No. 22-1463

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James Brown, M.D.,
Appellant,
v.
Marc Linder, in his individual and official capacities,
Appellee.

Appeal from the United States District Court
for the Southern District of Iowa

BRIEF *AMICUS CURIAE* OF FIRE (FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION) IN SUPPORT OF APPELLEE

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RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae Foundation for Individual Rights and Expression (FIRE), a nonprofit corporation organized under the laws of Massachusetts, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

All parties have consented to the filing of this *amicus* brief.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus FIRE (the Foundation for Individual Rights and Expression) 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. After defending the rights of students and faculty at campuses nationwide since 1999, FIRE recently changed its name from the Foundation for Individual Rights in Education to reflect a newly expanded mission to protect expressive freedom outside of higher education.

SUMMARY OF ARGUMENT

One professor criticizes another.[2] That is not unconstitutional retaliation; it is normal debate. It should be encouraged, not stifled through the threat of expensive litigation.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

[2] Brown's complaint lists him as "a board-certified urologist at the University of Iowa Hospitals and Clinics," JA 2, ¶ 7, and the University of Iowa site, of which this court can take judicial notice, lists James Brown, MD as Professor of Urology, https://medicine.uiowa.edu/urology/profile/james-brown-2.

1. Professors spend years developing expertise that is invaluable to the public. Part of their job, in addition to research and teaching, is to share opinions based on that expertise with the public—whether that has to do with global warming, criminal justice reforms, Supreme Court decisions, or OSHA enforcement proceedings.

These professors should not have to fear § 1983 claims for their speech. Even when they are speaking to the public within the scope of their employment, they are generally not acting under the color of state law. They are speaking not for their universities, but for themselves; and they are not wielding coercive government power.

This case illustrates the matter well. Though Linder identified himself as a University of Iowa law professor in his article criticizing Brown and when talking to a reporter for another critical article, he did not invoke whatever coercive or official power he may have had. Linder's grading decisions or his actions when participating in faculty hiring might be under color of state law; his public speech in this case was not.

2. Even if Linder had been acting under the color of state law, his speech was insufficient to deter a person of ordinary firmness from con-

tinuing their protected speech. Brown, too, was a professor who was participating in a public controversy; such scholars and scientists must expect criticism, and respond to it with rebuttals rather than § 1983 lawsuits. A reasonable professor in Brown's shoes would not be deterred from continuing in his activities simply because he was being criticized.

For these reasons, this Court ought to affirm the District Court's dismissal of the First Amendment retaliation claims in this case.

ARGUMENT

I. Linder was not acting under color of state law.

Professors are often asked to provide expert insight on important issues, and are expected to exercise their own independent judgment on when and how to do so. Their speech is vital to furthering public discussion, and should not be deterred by the prospect of 42 U.S.C. § 1983 lawsuits.

Indeed, the Supreme Court has recognized that members of certain professions must be able to exercise their independent judgment on the job without their actions becoming cloaked with state authority: it should be the "function" of an employee's job rather than merely an "employment relationship" with the state that determines whether a person acts under

the color of state law. *Polk County v. Dodson*, 454 U.S. 312, 319 (1981). In *Dodson*, the Court found that public defenders are not "amenable to administrative direction in the same sense as other employees of the State" because "a defense lawyer is not, and by nature of his function cannot be, the servant of an administrative superior." *Id.* at 321. Even though "public defenders are paid by the State," the Court found it insufficient to establish that a public defender acts under color of state law within the meaning of § 1983 when exercising independent judgment. *Id.*

Likewise, a professor is not a servant of the Dean or the University President, especially as to the professor's research and public commentary. "[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interest of his client.'" *Id.* at 318-19. A professor similarly best serves the public in his public commentary, not by acting on behalf of the State, but rather by advancing what he personally understands to be the truth, based on his own personal academic expertise. In their scholarship and commentary, professors famously speak just for themselves, not for the university or the State more broadly.

Courts have recognized this in the context of protecting public university professors' rights to speak, even when they are speaking as part of their jobs. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court generally held that government employees are not protected by the First Amendment as to their speech which is part of their job duties, because such speech involves "individuals charged with speaking on behalf of the government act[ing] within the scope of their power to do so." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1598 (2022) (Alito, J., concurring in the judgment) (so characterizing *Garcetti*). But the Court expressly left open the question whether a different rule applies as to university professors' "scholarship or teaching." *Garcetti*, 547 U.S. at 425.

And circuit courts have answered that university professors indeed retain their First Amendment rights in this context, because they are supposed to exercise their own academic freedom and discretion rather than just acting on behalf of the government. *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550, 552 (4th Cir. 2011); *Buchanan v. Alexander*, 919 F.3d 847, 852 (5th Cir. 2019); *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). Given that professors speak on their own behalf when engaged in

scholarship and even classroom teaching, they even more clearly speak on their own behalf when speaking to the public. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572, 576–78 (1968) (even a high school teacher's letter to a local newspaper criticizing his employer held to be protected by the First Amendment, despite the letter's noting that the author teaches at the high school, in part precisely because teachers have special expertise—there, about the operation of the school system—that the public needs to be able to access).

Indeed, Iowa Code § 261H.2 expressly recognizes the need to protect the "intellectual freedom" of faculty members, including with regard to their "discussion[] and debate," as well as the need "to encourage diversity of thoughts, ideas, and opinions." This contemplates that professors will disagree with each other, as Profs. Brown and Linder did. And it means that professors are not speaking for the state, just as public defenders' duties to their clients mean that they are not speaking for the state.

Universities are collectives of people who disagree with one another, where the "robust exchange of ideas discovers truth out of a multitude of

tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up). For this reason, courts should not attribute the speech of faculty to the institution itself. If faculty members' extramural speech were generally attributed to the institution, universities would have substantially greater authority to regulate a broad range of expression on political and social matters. In *amicus* FIRE's experience, administrators—citing public perception of the institution—often do seek broad censorial authority over faculty speech. For example, Texas' Collin College has repeatedly disciplined faculty members for referencing their college's name in public advocacy or commentary.[3] Another Texas institution, responding to local activists aggrieved by a professor's Facebook comments, demanded that the professor "indicate that you are not a spokesperson for" the university and "exercise appropriate restraint" in future public comments.[4] Meanwhile, a

[3] Adam Steinbaugh, *Collin College Sued Over Dismissal of Professor Suzanne Jones, Union Advocate and Critic of Confederate Monuments, COVID-19 Response*, FIRE (Sept. 24, 2021), https://www.thefire.org/collin-college-sued-over-dismissal-of-professor-suzanne-jones-union-advocate-and-critic-of-confederate-monuments-covid-19-response.

[4] Letter from Adam Steinbaugh, FIRE, to Suzanne Shipley, President, Midwestern State Univ., June 17, 2020, *available at* https://bit.ly/3O8QZRh.

New Jersey college justified a lecturer's termination by falsely claiming to have been "inundated" with complaints from members of the public who saw her appearance on a Fox News program and associated her with the college.[5]

Yet the fact that educators are employed by a particular institution, or that others know of their employment, does not cloak their speech or conduct with the color of law. "[A] public employee acts under color of law when he exercises power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Magee v. Trustees of Hamline Univ.*, 747 F.3d 532, 535 (8th Cir. 2014) (internal quotation marks omitted). Thus, for instance, because "[a] professor at a state university is vested with a great deal of authority over his students with respect to grades and academic advancement by virtue of that position," "[w]hen a professor misuses that authority in the course of performing his duties, he necessarily acts under color of state law for purposes of a section 1983 action." *Hayut v. State Univ. of N.Y.*,

[5] Adam Steinbaugh, *After FIRE lawsuit, Essex County College Finally Turns over Documents About Firing of Black Lives Matter Advocate*, FIRE (Jan. 23, 2018), https://www.thefire.org/after-fire-lawsuit-essex-county-college-finally-turns-over-documents-about-firing-of-black-lives-matter-advocate.

352 F.3d 733, 744 (2d Cir. 2003). But Brown had no similar authority over Linder, who was not a student or a subordinate or even an untenured law school colleague, but a professor in a different department. Brown was simply criticizing, not making decisions about grading or promotion.

Brown's § 1983 claim is based on the assertion that Linder was "acting under color of law, custom, and/or usage of the State of Iowa" when he wore a t-shirt that said "People Over Profits" to a hearing during which Brown testified, lodged a verbal complaint that Brown had a conflict of interest to the head of the Department of Urology at UIHC, and made critical statements of Brown in two newspaper articles that identified him as a University of Iowa professor. First Amended Complaint ¶¶ 10, 23, 26, 40, 46, 47, JA 3-7. None of these are things "made possible only because the wrongdoer is clothed with the authority of state law." *Cf. Magee*, 747 F.3d at 535-36 (concluding that, though a newspaper op-ed "noted [the author] was a [police] officer, this recites his occupation and does not necessarily indicate he was acting in his official capacity"). Indeed, they could equally have been done by a private university professor, or by an expert at a think tank or in private industry.

Indeed, courts have rejected the idea that "co-worker harassment [is] done under color of law 'when the harassment [does] not involve use of state authority or position.'" *Ottman v. City of Independence*, 341 F.3d 751, 762 (8th Cir. 2003) (quoting *Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992)). "The mere fact that all [defendants] were state employees or that the offending acts occurred during work hours is not enough." *Woodward*, 977 F.2d 1392 at 1401. Likewise, here one University of Iowa employee (Brown) claims he was wronged by another employee's (Linder's) speech; he is framing the objection as retaliation rather than harassment, but the essence is similar. In both situations, the alleged offenders are not using any coercive power stemming from their state positions, and are thus not acting under color of state law.

Of course, government employees who are participating in the exercise of coercive government power will indeed usually be acting under color of state law. Thus, in *Finnegan v. Myers*, 2015 WL 5252400 (N.D. Ind. 2015), cited at Appellant's Br. 21, a professor was found to be acting under color of state law when hired by a county Department of Child Services to give a medical opinion as to whether a child's death was accidental or from parental abuse. That professor, though, was assisting in a government

investigation into child abuse, and thus playing an official role in a criminal prosecution, *id.* at *9–*10—a core coercive power of the state. Here, Linder was just speaking as a member of the public (albeit one who had particular expertise reflected by his academic position).

Likewise, *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979), cited at Appellant's Br. 22, held that a county judge "was acting under color of law by using the power and prestige of his state office to damage the plaintiff." The judge was "urg[ing] the discharge" of the plaintiff by bringing "to bear his influence as a county judge" to those whom he spoke to on the topic. *Id.* That influence naturally stemmed from the judge's having a position of power and coercive authority in the government. Linder lacked any such power.

Finally, *Corbitt v. Anderson*, 778 F.2d 1471, 1472, 1475 (10th Cir. 1985), cited at Appellant's Br. 23, found that a director of a county's "political subdivision" acted under color of law when he launched a campaign attacking the plaintiff's professional standing. Acting in his capacity as a director, the defendant went to multiple state agencies suggesting that the plaintiff was not professionally qualified to handle a certain type or work and that he should be denied certain privileges. *Id.* at 1475.

> A former DVR official testified that Andersen's contacts were especially disturbing because of the potential development of *interagency* conflict. His concern was heightened because of Andersen's position as director of Southwest.

Id. Linder, by contrast, was speaking on his own behalf as a professor, not as a director of a political subdivision, or someone whose opinions required special attention because his power and managerial position could yield interagency conflict.

II. Linder's actions would not chill a person of ordinary firmness

Even if Linder were found to have acted under the color of state law, the District Court properly dismissed Brown's claim because Linder's actions would "not deter a person of ordinary firmness from continuing to speak out." Order, JA 90. To survive a motion to dismiss, the plaintiff must plausibly allege that the defendant's actions "would chill a person of 'ordinary firmness' from continuing in that activity." *Gonzalez v. Bendt*, 971 F.3d 742, 745 (8th Cir. 2020). The plaintiff cannot simply allege that the defendant made "harassing," "derogatory," or "humiliat-[ing]" comments, since such statements are typically "insufficient to deter a person of ordinary firmness from continuing to speak out." *Naucke v. City of Park Hills*, 284 F.3d 923, 926, 928 (8th Cir. 2002). Instead, actions chill a person of ordinary firmness if the defendant used "the punitive

machinery of the government" to inflict "concrete consequences." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003).

Brown is himself a professor, who chose to become involved in a controversy before a government body. JA 82. A person of ordinary firmness in that position must recognize that the prospect of public disagreement and criticism comes with the job. "[C]onflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy." *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003). Certainly such a person ought not be deterred by the prospect of someone wearing a critical T-shirt to a hearing, filing a conflicts complaint, or publishing a critical newspaper article. Amended Complaint ¶¶ 23, 26, 40, 43, JA 4-6. So, too, a professor would recognize that a verbal complaint to a university does not obligate the institution to act on it. Institutions regularly field complaints and people—whether students, faculty, or staff—have the right to make them, even if the First Amendment bars the institution from acting on it.

This Court's decision in *Naucke* sheds light on how critical speech is generally insufficient to chill a person of ordinary firmness. In that case, the wife of a fire chief sued under § 1983 based on the city administrator's

and city council's "(1) conducting a public audit of the fire department's ladies' auxiliary while [the wife] was President, (2) publicly scolding her at City Council meetings, (3) engaging in public name calling, (4) posting a picture of her home in a public place with the caption 'The Naucke House. Donations Needed.', and (5) circulating a letter suggesting [the administrator] was the father of one of her children." *Naucke,* 284 F.3d at 927. These acts go much further than Linder did, yet this Court held that, "while the comments were 'offensive, unprofessional, and inappropriate,'" they were still "insufficient to deter a person of ordinary firmness from continuing to speak out." *Id.* at 928. This applies even more clearly here, where the plaintiff is a professor who should expect to deal with disagreement and criticism based on his public actions.

CONCLUSION

Criticism among professors should be resolved by "discussion[] and debate," Iowa Code § 261H.2, not by § 1983 litigation. Linder was expressing his own views, not acting under color of state law. And in any event, Linder's speech would not have been adequate to deter the speech of a person of ordinary firmness in Brown's shoes. The District Court's decision should therefore be affirmed.

Respectfully Submitted,

s/ Eugene Volokh

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Century Schoolbook.

s/ Eugene Volokh
Attorney for *Amicus Curiae* FIRE
July 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 19, 2022. All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system, except that one of Linder's counsel will be served by e-mail at ryan.sheahan@ag.iowa.gov.

s/ Eugene Volokh
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July 19, 2022