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; JOY GASTON GAYLES, in both her official and individual capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

DARPANA M. SHETH
Counsel of Record
JEFFREY D. ZEMAN
On the Brief
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106
(215) 717-3473
darpana.sheth@thefire.org
jeff.zeman@thefire.org

JT MORRIS
On the Brief
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Avenue, SE, Suite 340
Washington, D.C. 20003
(215) 717-3473
jt.morris@thefire.org

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 22-1712 Caption: Porter v. Board of Trustees of North Carolina State University et al.,

Pursuant to FRAP 26.1 and Local Rule 26.1,

Foundation for Individual Rights and Expression
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Darpana M. Sheth Date: September 6, 2022

Counsel for: Amicus Curiae

CERTIFICATE OF SERVICE

****

I certify that on September 6, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Samantha K. Harris
ALLEN HARRIS PLLC
P.O. Box 673
Narberth, PA 19702
Tel: (267) 304-4538
sharris@allenharrislaw.com

Counsel for Plaintiff-Appellant

Eric M. David
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, LLP
Suite 1600
P.O. Box 1800
Raleigh, NC 27602
Tel: (919) 839-0300
edavid@brookspierce.com

Counsel for Defendants-Appellees

/s/ Darpana M. Sheth (signature) September 6, 2022 (date)

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty.[2] Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's campuses. To best protect professors' academic freedom and prepare students for success in our democracy, FIRE believes the law must remain unequivocally on the side of robust free speech rights on campus.

Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases, like this one, that implicate faculty rights. *See, e.g.*, Brief for FIRE, et al. as *Amici Curiae* Supporting Plaintiff-Appellant, *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640

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[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

[2] Formerly known as the Foundation for Individual Rights in Education, FIRE recently changed its name to reflect its expanded mission of protecting free expression beyond colleges and universities.

F.3d 550 (4th Cir. 2011) (No. 10-1413); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant-Petitioner, *McAdams v. Marquette Univ.*, 2018 WI 88 (No. 2017AP1240). Faculty have a right to meaningful legal remedies for the irreparable harm they suffer when public universities, like North Carolina State University, retaliate against them for protected expression. This is true whether the retaliation is a hasty termination or a series of adverse actions that erode the faculty member's standing and reputation, like the series of acts NCSU took against Professor Stephen Porter. To ensure that faculty like Porter can vindicate their First Amendment rights, FIRE urges the Court to reverse the district court's ruling.

SUMMARY OF ARGUMENT

Stephen Porter believed his university was sacrificing academic rigor and hiring diligence to the detriment of his fellow faculty and the rest of the North Carolina State University (NCSU) community. So he did what any other professor invested in the academic success of his or her institution would do: he questioned why NCSU's administration was making those sacrifices. But NCSU did not respect Porter's First Amendment right to engage in robust and free discussion of those issues.

Instead, NCSU's administrators first threatened to remove Porter from the Higher Education Program Area because of his speech, despite knowing he wished to stay. Next, when Porter refused to apologize for his speech, Defendants not only removed him from the program area, but barred him from attending his program area's orientation, cookout, and retreat. They also burdened him with teaching an additional course, while depriving him of opportunities to support his current advisees and recruit new ones. This "death by a thousand cuts" all but stripped Porter of the ability to do his job. The Supreme Court has said the First Amendment protects public employees from acts of employer retaliation as trivial as failing to throw a birthday party. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990). Defendants' actions go far beyond that.

A First Amendment retaliation plaintiff like Porter need only allege some government action that would deter a person of ordinary firmness in a similar position from exercising their free speech rights. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). While termination, demotion, loss of compensation, or loss of opportunity for advancement all meet this standard, so do a wide range of other retaliatory acts. Indeed, courts have recognized any adverse

action beyond mere criticism and verbal reprimands can meet the ordinary firmness chilling standard—including threats of punishment. *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686–87 (4th Cir. 2000).

It was error, then, for the district court to dismiss Porter's First Amendment retaliation claim after Porter alleged a series of retaliatory acts that NCSU took after he spoke out on matters of public concern. Above all, the district court erroneously relied on Title VII cases and held that ***only*** termination, demotion, loss of compensation, or loss of opportunity for advancement could support Porter's retaliation claim. No precedent limits First Amendment retaliation claims in this way.

The First Amendment bars NCSU and other public universities from retaliating against and harming professors like Porter who express viewpoints on matters of public concern the administration disagrees with. If it did not, public campuses would lose the robust and open debate essential to higher education. Public university faculty in the United States enjoy academic freedom largely because the First Amendment protects the free exchange of ideas from meddling officials.

Porter's plight, however, is just one example of how college professors too often work at the mercy of administrators who disregard

professors' constitutional rights in favor of silencing speech that either fails to match the administration's views, or elicits a "heckler's veto" from students, other faculty, or the public. *Amicus* FIRE's experience defending faculty rights for more than twenty years demonstrates that university administrators routinely impose all manner of burdens upon dissenting faculty. These include conducting sham investigations, forcing professors to stop important research, and imposing no-contact orders. In short, college administrators have the power and the tools to make professors' lives miserable and put them in fear of losing their jobs should they speak out of turn. And that is exactly what the Defendants did to Stephen Porter simply because he questioned NCSU's practices.

Even if NCSU officials did not formally terminate or demote Porter because of his speech, the series of adverse actions Porter alleges suffice to show a First Amendment retaliation claim. This is a fact-specific question for a jury and should be aided by discovery. Porter has alleged that Defendants' retaliatory acts handcuffed him from effectively doing his job as a tenured professor and Ph.D. advisor. That speech-chilling harm is not much different than one flowing from outright termination.

The First Amendment must bar retaliatory acts like those NCSU took against Porter. And professors like Porter must have a remedy for the harm flowing from such retaliatory acts. If not, college administrators will have free rein to take adverse action against faculty for their protected speech right up to the edge of official termination or demotion. The result would be a learning and research environment stifled by fear of speaking out. That is not a result the First Amendment permits.

For these reasons, FIRE urges this Court to reverse and allow Porter to pursue a remedy for NCSU's retaliatory acts against his speech on matters of public concern.

ARGUMENT

I. The First Amendment's Ordinary Firmness Standard Guards Against a Wider Range of Adverse Action Than the District Court Identified.

The district court dismissed Porter's First Amendment retaliation claim because he allegedly failed to plead a "materially adverse employment action" like a clear termination, demotion, loss of compensation, or loss of opportunity for advancement. *Porter v. Bd. of Trs. of N.C. State Univ.*, No. 5:21-CV-365-BO, 2022 WL 2195011, at *6 (E.D.N.C. June 17, 2022). In doing so, the district court looked to a Title VII decision limiting retaliatory acts instead of focusing on cases in the

First Amendment context. This was erroneous. FIRE urges the Court to reaffirm the broad standard for what counts as retaliation in the First Amendment context: any act that would chill a person of ordinary firmness from exercising their First Amendment rights. *Constantine*, 411 F.3d at 500.

Under this standard, courts have recognized that even the threat of adverse state action may deter ordinary people from speaking. A threat to professors' academic freedom is a threat to the robust exchange of ideas essential to student success at colleges and universities. But as FIRE's experience demonstrates, administrators often retaliate against outspoken college faculty in many ways that chill speech as effectively as an official termination. And here, the series of retaliatory acts Porter has alleged, though short of the enumerated actions the district court identified, did damage to his ability to perform his job and would have chilled a person of ordinary firmness from speaking out.

A. To ensure broad protections for free speech, courts should avoid limiting First Amendment retaliation claims to a handful of adverse actions.

This Court has held that a speaker has suffered First Amendment retaliation if "a similarly situated person of 'ordinary firmness'

reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case." *Blankenship v. Manchin*, 471 F.3d 523, 530 (4th Cir. 2006) (quoting *Baltimore Sun v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006)) (internal quotation marks omitted); *Constantine*, 411 F.3d at 500. And to meet the "ordinary firmness" standard, a plaintiff need allege only more than *de minimis* adverse acts like "criticism, false accusations, or verbal reprimands[.]" *Suarez*, 202 F.3d at 686.

On that basis, a wide range of government action beyond formal firing and demotion can show First Amendment retaliation. *See id.* (citing *Rutan*, 497 U.S. at 79). Indeed, because of the state's coercive power, even a threat of official retaliation is enough to deter an ordinary person from speaking on matters of public concern. For example, this Court explained that a state governor's threat to scrutinize a coal company chairman's business affairs would chill the free speech rights of a similarly situated ordinary person. *Blankenship*, 471 F.3d at 530–33; *see also Coszalter v. City of Salem*, 320 F.3d 968, 976–77 (9th Cir. 2003) (holding a threat of disciplinary action—considered individually or taken together with other adverse acts like an unwarranted disciplinary

investigation, a ten-day suspension from work, or an unpleasant work assignment—was reasonably likely to deter government employees from protected expression). In the same way, a university administrator threatening to reassign a faculty member because of what the faculty member said on a public issue would deter a similarly situated ordinary person from speaking out.

Thus, the district court erred by holding a First Amendment retaliation claim is limited to a handful of adverse action categories found in Title VII cases, like termination, demotion, loss of compensation or loss of opportunity for advancement. *See Porter*, 2022 WL 2195011, at *6. In doing so, the district court denied Porter an opportunity to remedy the harm from NCSU's series of retaliatory acts against his speech on matters of public concern. Instead, the district court should have found that Porter's well-pled allegations show NCSU's conduct would likely deter a person of ordinary firmness from engaging in protected speech.

True enough, the district court noted this Court has observed that "[w]hat constitutes a materially adverse action for a Title VII retaliation claim is 'similar to the standard for demonstrating an adverse action in the First Amendment retaliation context.'" *Id.* (quoting *Feminist*

Majority Found. v. Hurley, 911 F.3d 674, 697 n.12 (4th Cir. 2018)). On the other hand, *Hurley* did not consider violations of the plaintiffs' First Amendment rights. *Hurley*, 911 F.3d at 684–85. Rather, the Court held that the Title VII retaliation standard applied to the ***Title IX*** retaliation claims at issue. *Id.* at 697 n.12. Although *Hurley* held that analysis of the Title VII standard (and thus the Title IX standard) should look to the First Amendment ordinary firmness test, it made no suggestion that the inverse must also be true. *See id.* In short, *Hurley* does not limit First Amendment retaliation claims to the few adverse employment decisions actionable under Title VII.

Nor does *Ridpath v. Board of Governors Marshall University*, another decision relied on by the district court, limit First Amendment retaliation claims to the adverse employment actions actionable under Title VII. *Porter*, 2022 WL 2195011, at *6 (citing 447 F.3d 292, 316 (4th Cir. 2006)). Even though *Ridpath* noted that "[t]ermination, demotion, loss of compensation, and loss of opportunity for promotion are well-settled materially adverse employment actions" for First Amendment claims, the Court did not ***limit*** actionable First Amendment retaliation claims to those categories. 447 F.3d at 315–16. And it did not need to

reach that question, because the plaintiff was terminated from his teaching duties. *Id.*

Adverse acts need not conform to one of a few enumerated categories to show a First Amendment retaliation claim. *See, e.g.*, *Blankenship*, 471 F.3d at 530; *Constantine*, 411 F.3d at 500. If an adverse act objectively chills speech, it violates the First Amendment. And this makes sense. For instance, Title VII is a statute limited in scope: it prohibits adverse employment decisions based on "an individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). By contrast, the First Amendment protects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times, Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964). That is why any adverse act objectively chilling that debate—and on a college campus, the academic freedom that complements that debate—violates the First Amendment.

B. A broad ordinary firmness standard is especially vital to protect a robust campus debate and academic freedom against retaliation from administrators.

More than fifty years ago, the United States Supreme Court emphasized that our nation's public colleges and universities must

champion free expression. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Otherwise, these institutions cannot meet their role of training future leaders "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Id.* (quotation omitted).

Despite this admonition, FIRE has found colleges and universities frequently fail to protect robust freedom of speech, including when professors express controversial or unpopular ideas that result in public outcry. Rather than protect these professors' First Amendment rights, university administrators often take a range of adverse actions against faculty with whom they disagree, chilling academic freedom and critical debate on public issues. And these speech-chilling tactics go beyond termination or official demotions, as FIRE details below.

Consequently, limiting faculty to bringing First Amendment retaliation claims on just a few blatant instances of adverse action, like termination and demotion, will only encourage college officials to take adverse action against faculty speech just short of those measures, harming academic freedom and stifling campus debate. That result would harm our national commitment to academic freedom and free

expression on our public campuses. Faculty must have a remedy—and a crucial deterrent against officials who might otherwise retaliate against speech—for a host of adverse actions that punish and chill protected faculty speech. This dual need for remedy and deterrence highlights why a broad "ordinary firmness" standard is the one this Court should reiterate.

C. A history of administrators retaliating against faculty speech by a host of methods highlights the need for a broad ordinary firmness standard.

FIRE is all too familiar with administrators responding to protected faculty speech with investigations, "shadow" courses, and suspensions—all of which chill discourse, harm academic freedom, and quell public debate. Just consider these examples:

- ***A retaliatory investigation.*** In December 2021, University of Washington professor Stuart Reges sent an email to other faculty criticizing the University's "land acknowledgement statements" and added his diverging viewpoint to his course syllabus.[3] But rather than

[3] *LAWSUIT: Professor sues University of Washington after admins punish him for 'inappropriate' opinion*, FIRE (July 13, 2022), https://www.thefire.org/lawsuit-professor-sues-university-of-washington-after-admins-punish-him-for-inappropriate-opinion [https://perma.cc/V3RC-MNAY].

respect Reges's exercise of his First Amendment right to express a different viewpoint, the University ordered him to remove his viewpoint from his syllabus and then investigated him for a potential violation of the school's harassment policy. What's more, the University created a competing section of Reges's course and advised students that they could switch to this "shadow" course by watching another professor's pre-taped lectures. This move ultimately reduced Reges's class size by a full third.[4]

• ***Canceling a class.*** In April 2021, Cypress Community College professor Faryha Salim argued against lionizing the police in response to a student's "persuasive presentation" assignment in a communications class.[5] Online backlash to a video recording of the exchange prompted Cypress to cancel Salim's online communications class and publicly announce Salim's involuntary leave of absence. The College cited public safety concerns. But it failed to explain how canceling Salim's online class made its community safer. This disparity suggests the College had

[4] Complaint for Civil Rights Violations ¶¶ 47, 51, *Reges v. Cauce*, No. 2:22-CV-00964 (W.D. Wash. filed July 13, 2022), ECF No. 1.

[5] Sabrina Conza, *FIRE demands answers from Cypress College over cancelled professor*, FIRE (May 14, 2021), https://www.thefire.org/fire-demands-answers-from-cypress-college-over-cancelled-professor [https://perma.cc/3B6N-ME9U].

succumbed to a "heckler's veto" instead of standing up for Salim's First Amendment rights and academic freedom.

• ***A no-contact requirement.*** In February 2022, State University of New York at Fredonia philosophy professor Stephen Kershnar appeared on a podcast to discuss the immorality of "adult-child sex," a topic he had taught his students for years as part of his broader research on the origins of commonly held moral convictions.[6] When the conversation went viral online, swift and heated public criticism prompted the University to take adverse action against Kershnar. In fact, the University announced it had prohibited Kershnar from "contact with the campus community" and assigned him to an "alternate work assignment from an alternate location." Like Cypress College, SUNY

[6] Anthony Reyes & Natalie Fahmy, *SUNY Fredonia professor 'assigned to duties that do not include his physical presence' as investigation continues*, WKBW (Feb. 3, 2022), https://www.wkbw.com/news/local-news/suny-fredonia-professor-assigned-to-duties-that-do-not-include-his-physical-presence-as-investigation-continues [https://perma.cc/9STX-HYTX]; Josh Bleisch, *FIRE calls on SUNY Fredonia to end suspension, investigation of professor for philosophical discussion of sex with minors*, FIRE (Feb. 4, 2022), https://www.thefire.org/fire-calls-on-suny-fredonia-to-end-suspension-investigation-of-professor-for-philosophical-discussion-of-sex-with-minors [https://perma.cc/UH62-HPHH].

Fredonia justified its adverse action in the name of public safety, despite disclosing none of the threats over Kershnar it claimed to have received.

• ***Stifling academic research.*** In November 2021, the University of Texas at Austin forced three professors to pause a study they had launched, after some complained that the research discriminated on the basis of race.[7] As FIRE pointed out in a letter to the University, pausing the ongoing research risked irreparably harming the professors' work, including introducing unanticipated variables in their study design, or creating a stigma that would dissuade prospective subjects from participating.[8] Other faculty members also objected to the suspension of the research, explaining that the administrators' actions sent "a message that risks censoring and chilling professor speech based on viewpoint, violating central tenants of the First Amendment."[9]

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[7] Kate McGee, *UT-Austin professors criticize university for halting antiracism study with preschoolers*, TEXAS TRIBUNE (Nov. 22, 2021), https://www.texastribune.org/2021/11/22/university-texas-austin-antiracism-preschoolers [https://perma.cc/DZ93-B5HT].

[8] *FIRE Letter to the University of Texas at Austin*, FIRE (Nov. 24, 2021), https://www.thefire.org/fire-letter-to-the-university-of-texas-at-austin-november-24-2021 [https://perma.cc/GLL7-7S5A].

[9] McGee, *supra* note 7.

Simply put, when universities and colleges impose these kinds of hardships, it signals to professors they should keep their mouths shut—not only for fear of losing their jobs, but also for fear of losing their courses, their students, and precious opportunities for research. And any chilling of faculty members' protected speech jeopardizes the vitality and diversity of our nation's public universities. As the Supreme Court explained in *Sweezy v. New Hampshire*: "No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." 354 U.S. 234, 250 (1957).

It is no surprise, then, that other circuits assessing First Amendment retaliation claims in the university context have found the mere threat of punishment sufficient to grant students standing in challenges to policies that implicate their expressive rights. *See, e.g., Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019) (holding university's powers to refer cases for discipline and call student meetings objectively chilled speech); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020) (holding bias policy enforced by referrals for discipline

"sufficiently proscriptive to objectively chill student speech"); *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 236 (3d Cir. 2010) (holding student had standing to challenge university's code of conduct because challenged provisions had the potential to chill protected speech); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008) (upholding facial challenge to university sexual harassment policy by student who was "concerned that discussing his social, cultural, political, and/or religious views regarding these issues might be sanctionable by the University."). Even though administrators in those cases stifled speech through policy or code, the chilling effect is no different than if those administrators retaliated against the speech. In both situations, the administrators deter protected speech by sowing fear that the speech may result in adverse action.

The need to deter ***any*** state action that sows such speech-chilling fear—and providing a remedy against the harm it causes—highlights why the ordinary firmness standard must be unconstrained by enumerated categories of adverse action. To that end, the district court erred in not recognizing that NCSU handcuffing Porter from performing

his most essential job duties could have chilled the speech of any ordinary person.

II. Because the Ordinary Firmness Standard Is Fact-Intensive, Courts Should Hesitate to Dismiss Based on That Standard.

This Court has made clear that the "ordinary firmness" inquiry is fact–intensive and specific to the circumstances of each case. *Suarez*, 202 F.3d at 686. To this end, dismissal under Rule 12(b)(6) is usually unjustified unless there is not even a permissible inference of an objectively chilling act. *Blankenship*, 471 F.3d at 533. At the pleadings stage, a vast range of adverse actions beyond termination, demotion or loss of compensation can support a First Amendment retaliation claim in the education context. Here, Porter's allegations of inability to perform his job duties, and the extraordinary assignment of a fifth course, pass the *de minimis* threshold for an objectively speech-chilling adverse action.

A. Whether a specific retaliatory act would chill the speech of a person of ordinary firmness is best left to a jury of ordinary persons.

This Court held over 20 years ago that the "ordinary firmness" inquiry requires a fact–intensive analysis of "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." *Suarez*, 202 F.3d at 686. Thus, courts generally should not resolve, on a motion to dismiss, whether the alleged state action would have deterred a speaker of ordinary firmness from exercising their First Amendment rights. And decisions from several circuits confirm that the fact–intensive nature of the "ordinary firmness" question is best left for the jury.

For instance, the Eleventh Circuit characterized the ordinary firmness test as a question of fact for the jury, requiring a plaintiff to only allege sufficient facts that a jury could find would deter a person of ordinary firmness to beat a motion to dismiss. *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005). Likewise, the Eighth Circuit concluded that whether a series of parking tickets satisfies the "ordinary firmness" threshold "is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge, one ordinary person. The jury, after all, represents the conscience of the community." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003).[10] All of this is not to say, of course, that

[10] *See also Noonan v. Kane*, 698 F. App'x 49, 54 (3d Cir. 2017) ("Whether [] retaliation would deter a person of ordinary firmness from exercising those rights is a question to be decided by the factfinder[.]"); *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002) ("Whether a retaliatory

the ordinary firmness question can never be resolved before trial. *Ehrlich*, 437 F.3d at 416 (explaining that "[b]ecause our analysis of the adverse impact is objective, it can be resolved as a matter of law"). But even so, this Court explained that to evaluate whether a speaker has been objectively chilled as a matter of law "must be undertaken with the aid of discovery and not at the motion-to-dismiss stage." *Blankenship*, 471 F.3d at 533.

B. At the pleadings stage, a retaliatory act that chills speech can take on many shapes.

When exercising their First Amendment rights—particularly in ways that confront state authority—the ordinary person has far more to fear than termination, demotion, loss of compensation, or loss of opportunity for advancement in their job. That is why meeting the pleading threshold for First Amendment retaliation simply requires alleging something more than criticism or verbal reprimand. *Suarez,* 202 F.3d at 686. As the Supreme Court acknowledged, even slights like "failing to hold a birthday party for a public employee . . . when intended

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action is sufficiently severe to deter a person of ordinary firmness from exercising his or her rights is a question of fact.").

to punish her for exercising her free speech rights" can deter the ordinary person from exercising their free speech rights. *Rutan*, 497 U.S. at 75 n.8.

With that in mind, several decisions in the context of public education highlight the range of retaliatory acts that a plaintiff can allege to beat a motion to dismiss a First Amendment retaliation claim. For example, the Second Circuit held the following alleged acts against a teacher who reported her principal for misrepresenting student achievement were sufficient to show an objective chilling injury and beat a motion to dismiss:

- Assigning her to classroom work;
- Reducing her preparation periods from two to one;
- Assigning her to lunchroom duty;
- Removing her belongings from her storage area;
- Sending negative evaluation letters criticizing her work;
- Failing to process her insurance forms; and
- Assigning her to a fifth–floor classroom despite knowing her physical disabilities made it difficult for her to climb stairs.

Bernheim v. Litt, 79 F.3d 318, 323–24, 326 (2d Cir. 1996).

Similarly, the Sixth Circuit has held that a university's lawsuit against a professor for the return of sabbatical pay after the professor's spouse sponsored a no-confidence vote against the university president and provost sufficed to meet the ordinary firmness standard. *Benison v. Ross*, 765 F.3d 649, 660 (6th Cir. 2014). In another case, a court found that withholding a mold report from a teacher who spoke out about mold in public schools was an adverse employment action supporting a First Amendment retaliation claim because the teacher's health and ability to perform her job duties were "directly related to the presence or absence of mold in the air." *Smith v. Cent. Dauphin Sch. Dist.*, 511 F. Supp. 2d 460, 466–67 (M.D. Pa. 2007).

These adverse acts echo the series of adverse acts Porter alleged he endured because of his protected speech. So, like the allegations in *Bernheim*, Porter's allegations are enough to withstand a motion to dismiss.

C. Porter's allegations show state action that would have chilled a person of ordinary firmness from speaking.

The district court erred in finding that Porter did not allege state action that would chill a person of ordinary firmness from exercising their First Amendment rights. Porter's allegations far surpass *de minimis*

adverse acts like criticism or a verbal reprimand. For starters, Porter alleges that despite Defendants knowing that Porter's position in the Higher Education Program Area was of great value to him, they repeatedly threatened to remove him from the program. Complaint and Jury Demand ¶¶ 41–44, 56–60, 65, *Porter*, No. 5:21-CV-00365-BO (E.D.N.C. filed Sept. 14, 2021), ECF No. 1. And Porter also explains how Defendants made clear that Porter's speech was unacceptable, and when Porter refused to apologize for it, Defendants punished him by removing him from his program area and burdening him with teaching a fifth course—when no other tenured faculty member has ever been required to teach five courses. *Id.* ¶¶ 63–64, 67, 74–75, 78, 80.

These acts alone are enough to chill a person of ordinary firmness from exercising First Amendment rights, like Porter did. *See Suarez,* 202 F.3d at 686. But Defendants did not stop there. Porter also alleged how losing his position in the Higher Education Program Area resulted in further ignominy, like Defendants barring him from the Higher Education Orientation for new Ph.D. students, the Higher Education welcome cookout, and the Higher Education retreat. Compl. ¶ 85, ECF No. 1.

Even worse, Porter's removal from the Higher Education area of study led to his exclusion from the Diagnostic Advisement Procedure ("DAP") process, a high-stakes evaluation for Ph.D. students. *Id.* ¶¶ 86–88. Under university policy Ph.D. students facing possible removal from the program are supposed to have their own advisor on their DAP panel. But after NCSU removed Porter from DAP because of his protected speech, he could no longer effectively advise Ph.D. students. *Id.* ¶¶ 89–94. This all damaged his relationships with his advisees and humiliated him, especially after one administrator suggested to students that Porter ***chose*** not to review his students' work. *Id.* ¶¶ 95–96.

In short, the retaliatory acts Porter endured handcuffed him so much that he could not do his job. That is enough to deter any ordinary professor from questioning NCSU's administrators like Porter did.

What is more, Porter reasonably fears he may be terminated because Defendants have prevented him from performing his job duties. *Id.* ¶¶ 99, 115. So too would any ordinary professor fear such future adverse action—a fear certain to chill that professor's speech. As Porter expressed to his department head, Defendant Lee, "the process is being set up so that when I go up for my post-tenure review a couple of years

from now, I'm not going to have any advisees. And then you and [Defendant] Dean Danowitz can say well, we need to strip Porter of tenure and fire him because he's not fulfilling his job duties." *Id.* ¶ 101. Defendant Lee agreed that Porter's concern was valid, replying "[r]ight, I hear you." *Id.* ¶ 102.

In the end, Porter alleged a series of adverse acts taken against his protected speech that a jury could find to chill a person of ordinary firmness. And that is not all. Porter's allegations also show how Defendants have effectively hung an imminent threat of termination over Porter's head.

Requiring more of Porter would set a near-impossible standard for faculty who face adverse action because of their protected speech short of outright termination or demotion. What's more, it would embolden college administrators to push adverse action right up to the edge of outright termination or demotion. A professor must have a remedy against administrators who deliberately make life miserable for the professor simply because he expressed a viewpoint the college disagrees with. Otherwise, the First Amendment guarantee for robust free speech on college campuses will suffer greatly.

The deliberate deprivation of a thing of known value by the state for engaging in protected speech will deter ordinary people from further exercising their expressive rights. They may hope that by staying silent they might get that thing back, or they may fear that more speech may result in further reprisal. Defendants' actions are the very definition of First Amendment chill.

CONCLUSION

FIRE urges the Court to reverse the decision below and reaffirm a broad "ordinary firmness" test necessary to protect the free speech and academic freedom of Porter and other professors.

Dated: September 6, 2022

/s/ Darpana M. Sheth

DARPANA M. SHETH
Counsel of Record
JEFFREY D. ZEMAN
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
darpana.sheth@thefire.org
jeff.zeman@thefire.org

JT MORRIS
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
(215) 717-3473
jt.morris@thefire.org

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/s/ Darpana M. Sheth

Darpana M. Sheth
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION