor Porter from various other meetings regarding Ph.D. students, including the entire recruitment weekend devoted to prospective Ph.D. students.[38] Later, the department created a new program area, and all faculty save Professor Porter were invited.[39] The department has since sucked resources from the old program area, leaving Professor Porter marooned in an abandoned husk.[40]

Some of these events taken in isolation—an email placed in his file accusing him of bullying, for instance—may not rise above the level of "petty slights and minor annoyances." *White*, 548 U.S. at 68. But when considered in conjunction with "the constellation of surrounding" adverse actions, *Oncale*, 523 U.S. at 82, this pattern of conduct would certainly

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[37] J.A. 24 ¶ 86.

[38] *Id.* at 98, 104.

[39] *Id.* at 110.

[40] *Id.* at 110–15.

"have a chilling effect on First Amendment rights." *Brodheim*, 584 F.3d at 1270.

This broader take is especially important in the university setting. Academic freedom is intended to not just protect against termination, but to provide Professors with the freedom to think differently, challenge orthodoxy, and contribute to the marketplace of ideas in novel and innovative ways. Because these professors are sophisticated employees who often enjoy tenured status, wrathful administrators must deploy indirect tactics. And yet these indirect tactics, especially when viewed cumulatively, have a stultifying effect that chills faculty willingness to speak out, rebut the entrenched consensus, and work on pathbreaking research. As the Supreme Court has warned, the consequences of such an academic "atmosphere of suspicion and distrust" are particularly dire, as without the vigorous protection of these vital freedoms, "our civilization will stagnate and die." *Sweezy,* 354 U.S. at 250. Because of the vital importance of academic freedom, a "special concern of the First Amendment," *Keyishian*, 385 U.S. at 603, a series of small actions against tenured, independent faculty should be viewed differently, and with

much greater skepticism, than similar actions from a Walmart floor manager. *Oncale*, 523 U.S. at 81.

The district court below did not look at the "constellation of surrounding circumstances" when considering the adverse actions alleged by Professor Porter. The district court, for instance, concluded that his fear that adverse actions may put his tenure at risk was too speculative.[41] But the court should have recognized how Defendants' actions chip away the foundation on which those tenure protections rest and undermine the benefits of tenure and robust academic freedom. Tenure should not serve the perverse role of shielding adverse actions from scrutiny because courts adopt the approach of waiting for tenure review to arrive. A castle may be a defense, but it becomes a trap when under constant siege.

In short, the court below seems to have been waiting on a single, dramatic action down the road—termination, loss of tenure, etc. The court erred in not looking to the cumulative chilling effect of Defendants' actions. Professors should not have to wait for the castle doors to be breached before defenders will bother to man the walls.

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[41] J.A. 49–50

ii. Courts should be wary of pretexts when assessing causation.

In both Professor Weiss's and Professor Porter's cases, university officials sought cover under viewpoint-neutral pretexts for adverse action. Courts should not let such pretexts undermine the plausibility of plaintiffs' allegations. Often the true motives for an adverse action will only come to light through discovery.

Bad actors are not in the habit of flaunting their motives. "In practical terms, the government rarely flatly admits it is engaging in viewpoint discrimination." *Ridley v. Massachusetts Bay Transp. Authority*, 390 F.3d 65, 86 (1st Cir. 2004). Hence, courts must be on alert for subterfuge. "The existence of reasonable grounds . . . however, will not save a regulation that is in reality a façade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 811 (1985); *see also Ridley*, 390 F.3d at 86 ("The recitation of viewpoint-neutral grounds may be a mere pretext for an invidious motive."). While the motion to dismiss standard does allow for dismissal where there is an "obvious alternative explanation" for the plaintiffs' theory of the case, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007), an alternative explanation is only "obvious" if there is no

plausible inference drawn from the allegations that the explanation is pretextual. *See Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017) ("The question is not whether there are more likely explanations for the City's action, however, but whether the City's impliedly proffered reason . . . is so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation that it renders [plaintiff's] claim of pretext implausible."). Moreover, the plausibility of ill motives increases where there is a series of adverse actions, each enjoying a convenient excuse. "Actions that might seem otherwise neutral in isolation can take on a different shape when considered in conjunction with other surrounding circumstances." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015).

The need to carefully scrutinize pretextual explanations is particularly important in the academic setting where bureaucrats and administrators are highly sophisticated and can cloak their retaliatory actions in a variety of pleasant-sounding euphemisms such as "encouraging diversity," "supporting collegiality," "promoting equity," or "furthering inclusiveness."

In Professor Weiss's case, the district court erred by holding that the university's pretextual motives were "obvious alternative explanations" for Professor's Weiss's claim of retaliation and therefore justified outright dismissal. The university adopted a directive that effectively unseated Professor Weiss as curator and then enforced the directive to bar her from accessing the remains she'd curated and studied without controversy for years. The university's pretext for doing so was that Professor Weiss had mishandled remains by posting a photo of her holding a skull without gloves. Professor Weiss's complaint alleged why her behavior was appropriate. The university also claimed that state law required them to adopt the directive and cut off Professor Weiss. Professor Weiss's allegations, however, plausibly alleged that the adoption and enforcement of the directive was in fact motivated by her recent publications and viewpoints.

The district court, in dismissing the complaint, simply sided with the university's pretextual explanations, rather than allowing Professor Weiss access to discovery to disprove these pretexts. For instance, the district court concluded that the alternative explanation for the directive—that Weiss's tweet was improper—rendered her allegations

implausible. *Weiss*, Order Granting Motion to Dismiss at 26. The district court should have instead recognized that the university's explanation created an issue of fact that would require discovery and fact-finding.

With Professor Weiss's amended complaint, the University continues to argue that the case should be dismissed because it can point to pretextual rationalizations for its actions. For instance, the University argues that Professor Weiss's chair was justified in limiting access to a departmental listserv because Professor Weiss "misused" the forum. But whether Professor Weiss's email was proper for the forum is an issue of fact, not a trump card that university officials can use to shut down a First Amendment lawsuit.

Likewise here, the court below accepted the Defendants' rationales that Porter had been an unprofessional bully who refused to mend relationships he'd fractured with his ill manners.[42] But as the Supreme Court has warned, courts should be wary of a government's neutral rationales in the context of First Amendment challenges. Since defendants in First Amendment retaliation claims will always posit a legitimate excuse for their conduct, deference to such excuses at the

[42] J.A. 50.

motion-to-dismiss stage will bar plaintiffs from ever engaging in the discovery needed to demonstrate retaliatory motive, which is particularly important in the context of academia given the sophistication with which university officials can hide their true motives. Defendants' "collegiality" rationale is especially suspect here, because the only alleged bullying cited by Defendants at this point is the very speech that Porter claims to have been punished for.

CONCLUSION

Professors should never fear punishment for speaking their minds. "If teachers must fear retaliation for every utterance, they will fear teaching." *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993). If we are to maintain the caliber of our universities as bastions of open discourse, faculty must know that courts stand ready to defend their First Amendment freedoms. Amici urge this Court to reverse.

DATED: September 6, 2022.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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