No. 24-50879

In the United States Court of Appeals for the Fifth Circuit

RICHARD LOWERY,

Plaintiff-Appellant,

v.

LILLIAN MILLS, in her official capacity as Dean of the McCombs School of Business at the University of Texas at Austin; ETHAN BURRIS, in his official capacity as Senior Associate Dean for Academic Affairs of the McCombs School of Business at the University of Texas-Austin; SHERIDAN TITMAN, in his official capacity as Finance Department Chair for the McCombs School of Business at the University of Texas-Austin; CLEMENS SIALM; JAY HARTZELL,

Defendants-Appellees.

Appeal from Orders of the United States District Court for the Western Dist. of Texas, The Hon. David A. Ezra (USDC No. 1:23-CV-129-DAE)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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I. *RUTAN*'S NON-EXCLUSIVE LIST OF ADVERSE ACTIONS IS CONSISTENT WITH LOWERY'S ARGUMENT THAT THREATS OF REDUCED PAY AND LOSS OF PROFESSIONAL OPPORTUNITIES SUFFICE

Contrary to UT's suggestion, see UT's Brief 17,[1] Lowery does not doubt the continuing vitality of *Rutan v. Republican Party*, 497 U.S. 62 (1990). Indeed, *Rutan* is consistent with Lowery's claim that the threat of an adverse employment action suffices to establish a public employee's claim of First Amendment retaliation. *Rutan*'s essence is that "promotions, transfers, and recalls after layoffs based on political affiliation or support" violate First Amendment rights. *Id.* at 75. In so holding, the Supreme Court rejected the Seventh Circuit's more restrictive test, which limited relief to cases where employment decisions were substantially equivalent to dismissal. *Id. Rutan* thus expanded public employees' free-speech rights.

Moreover, nothing in *Rutan* suggests that its list of adverse actions is exclusive—the court simply evaluated the adverse actions alleged by the plaintiffs in that case. Indeed, *Rutan* explicitly stated that the First Amendment protects state employees even from acts much more "trivial" than those suffered by the plaintiffs in *Rutan* if those acts were "intended to punish [them] for exercising [their] free speech rights." *Id.*

[1] Citations to appellate briefs are to each brief's own original pagination, rather than to the pagination in ECF filing ribbon.

at 75 n.8 (internal quotation marks omitted). *Rutan* expressly recognizes that its list of adverse actions is not exclusive.[2]

To be sure, *Rutan* is not a case about threats to strip pay, supervisory status, or job duties in order to chill employee speech, but its holding does not conflict with Lowery's position—that the overwhelming majority of circuits nationwide would agree with—that employer actions that would chill a reasonable employee suffice for a retaliation claim.

Lowery takes no issue with *Rutan*. He does assert that *Breaux v. City of Garland,* 205 F.3d 150 (5th Cir. 2000), is no longer good law, but that opinion does not discuss *Rutan* at all. Indeed, *Breaux* is an outlier that conflicts with almost every other circuit.[3]

II. THE SUPREME COURT'S DISCUSSION OF RETALIATION IN *HOUSTON COMMUNITY COLLEGE SYSTEM* FAVORS LOWERY'S ARGUMENT MUCH MORE THAN UT'S

UT also suggests that the Supreme Court's opinion in *Houston Community College System v. Wilson,* 595 U.S. 468 (2022) supports UT's argument that *Breaux* remains good law. But *Houston Community College System* considered only the narrow issue of whether an elected

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[2] This Court has never considered this list in *Rutan* to be exclusive. For instance, this Court has held that formal reprimands constitute adverse employment actions, even though reprimands are not mentioned in *Rutan*. *See Benningfield v. City of Hous*., 157 F.3d 369, 377 (5th Cir. 1998).

[3] See the cases cited at Opening Br. 25-27.

body verbally censuring one of its members presents an actionable First Amendment claim. *Id.* at 471, 474. The court concluded that it does not, in part because "elected bodies in this country have long exercised the power to censure their members." *Id.* at 475. The censure was speech by elected representatives about another elected representative, and everyone "involved was an equal member of the same deliberative body." *Id.* at 479.

Conversely, the Defendants exercise state power over Lowery's conditions of employment. ROA.126, 2709, 2825. Thus, unlike *Houston Community College System,* this case presents an unequal power relationship, and one inherent in virtually every employer-employee relationship. In fact, Lowery's official-capacity claims are functionally claims against UT, his employer.[4]

To be sure, in dicta, the Supreme Court in *Houston Community College System* notes that to "distinguish material from immaterial adverse actions, lower courts have taken various approaches" in First Amendment retaliation cases. *Id.* at 477. The court favorably mentions the "chill a person of ordinary firmness" test—which is virtually

[4] An official-capacity lawsuit is "only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Official-capacity defendants "are therefore representing their respective state agencies . . . ." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004). Lowery alleged only official-capacity claims and seeks no damages, only legal protection to speak free from threats by his superiors.

identical to the test in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (a reasonable employee would have found the challenged action materially adverse to the point of being dissuaded from bringing or supporting a charge). The *Keenan* standard, which the district court originally adopted and later repudiated, is a "chill a person of ordinary firmness" test. *See* ROA.1331-1332, 3146-3148.

The Supreme Court also favorably mentions an older Fourth Circuit test. *Hous. Cmty. Coll. Sys.,* 595 U.S. at 477-78.[5] This older test was a flexible "fact intensive inquiry" looking at factors such as the "relationship between the speaker and the retaliator," but the Fourth Circuit stressed one important factor was the presence or absence of "a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686-87 (4th Cir. 2000). Lowery has alleged and supplied evidence of exactly such threats. ROA.115-116, 119, 125, 2720, 2722.

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[5] Like most other circuits, the Fourth Circuit now applies a test that is virtually identical to *Burlington Northern's* test. *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 697 n.12 (4th Cir. 2018) (citing *Burlington Northern* and stating that "for purposes of a First Amendment retaliation claim under § 1983, a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.") (cleaned up); *see also Biers v. Cline*, No. 12CV375, 2015 U.S. Dist. LEXIS 97111, at *9-10 (M.D.N.C. July 24, 2015).

Noticeably absent from the *Houston Community College System* opinion is any mention of *Breaux's* more rigid and restrictive test for what constitutes a sufficient adverse employment action. Thus, if anything, *Houston Community College System* supports Lowery's position much more than UT's.

III. THIS COURT SHOULD CLARIFY THAT *BURLINGTON NORTHERN* IMPLICITLY OVERRULED *BREAUX*

As Lowery noted in his opening brief, numerous Fifth Circuit and district court decisions have questioned whether the *Breaux* standard still persists after *Burlington Northern.* Opening Br. 22-23. UT asserts that Lowery has not cited a Fifth Circuit case applying the *Burlington Northern* standard to a First Amendment retaliation claims. UT's Br. 17. But in fact, *Garrett v. Judson Independent School District* functionally did just that. 299 Fed. Appx. 337, 346 (5th Cir. 2008) (per curiam) (public school teacher stated claim for First Amendment retaliation when alleged an adverse employment action in the form of a "campaign of unfounded charges of incompetence"). Although that case never cites *Burlington Northern, Garrett*'s holding is irreconcilable with *Breaux*. And multiple courts in the Fifth Circuit have interpreted *Garrett* as impliedly adopting the *Burlington Northern* standard. *See Sanchez v. Presidio Cty.*, No. P:19-CV-037-DC, 2021 U.S. Dist. LEXIS 118416, at *10 (W.D. Tex. June 20, 2021); *Sanchez v. Presidio Cty*., No. PE:19-CV-00037-DC-DF, 2021 U.S. Dist. LEXIS 118236, at *6-7 (W.D.

Tex. Mar. 3, 2021); *Simonelli v. Fitzgerald*, No. SA-07-CA-360, 2009 U.S. Dist. LEXIS 110782, at *16 (W.D. Tex. Oct. 22, 2009).

It is now time for this Court to join its sister circuits and clarify what some district courts in this circuit already understand: that the *Burlington Northern* standard has supplanted the *Breaux* standard for public employees' First Amendment retaliation claims.[6] Keeping *Breaux* on life support invites public employers to threaten employees in order to silence unwanted criticism—which is exactly what happened in this case.

UT's officials were of course free to publicly disagree with Lowery's opinions and offer counter-speech. Instead, they pressured Lowery behind closed doors and weaponized complaints from left-wing faculty as a basis to "counsel" Lowery about his First Amendment activity. This censorial activity would be plainly illegal in any other circuit. It should be equally so in this circuit.

IV. LOWERY HAS STANDING TO CHALLENGE UT'S SPEECH RESTRICTIONS

Lowery enjoys standing to challenge both the UT administrators' self-admitted attempt to chill his speech as well as UT's unwritten speech code. He has brought both as-applied and facial challenges

[6] Even the district court stated that it "would actually be disappointed if [this case] wasn't appealed" because it desired greater "clarity in the law in the Fifth Circuit in this area." ROA.3461:17-25, 3463:4-8.

(ROA.42-46, 2731-2738) and is no less entitled to seek relief than were the plaintiffs in *Susan B. Anthony's List v. Driehaus,* 573 U.S. 149 (2014), *Speech First, Inc. v. Fenves,* 979 F.3d 319 (5th Cir. 2020), or *Ostrevich v. Tatum,* 72 F.4th 94 (5th Cir. 2023).

An imminent threat of enforcement creates an Article III injury-in-fact. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Driehaus,* 573 U.S. at 158; *see also MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"). In this case, the "basis for the threat" is UT's informal policy of mandating civility when speakers promote disfavored viewpoints or criticize the university president.

In UT's view, its administrators may legally threaten faculty into silence, so long as they don't act on those threats by issuing a formal reprimand or instituting disciplinary proceedings. Such a standard ignores human nature and the purpose behind pre-enforcement challenges. Unless one is independently wealthy, it is foolhardy to disregard such threats. Public employers in this Circuit—like UT—would prefer to maintain the ability to threaten their employees, especially the whistleblowers. Threats are a useful tool for maintaining one's image—and keeping the tax dollars and alumni donations flowing.

Deans Mills and Burris openly admitted that their goal in asking Carvalho to counsel Lowery was to get Lowery to speak differently or not at all (ROA.2977:3-14, 3008:22-3009:11)—and their actions had their intended effect because Lowery stopped speaking. ROA.115-116, 118-119.

UT claims that it has no informal policy or practice of policing disfavored speech, but Dean Mills's own words indicate otherwise. She was clear that she found Lowery's speech "factually inaccurate," "offensive" or "unmannerly." ROA.2833-2834, 2991, 2996-2997, 3007, 3016. What is the point of using these words during an internal discussion with Professor Carvalho? She was not participating in the marketplace of ideas.

There are other examples, but the August 12 meeting is probably the most instructive. Mills conveyed her "require[ment]" that Lowery stop criticizing the Civitas Institute or GSLI. ROA.3015. Her own notes of the meeting—held one week after President Hartzell texted her about Lowery and three days after Graves asked her to review and handle the anonymous complaint against Lowery as a "personnel issue"—indicate that she characterized Lowery's comments as "factually inaccurate and disruptive to university of operations." ROA.3016. In her own words, she "related her expectations for professionalism and reasonable respect for Chain of Command regarding College communications." ROA.3016.

This talk of "expectations," "disruption to university operations," and respect for UT's chain-of-command is strong stuff. This was not a low-key discussion among equals—Dean Mills, while speaking for the University of Texas, was sending a message: Lowery needs to stop saying these things . . . or else.

Whether one calls this "a talking to," a warning, a shot across the bow, a threat of enforcement, or actual enforcement, the language used by Mills (and others) was calculated to chill Lowery's speech and it had its intended effect. Lowery stopped tweeting and publicly criticizing UT.

It was only after Lowery began self-censoring—after he gave into UT's threats—that UT renewed his Salem Center appointment. *See* ROA.2825. And even after that, Defendant Burris stated that "[a]lthough he had just renewed Lowery's annual appointment . . . he might not approve Richard Lowery's appointment to the center in the future because of his speech critical of the administration." ROA.126. These threats would chill an objectively reasonable person, just as they chilled Lowery.

Moreover, Lowery plausibly alleged that leftwing faculty are not counseled or given a talking-to for making provocative remarks in public. ROA.2731, 2736 ("Yet faculty expressing leftwing views are not asked to tone-down their tweets or make them more civil or less rude"). It is inappropriate for UT administrators to pick-and-choose which faculty members' political viewpoints get to use provocative language.

See, e.g., R. A. V. v. St. Paul, 505 U.S. 377 (1992). These facts are more than sufficient to provide Lowery with standing.

V. LOWERY'S LEGAL CLAIMS DO NOT LIMIT FIRST AMENDMENT RIGHTS BECAUSE UT ADMINISTRATORS SPEAKING IN THEIR OFFICIAL ROLES ENGAGE IN GOVERNMENT SPEECH

UT at times suggests that its administrators were just exercising their own First Amendment rights when they pressured Carvalho to counsel Lowery about his speech that they found, variously, "uncivil," "crossing the line," failing to respect the chain-of-command, or "factually inaccurate." ROA.125-126, 3015-3018. But the official-capacity defendants are just stand-ins for the university and no reasonable person looking at the context would believe that UT's administrators were having some sort of debate, where they were attempting to persuade either Carvalho or Lowery to recognize the error of Lowery's opinions. They were exercising state power in an attempt to get Lowery to change his speech or forego it altogether.

And when university administrators exercise state power in this manner, they speak (and act) for the government; they do not speak as citizens or faculty members. *See, e.g.*, *Adams v. Trustees of North Carolina-Wilmington,* 640 F.3d 550, 563 (4th Cir. 2011) (noting that in "instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching," then "the Constitution

does not insulate their communications") (internal quotations omitted); *Abcarian v. McDonald*, 617 F.3d 931, 937 (7th Cir. 2010) (finding speech unprotected as "insufficient reason to believe that" a department head "ever stepped outside his administrative role to speak as a citizen"); Keith Whittington, *What Can Professors Say on Campus? Intramural Speech and the First Amendment,* at 24 (August 2, 2023) (forthcoming Journal of Free Speech Law) (available at https://ssrn.com/abstract=4551168) ("When professors speak as academic administrators, by contrast, they do not speak for themselves but rather speak with an institutional voice").

Put succinctly, deans (or department heads) do not enjoy a First Amendment right to bully faculty members into silence because the university president is upset that the criticism is hurting his image. And when they "counsel" subordinates to be silent or speak differently, they do so as employers and state actors, not citizens.

VI. UT MISREPRESENTS THE RECORD WHEN IT CLAIMS THAT IT NEVER BACKED AWAY FROM THE *KEENAN* STANDARD THAT UT ITSELF HAD SUPPLIED

In seeking to avoid application of either judicial estoppel or the law-of-the-case doctrine, UT baldly asserts that "Defendants *never* backed away from *Kennan v. Tejada* [sic] like Lowery claims." UT's Br. 35 (emphasis added). This claim is flatly contradicted by the record—and by the district court's decision.

In its second attempt at a motion to dismiss before the district court, UT repeatedly argued that *Keenan* was the wrong standard because it applied only to citizens, not employees. ROA.2750-52, 2808. "But Lowery is not 'an ordinary citizen'; he is a public employee suing his governmental employer over events that allegedly occurred in his workplace." ROA.2808. This argument contradicts UT's prior insistence that the *Keenan* standard applied to Lowery's chilled-speech claim. *See* ROA.686, 1289, 1294, 1842, 2405, 3097.

The district court was understandably not amused by UT's shifting positions on the applicability of *Keenan*. ROA.3146-3148 ("Even more baffling is Defendants' citation again to the *Keenan* standard . . . even after they argued . . . that a different standard for employment retaliation related to speech applies"). ROA.3148 n.3.

These serial errors have almost certainly prolonged this litigation and greatly increased its cost to all parties. UT should be more careful to keep its story straight. UT did back away from the *Keenan* standard, after first successfully convincing the district court to apply that standard to Lowery's chilled-speech claim.

As a result—at a minimum—this Court should find that judicial estoppel applies and requires reversal of the dismissal of Lowery's chilled-speech claim.

VII. THE LAW OF THE CASE DOCTRINE IS NOT LIMITED TO APPEALS

UT also asserts that the law-of-the-case doctrine is somehow limited only to issues of law or fact "decided on appeal." UT's Br. 36. But that is only one variation of that doctrine. Its essence boils down to: "[a] judge should hesitate to undo his own work." *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983). And there are many examples of the doctrine being applied to prior district court rulings. *See, e.g.*, *O'Keefe v. Noble Drilling Corp.*, 347 F. App'x 27, 30 (5th Cir. 2009); *Stryker Corp. v. TIG Ins. Co.*, No. 1:05-cv-51, 2014 U.S. Dist. LEXIS 5119, at *3-4 (W.D. Mich. Jan. 15, 2014).

As this Court has explained, "[t]he 'law of the case' doctrine is a common label used to describe what is really four distinct rules." *Williams v. Bexar Cty.*, No. 98-51187, 2000 U.S. App. LEXIS 39928, at *4 (5th Cir. July 14, 2000). Although two of these rules concern the relationship between district and appellate courts, the other two occur at the district-court level alone. *See id.* at *4 n.3 (describing the four rules and citing C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4478, p. 788 (1981)).

Lowery's argument concerns what this Court classified as the first variation of the doctrine: "the desire of a single court to adhere to its prior rulings without need for repeated reconsideration." *Id.* "Under each of its [four] variations, the doctrine counsels the courts to refrain from revisiting issues that have been decided in the same case" because

of "the sound policy that when an issue is once litigated and decided, that should be the end of the matter." *Id.* at *4 (cleaned up). To be sure, it is prudential doctrine, and a district court may re-examine its prior rulings when justice requires. But the law of the case doctrine "directs a court's discretion" so that the court should only determine that "the doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Pepper v. United States*, 562 U.S. 476, 506-07 (2011) (cleaned up).

The district court made no finding of clear error or manifest injustice. It was error for the district court to refuse to even consider the application of this doctrine, especially in light of the many hours invested pursuing Lowery's chilled-speech claim, based on a test first proposed by UT and then adopted by the district court.

VIII. UT MISREPRESENTS THE RECORD WHEN IT CLAIMS THAT LOWERY NEVER ASKED TO LIFT THE PROTECTIVE ORDER BARRING NEPOTISM DISCOVERY

In its zeal to prevent Lowery (or the public) from obtaining evidence for the allegations that UT President Jay Hartzell used his office to secure special treatment for his son, UT asserts that Lowery failed to preserve error because "Lowery never sought reconsideration of this ruling after he amended his complaint to add the unwritten-speech-code claim and Hartzell as a Defendant[.]" UT's Br. 49.

This is another misrepresentation of the record on appeal.

On September 12, 2024, months after the complaint's amendment, Lowery filed a "Motion to Dissolve Protective Order Re Nepotism Allegations and For Expedited Hearing Re Same." ROA.3079-3092. One week later, UT filed a response to that motion. ROA.3093-3100, 3144. Lowery notes that all but one of the attorneys signing UT's brief in this appeal were listed on the signature block for that response brief. *Compare* UT's Br. 52 *with* ROA.3099. Yet those same attorneys now claim that Lowery never sought to revisit discovery into the Hartzell nepotism allegations.

The record speaks for itself.

IX. NEITHER JUDGE EXPLAINED WHY THE WITHHELD TEXTS AND TALKING POINTS WERE PRIVILEGED, WHICH WARRANTS A SECOND LOOK

UT's misrepresentation of the record and concealment of Jay Hartzell's involvement in the summer 2022 campaign against Lowery also supports Lowery's request that this Court take a second look at a handful of documents UT withheld on a claim of privilege.

Lowery acknowledges that this Court is often reluctant to wade into discovery matters, but neither the magistrate judge nor the district court provided much more than an *ipse dixit* pronouncement explaining why the Hartzell text-thread or the syllabus talking points email were withheld, instead of being produced or redacted. ROA.2524-2525, 2616-2619, 2699-2700. Importantly, defendants had at first declared under

oath that Hartzell did not contact them about Lowery or his speech in the summer of 2022, although we now know that those declarations were factually inaccurate. *Compare* ROA.1141, 1143, 1147, 1149, *with* ROA.1423, 1425, 1432-1433, 1436-37.

Lowery understandably distrusts UT's representations on these issues, because UT has been less-than-forthright in its representations on sensitive issues—particularly ones that pertain to Jay Hartzell or his vendetta against Lowery. Under these circumstances, a brief second look in camera by this Court is warranted.

X. LOWERY ASKS ONLY THAT HE BE ALLOWED FURTHER DISCOVERY IF HE OBTAINS REVERSAL ON THE MERITS

UT asserts that Lowery has not shown that the district court's mistakes on the nepotism discovery and withheld documents constituted reversible error. To be sure, Lowery is not asserting that they provide a *separate* basis to reverse the district court on the merits. Lowery only argues that, if this Court agrees with Lowery that he has one or more viable substantive legal claims, this case should be remanded for further proceedings, including targeted discovery on the nepotism allegations and disclosure of any improperly withheld documents.

If Lowery had not raised these discovery issues now, UT would likely have claimed that Lowery forfeited or waived his right to raise them ever again.

CONCLUSION

Richard Lowery respectfully requests that this Court reverse the district court's rulings on the (1) motion to dismiss; (2) motion for partial summary judgment; (3) order affirming attorney-client privilege in Hartzell's August 5 text messages and the PR-talking points email; and (4) order affirming the protective order preventing discovery into the Hartzell nepotism allegations, and remand this case for further proceedings.

Respectfully submitted,

s/Endel Kolde

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with FED. R. APP. P. 32 and 5TH CIR. R. 32.3, that this brief is set in 14-point Century Schoolbook, a proportionately spaced serif font, and as calculated by Microsoft Word (from a continuously updated Office 365 subscription), considering the appropriate exclusions, contains 3,709 words.

Dated: April 21, 2025

s/Endel Kolde