No. 23-5293

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALLAN M. JOSEPHSON,

Plaintiff-Appellee,

v.

TONI M. GANZEL, in her official and individual capacities; KIMBERLY A. BOLAND, in her official and individual capacities; CHARLES R. WOODS, in his official and individual capacities; JENNIFER F. LE, in her official and individual capacities; BRYAN D. CARTER, in his official and individual capacities; WILLIAM D. LOHR, in his official and individual capacities,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:19-cv-00230-RGJ-CHL
The Honorable Rebecca Grady Jennings

Brief of Appellee Allan M. Josephson

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STATEMENT IN OPPOSITION TO ORAL ARGUMENT

For three reasons, Appellee Dr. Allan M. Josephson respectfully submits that oral argument is not necessary since "the dispositive … issues have been authoritatively decided." FED. R. APP. P. 34(a)(2)(B).

First, Defendants' qualified immunity arguments highlight no lack of clarity in the governing legal standards and depend on Defendants' version of the facts. Both flaws deprive this Court of jurisdiction over this interlocutory appeal.

Second, Dr. Josephson asserts a clearly established right—the right to be free from retaliation for speech the First Amendment protects. The district court correctly relied on decades of precedent from the Supreme Court and this Court to conclude that the First Amendment protects Dr. Josephson's speech. And Defendants' attempts to relitigate the sufficiency of the evidence—or the district court's determination that disputes of material fact remain—are beyond the scope of this interlocutory qualified immunity appeal.

Last, Defendants' sovereign immunity arguments are akin to those asserted in appeals this Court has certified as frivolous. Thus, "the facts and legal arguments are adequately presented in the briefs and record," such that this Court's "decisional process would not be significantly aided by oral argument." FED. R. APP. P. 34(a)(2)(C).

If this Court nonetheless prefers to hold oral argument, Dr. Josephson respectfully requests the opportunity to participate.

STATEMENT OF JURISDICTION

Dr. Josephson agrees the district court had jurisdiction and denied Defendants qualified and sovereign immunity. Defs.Br., Doc. 30, at 1.[1]

After such a summary judgment decision, this Court's "jurisdiction to hear an interlocutory appeal … is narrow." *Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998). It exists only "to the extent that [the appeal] turns on an issue of law," *Gillispie v. Miami Twp.*, 18 F.4th 909, 915 (6th Cir. 2021), meaning this Court is limited to "resolving pure questions of law." *Moldowan v. City of Warren*, 578 F.3d 351, 369 (6th Cir. 2009). Because Defendants "drift[ ] from the purely legal into the factual realm and begin[ ] contesting what really happened," this Court's "jurisdiction ends and the case should proceed to trial." *Berryman*, 150 F.3d at 565.

Similarly, this Court has "jurisdiction only to the extent that [D]efendant[s] limit[their] argument to questions of law *premised on the facts taken in the light most favorable to [Dr. Josephson].*" *Gillispie*, 18 F.4th at 915 (cleaned up, emphasis added). This they refuse to do, even after Dr. Josephson's motion to dismiss this appeal. *See* Mot. to Dismiss, Doc. 22. Again, this Court lacks jurisdiction over this appeal.

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[1] All pinpoint citations to documents filed in this appeal will use the document's internal pagination rather than this Court's file-stamping.

STATEMENT OF ISSUES

Dr. Allan Josephson—a well-respected child psychiatrist, a skilled clinician, a talented division chief, and a nationally known leader—raised concerns about the best way to treat gender dysphoria in children in a panel discussion held on his own time over 600 miles from the University of Louisville where he expressed his own views. After hearing about his speech from a hostile blog, a handful of people on campus demanded the University discipline Dr. Josephson because they disliked his views, and Defendants agreed. Within seven weeks, they demoted him. Then they created a hostile environment while creating pretexts for terminating him. Last, they carried out this goal, ending Dr. Josephson's 40-year career. The district court rightly denied all immunity claims.

This appeal presents three issues that this Court reviews *de novo*:

1. Whether this Court lacks jurisdiction over this interlocutory appeal that identifies no abstract issue affecting the law's clarity and rejects Dr. Josephson's version of the facts.
2. Whether the district court correctly concluded that the Eleventh Amendment allows Dr. Josephson to seek prospective equitable relief from Defendants in their official capacities.
3. Whether the district court correctly denied qualified immunity to Defendants, all of whom participated in retaliating against Dr. Josephson for First Amendment protected speech.

The answer to all three is the same: "Yes."

INTRODUCTION

"Justice delayed is justice denied." This maxim, while not composed for Dr. Josephson's case, perfectly describes this appeal. Over a year ago, the district court ruled the parties offered "competing characterizations of the facts" that "could not be further apart." Order, R. 99, Page ID # 5768. After four years of litigation, it paved the way for trial.

To avoid a jury, Defendants appealed. Dr. Josephson detailed how their immunity arguments below are beyond this Court's narrow interlocutory jurisdiction and frivolous. Defendants promised something substantial, without revealing the slightest hint of it. After six months, their hide-the-ball strategy paid off when the motions panel referred Dr. Josephson's motion to this Court. Order, Doc. 27, at 2.

Now, after Defendants' third bite at the immunity apple, it is evident that the district court was right. Defendants simply contest the sufficiency of the evidence, asking this Court to grant them immunity based on their narrative, not Dr. Josephson's as the law requires. They ask this Court to ignore decades of established precedent—from this Court and the Supreme Court—that protects professors' right to express their views on public issues off campus, prohibits public universities from retaliating against professors who exercise this right, and allows wrongly terminated professors to seek reinstatement. This Court should affirm the district court, reject Defendants' immunity claims, and remand for trial.

STATEMENT OF THE CASE[2]

Defendants insist this Court must conduct its *de novo* review with blinders on, considering only six facts the district court cited in one paragraph. Defs. Br., Doc. 30, at 3. That's nonsense, as their reliance on the record, not just the opinion, confirms.[3] *Id.* at 3 n.1

For this novel approach, Defendants selectively quote what is, in its full context, a statement that *might* apply in *some* cases: "Indeed, '*ideally* we need look no further than the district court's opinion,' and 'we *often may be able* merely to adopt the district court's recitation of the facts and inferences.'" *Barry v. O'Grady*, 895 F.3d 440, 443 (6th Cir. 2018) (quoting *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015)) (emphasis added). But this Court does not limit itself to this approach. *DiLuzio*, 796 F.3d at 611 ("[W]hile we need not engage in a plenary review of the record, neither are we limited to only to the facts, evidence, or inferences that the district court has stated expressly.").

For this appeal, this Court must "accept [Dr. Josephson's] 'version of the facts' and draw all inferences in [his] favor." *Rudolph v. Babinec*, 939 F.3d 742, 746 (6th Cir. 2019) (quoting *Scott v. Harris*, 550 U.S. 372, 378 (2007)). Below, Dr. Josephson detailed these facts. Pl.'s Summ. J. Br., R. 64-1, Page ID ## 1800–22; Pl.'s Summ. J. Resp., R. 72, Page ID ## 4572–4604. Here are highlights of the three-act tragedy he endured.

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[2] Internal references to this statement will cite it as "Case."

[3] Dr. Josephson conceded nothing, Defs.Br., Doc. 30, at 3, but just paraphrased the district court. Mot. to Dismiss, Doc. 22, at 12 & n.28.

I. Defendants demoted Dr. Josephson within weeks of learning he spoke about gender dysphoria.

A. Dr. Josephson earned a national reputation as a distinguished scholar, skilled clinician, and excellent leader.

In his 40 years as a child psychiatrist, Dr. Josephson held posts at the University of Minnesota and the Medical College of Georgia, where he rose to full professor and division chief. He is a distinguished life fellow for the American Academy of Child & Adolescent Psychiatry and the American Psychiatric Association, as well as a prolific author and speaker. Compl. ¶¶ 55, 57–58, 68–70, R. 19, Page ID ## 215–17.

In 2003, the University of Louisville hired him to lead its struggling Division of Child & Adolescent Psychiatry. He doubled the faculty and enhanced its reputation; balanced the budget; launched, re-launched, and expanded programs; and doubled (or more) the patient load. Meanwhile, he maintained a rigorous clinical schedule, taught at the medical school, gave 88 presentations, and authored or contributed to at least 21 scholarly articles and 12 books or chapters. *Id.* ¶¶ 72–76, Page ID ## 217–18; Woods Email, R. 66-14, Page ID # 2270.

The American Psychiatric Association gave Dr. Josephson one of its highest awards. The American Academy of Child & Adolescent Psychiatry named him Master Clinician four consecutive years. The Society of Professors of Child & Adolescent Psychiatry asked him to teach other division chiefs 13 times. Compl. ¶ 76, Page ID # 218; Josephson CV, R. 19-1, Page ID ## 261, 278–79; Woods Email, R. 66-14, Page ID # 2270.

B. Dr. Josephson publicly expressed concerns about how best to treat gender dysphoria in children.

Around 2014, Dr. Josephson became concerned that doctors and others were rushing to prescribe puberty-blockers and later cross-sex hormones, setting the stage for surgery. In 2016 and 2017, he served as an expert witness in several cases, outlining the causes of gender dysphoria, how children are not equipped to make far-reaching life decisions that pose medical consequences they cannot fully appreciate until adulthood, and how gender dysphoria usually subsides by late adolescence. Compl. ¶¶ 85–93, R. 19, Page ID ## 219–21.

When Dr. Josephson informed his superiors of this work, they allowed him to pursue it. Woods Email, R. 64-24, Page ID # 1930; Rabelais Email, R. 64-25, Page ID # 1933. It created no problems on campus. Pl.'s Summ. J. Br., R. 64-1, Page ID # 1802 n.26–27. His annual evaluations rose from 350 and 370 in 2012 and 2013 to perfect 400s the next three years. Annual Rev., R. 64-22, Page ID # 1923; Annual Rev., R. 64-23, Page ID # 1927; Annual Rev., R. 64-27, Page ID # 1936.

In October 2017, Dr. Josephson, on his own time, participated in a Heritage Foundation panel in Washington, D.C. Compl. ¶¶ 99–103, R. 19, Page ID ## 221–22. Speaking for himself alone, Heritage Found. Tr., R. 66-16, Page ID # 2304, he outlined how childhood gender dysphoria is a social-cultural, psychological phenomenon that cannot be fully treated with drugs and surgery and how providers should instead explore and address what causes the confusion that leads to it. Compl. ¶ 112, Page

ID ## 224–25; Heritage Found. Tr., Page ID ## 2326–37. This discussion was published online, Compl. ¶ 120, Page ID # 226, but did not impact his campus. Pl.'s Summ. J. Br., R.64-1, Page ID # 1803 n.34.

C. LGBT Center officials activated Dr. Josephson's dean.

Within five days, officials at the University's LGBT Center learned of Dr. Josephson's remarks from a blog called *The Slowly Boiled Frog*. Buford Email, R. 64-4, Page ID ## 1864–67. Its director emailed Defendant Ganzel (Dr. Josephson's dean) to complain, quoting the blog, not Dr. Josephson. Buford Email, R. 64-5, Page ID # 1869. Though not a psychiatrist or psychologist, he claimed Dr. Josephson "might be violating the ethical standards of psychiatry." *Id.* Later, Defendants would echo these claims, but when asked at depositions, no one could point to any ethical standard Dr. Josephson violated. Pl.'s Summ. J. Br., R. 64-1, Page ID ## 1804 & n.45–50. Unrebutted expert testimony later contradicted these claims. Cantor Rep't ¶¶ 99–139, R. 66-17, Page ID ## 2408–19. Indeed, England's National Health Service has since echoed Dr. Josephson's views.[4] This Court affirmed Tennessee's and Kentucky's later efforts to restrict these dangerous and invasive drug interventions for children.[5]

Yet Ganzel accepted these unfounded claims and was "so sorry to

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[4] HILLARY CASS, INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE: FINAL REPORT (THE CASS REVIEW) (Apr. 2024), *available at* https://bit.ly/49AfqSs.

[5] *Doe 1 v. Thornbury*, 75 F.4th 655 (6th Cir. 2023); *L.W. by and through Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023); *L.W. by and through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023).

hear this." Buford Email, R. 64-5, Page ID # 1868. She emphasized how Dr. Josephson's presentation "doesn't reflect the culture we are trying so hard to promote." *Id.* This prompted Defendant Woods (Dr. Josephson's chair) to reference "concerning conversations." *Id.* But none of Dr. Josephson's superiors ever watched his remarks to learn what he said. Pl.'s Summ. J. Br., R. 64-1, Page ID # 1805 n.59.

D. Defendants agitated because they objected to Dr. Josephson's views on gender dysphoria.

The next day, a Division psychologist learned Dr. Josephson was an expert witness for a Florida school district that had a gender dysphoric student who sought to use the opposite sex's showers and locker rooms. Steinbock Email, R. 65-38, Page ID # 2062. This alarmed Defendant Carter, who insisted on his first-ever urgent meeting with Woods and sent emails predicting various negative effects on recruitment, retention, and patient care from Dr. Josephson's Heritage Foundation remarks and expert witness work. Carter Email, R. 64-6, Page ID # 1871–72; Carter Email, R. 64-7, Page ID # 1875. Carter never substantiated any of these and never identified a single professional standard that Dr. Josephson violated. Pl.'s Summ J. Br., R. 64-1, Page ID # 1806 & n.63–72. The Eleventh Circuit ultimately agreed with Dr. Josephson's views.[6]

Carter kept agitating, saying "virtually all of the child psych faculty

[6] Pl.'s Notice of Suppl. Authority, R. 97, Page ID ## 5689–90 (featuring *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022)).

… share similar concerns," Carter Email, R. 64-9, Page ID # 1881, and "agree that Allan must cease and desist in these activities in his role as our division chief and UofL faculty member," Carter Email, R. 64-8, Page ID # 1877. This agitating spurred Woods to draft notes for a meeting with Ganzel where he said that if Dr. Josephson kept expressing his views on gender dysphoria, he would "be at odds enough with [his] Divisional colleagues that [he] will not be able to continue to lead them." Woods Notes, R. 65-1, Page ID # 1949. Defendant Le joined Carter and others in demanding that Dr. Josephson apologize for his remarks or issue an unprecedented statement via University public relations that he had not spoken for the University. Compl. ¶¶ 173–76, R. 19, Page ID # 231.

E. After seven weeks, Defendants demoted Dr. Josephson.

About seven weeks after the Heritage Foundation panel, Woods demanded Dr. Josephson resign as division chief or be "unilaterally remove[d]." Woods Letter, R. 65-5, Page ID# 1857–58. He claimed: a majority of faculty "disagrees with your approach to management of children and adolescents with gender dysphoria." *Id.* Though such disagreements were common, Woods demoted Dr. Josephson because of "the nature of this area of disagreement and your increasingly public promotion of your approach as an expert witness." *Id.* Before taking this rare action, he discussed it extensively with Defendant Boland (his vice chair) and cleared it with Ganzel. Pl.'s Summ. J. Br., R. 64-1, Page ID # 1808 & n.86–88. He tapped Carter, Le, and Lohr (another professor) to lead the Division.

II. After demoting Dr. Josephson, Defendants created a hostile environment for him while preparing to terminate him.

A. Defendants reduced Dr. Josephson's role because of his views on gender dysphoria.

Woods' demotion letter outlined the demotion's consequences. Woods Letter, R. 65-5, Page ID # 1858. But Defendants decided these were not enough. The demotion did not stem their animosity towards Dr. Josephson. Less than a week later, in preparing to meet with him, Lohr threatened the "[g]loves could be coming off," as he was "inclined to challenge his inductive reasoning as unscientific and ask how much he's earned as an expert witness of the last 2 years on sexuality issues." Lohr-Le Emails, R. 65-43, Page ID # 2138. Le and Lohr agreed Dr. Josephson would not meet with Division fellows alone. *Id.*

Days later, Le, Lohr, and Carter discussed with Boland and Woods an assignment that banned Dr. Josephson from "pursu[ing] interests in LGBTQ advocacy" at work, stopped him from treating LGBTQ patients, illegally mandated he use transgender terminology (*i.e.*, terms inconsistent with sex), gagged him from discussing gender dysphoria with students, and subjected his teaching to more scrutiny. Le Email, R. 65-10, Page ID # 1967–71. They claim they never followed through with imposing these punishments. Defs.Br., Doc. 30, at 34–36. But this shows they were still upset over Dr. Josephson's views, and they followed through on banning him from treating LGBTQ patients. Josephson Decl. ¶ 6, R. 64-3, Page ID # 1849. They were clear on why they did this: "[H]is stance on

LGBTQ patients is inconsistent with that of our division" and sparked "numerous complaints." Le Email, R. 65-10, Page ID # 1970–71.

They took away his teaching duties, Boland Dep., R. 68-34, Page ID # 3603–04, and temporarily banned him from faculty meetings, Woods Email, R. 66-25, Page ID # 2831—all because they disliked his views.

B. Defendants demanded the impossible of Dr. Josephson.

In addition to the demotion, Woods required Dr. Josephson to highlight when his views differed from the University's gender dysphoria curriculum. Woods Letter, R. 65-5, Page ID # 1958; Woods Notes, R. 65-2, Page ID # 1950. But this curriculum didn't even exist at the time. Josephson Dep., R. 68-29, Page ID # 3330. So there was no way he could comply.

Similarly, in February 2018, Carter noted Dr. Josephson's hours were low. Carter Email, R. 65-24, Page ID # 2026. But Defendants had not finalized his new role. In late-January, Boland remarked that his work assignment "is still a work in progress" and "should be finalized in the next few weeks." Boland Email, R. 66-28, Page ID # 2834. By March, Dr. Josephson thought he was fulfilling his assignments, but Boland jumped to the conclusion he was lying. Boland Email, R. 65-16, Page ID # 2007. Reasonable jurors could conclude this rush to condemn Dr. Josephson before finalizing his new duties shows a retaliatory motive.

C. Defendants compiled complaints against Dr. Josephson that they never investigated.

Defendants still were not satisfied. Lohr, Le, and Carter "were

gathering complaints and concerns" against him. Lohr Dep., R. 68-37, Page ID # 3848. In two days, four hit Woods' inbox. Woods Email, R. 64-17, Page ID ## 1907–08; Woods Email, R. 64-18, Page ID ## 1909–10; Woods Email, R. 64-19, Page ID ## 1911–13; Woods Email, R. 66-2, Page ID # 2164. LGBT Center officials manufactured three of them. Steinbock Dep., R. 68-40, Page ID ## 4059, 4062. Woods circulated them to Boland and others. Woods Email, R. 66-21, Page ID # 2825.

Le also collected complaints from students and staff. *E.g.*, Le Documents, R. 65-39, Page ID ## 2068–69, 2080–81. Lohr circulated a complaint he received a month earlier after Dr. Josephson spoke off campus about gender dysphoria. Woods Email, R. 65-11, Page ID ## 1972–73. To Woods, this was fodder for the file, *id.*; to Boland, his comments were "pretty concerning," Boland Email, R. 65-21, Page ID # 2018. No one investigated any of these complaints or allowed Dr. Josephson to respond.

By mid-February, the complaint-collecting campaign was so intense Carter feared it "makes it look like I am intentionally looking for things to target Allan." Le Email, R. 66-29, Page ID # 2837. Le still urged him to contact Woods and Boland, likening it to "reporting to [Child Protective Services]. Let them investigate." *Id.*, Page ID # 2836. But no one did.

In late 2017, Le began tracking these complaints in a spreadsheet. Le Dep., R. 68-36, Page ID # 3757. Here she detailed anything negative she, Carter, and Lohr heard. Allan Tracking Document, R. 65-4, Page ID ## 1953–56. Many entries focused on objections to Dr. Josephson' speech.

Id., Page ID ## 1953–55 (entries for Jan. 19, Feb. 27, Mar. 23, Oct. 12, Nov. 28, Nov. 30); Le Documents, R. 65-39, Page ID ## 2103–08. No one had seen this done for any other professor. Pl.'s Summ. J. Br., R. 64-1, Page ID # 1813 & n.150. But even in mid-2018, she circulated her "Allan tracking document" to Lohr for contributions as Defendants sought to paper the file. Le Email, R. 65-46, Page ID # 2144.

D. Defendants never took Dr. Josephson's concerns seriously, resisted meeting with him, and attacked him.

In December, Dr. Josephson met with Woods and Boland, who did not answer his questions about the demotion, but ordered him to end any gender dysphoria cases and banned him from faculty meetings. Josephson Decl. ¶¶ 6–7, R. 64-3, Page ID # 1849. After this, he tried to meet with Woods again, only to be repeatedly put off, with Woods quipping, "I am inclined to meet with him at some point." Boland Email, R. 65-23, Page ID # 2023. When they finally met weeks later, Dr. Josephson raised several concerns about the rush to judgment that led to his demotion, including one about how news of that demotion was leaked to attorneys taking Dr. Josephson's deposition before it had been made public. Josephson Decl. ¶¶ 9–12, R. 64-3, Page ID ## 1849–50. Woods feigned concern, then failed to respond, then referred him to others (who referred him back to Woods, who did nothing). *Id.* ¶¶ 13–15; Josephson Notes, R. 67-4, Page ID ## 2850–51; Woods Email, R. 65-15, Page ID # 2005.

Le and Lohr similarly resisted meeting with him until March 23.

Then when Dr. Josephson asked questions, Lohr labeled him "childish, narcissistic, and flippant"; Le berated him for his views on gender dysphoria; and Carter accused him of lying, being deceptive, and withholding information. Compl. ¶¶ 274–75, 279, R. 19, Page ID ## 241–42. They dismissed his concerns about the leak, concerns they later admitted were reasonable. Pl.'s Summ. J. Br., R. 64-1, Page ID # 1815 & n.179–80.

E. By spring, Defendants openly discussed terminating Dr. Josephson.

By March, four months post-demotion, Defendants started planning for Dr. Josephson's exit. Facing the prospect of losing funding if faculty "retire or resign," Le predicted: "We will likely be losing both Allan [Josephson] and Fred [Stocker] this year." Le Email, R. 66-7, Page ID # 2255. This referred to "whether or not Dr. Josephson's contract would be renewed." Carter Dep., R. 68-41, Page ID # 4165. Later, Lohr noted Dr. Josephson would "possibly [be] … leaving soon." Lohr Email, R. 65-44, Page ID # 2140. They had plans; Dr. Josephson did not. Josephson Dep., R. 68-29, Page ID ## 3364–65; Lohr Dep., R. 68-37, Page ID # 3860.

F. That summer, Defendants honed their pretext for terminating Dr. Josephson.

That summer, Lohr focused on Dr. Josephson's "productivity and billing." Lohr Email, R. 65-45, Page ID # 2143. This proved difficult, as Le had to consult at least three other people, efforts Carter dubbed "[e]xcellent sleuthing." *Id.*, Page ID # 2142. He also exulted that this information "will be valuable for Kim [Boland] and Ron Paul," *id.* now Dr.

Josephson's chair and the head of faculty affairs, respectively.

Even six months post-demotion, the three could not contain their ill will toward Dr. Josephson for his gender dysphoria views. Carter objected to Dr. Josephson "literally going against the scientific and ethical position of the profession … and getting paid to do it." Le Email, R. 67-7, Page ID # 2857. Le "definately [sic] agree[d] with [Carter's] position." *Id.*

Later, in depositions, they would disclaim any gender dysphoria expertise and were unable to identify any ethical provision Dr. Josephson violated. Pl.'s Summ. J. Br., R. 64-1, Page ID # 1816 & n.194; *accord id.*, Page ID # 1806 & n.69–70. Unrebutted expert testimony shows their claims were wrong. Cantor Rep't ¶¶ 99–139, R. 66-17, Page ID ## 2408–19. The *en banc* Eleventh Circuit, England's National Health Service, and this Court ultimately validated Dr. Josephson. *See supra* notes 4–6.

To Boland, this "[e]xcellent sleuthing"—two pages of Dr. Josephson's alleged shortcomings—was "a huge help." Boland Email, R. 65-26, Page ID # 2031. She sent it to her assistant twice. Boland Email, R. 65-27, Page ID # 2033–35; Boland Email, R. 65-29, Page ID # 2040. But Le knew the information was unreliable, reminding herself to "verify … before including in anything." Le Notes, R. 65-28, Page ID # 2036.

And unreliable it was. Yes, Dr. Josephson's productivity initially declined after the abrupt demotion (as one would expect), but so had five others'. Josephson Decl. ¶¶ 49–54, 64–69, R. 64-3, Page ID ## 1855, 1857; Productivity Chart, R. 68-27, Page ID # 3293. A sixth professor's

figures were so low they were removed from the analysis to preserve the Division's averages. Moore Email, R. 67-8, Page ID # 2859.

Yet Defendants focused only on Dr. Josephson. Lohr Dep., R. 68-37, Page ID # 3862; Le Dep., R. 68-36, Page ID # 3751; Josephson Decl. ¶¶ 57, 70, R. 64-3, Page ID ## 1856–57. They faulted his telepsychiatry figures, only to admit later his "productivity from the telepsych perspective was pretty solid"—so solid they reduced his clinical duties. Le Dep., R. 68-36, Page ID ## 3741, 3776–78; Josephson Decl. ¶ 26, R. 64-3, Page ID # 1851. They faulted him for not getting leave approved, knowing his assistant was at fault. Boland Email, R. 65-27, Page ID # 2034; Lohr Email, R. 66-4, Page ID # 2247; Josephson Decl. ¶¶ 95–96, R. 64-3, Page ID # 1860–61. They claimed he had weeks with no patients, but these were weeks he was on leave. Boland Email, R. 65-27, Page ID ## 2034–35; Josephson Decl. ¶¶ 93–94, R. 64-3, Page ID # 1860.

Why all this "sleuthing"? As Carter put it, they needed to generate "strong documentation" to "avoid Allan's reappointment." Lohr Email, R. 65-36, Page ID # 2057. After reading this, Boland added: "the Dean is supportive of what we and you are doing." *Id.*, Page ID # 2056.

G. After mid-July, Defendants never met with Dr. Josephson but pursued nonrenewal.

On July 9, Le, Carter, and Lohr met with Dr. Josephson, as Boland instructed, where they revised his work assignment and discussed the unreliable information they compiled. Allan Tracking Document, R. 65-

4, Page ID # 1955. They did not ask for his perspective but reduced their list of flaws to writing. Co-chiefs Letter, R. 65-25, Page ID ## 2028–30. Their goal was to document problems without investigating whether they were valid and without suggesting how to improve. For Boland instructed them when crafting their directives: "Definitely leave the crystal out of clear." Lohr Email, R. 65-36, Page ID # 2056.

After this, Defendants never discussed Dr. Josephson's performance with him. Josephson Decl. ¶ 27, R. 64-3, Page ID # 1851. Boland planned to "meet with him and … talk about a timeline for a Performance Improvement Plan." Boland Email, R. 65-26, Page ID # 2031. No plan was implemented. Boland Dep., R. 68-34, Page ID # 3641–42; Lohr Dep., R. 68-37, Page ID # 3862; Ganzel Dep., R. 68-38, Page ID # 3891.

This stands in stark contrast to how Defendants normally operated. For an administrative assistant, Defendants would develop a job description, wait two or three weeks, and implement a performance improvement plan. If problems persisted, probation would follow, with termination being an option two or three months later. Le Email, R. 64-21, Page ID # 1918. Professors with productivity issues would receive a "process improvement plan," followed by two or three months of probation. Boland Dep., R. 68-34, Page ID ## 3645–46; Ganzel Dep., R. 68-38, Page ID # 3935; Josephson Decl. ¶ 29, R. 64-3, Page ID # 1852. But Dr. Josephson—a full professor with over 35 years of experience, who led the Division for almost 15 years—got none of this. Ganzel Dep., R. 68-38, Page

ID # 3891; Josephson Decl. ¶¶ 27–28, R. 64-3, Page ID # 1851–52.

Defendants' letter was the only formal productivity warning Dr. Josephson received in his entire career. Josephson Decl. ¶ 23, R. 64-3, Page ID # 1851. But they still struggled to specify what they wanted him to do. Lohr Email, R. 67-12, Page ID # 2866.

But they knew what they wanted to do: generate "strong documentation" to "avoid Allan's reappointment"—something Boland and Ganzel supported. Lohr Email, R. 65-36, Page ID # 2056–57.

With this blessing, the scrutiny continued. Le added to her "Allan tracking document." Allan Tracking Document, R. 65-4, Page ID # 1955–56. Lohr noted they should "continue our documentation and monitoring." Le Documents, R. 65-39, Page ID # 2103. He, Le, Boland, and Ganzel discussed Dr. Josephson's productivity. Le Dep., R. 68-36, Page ID ## 3743, 3754; Ganzel Dep., R. 68-38, Page ID ## 3939–40; Boland Email, R. 65-30, Page ID # 2043; Lohr Email, R. 67-13, Page ID # 2870. They did not talk to him or note it had steadily improved since July. Josephson Decl. ¶¶ 27, 61–63, 73–74, R. 64-3, Page ID ## 1851, 1857–58.

By this time, Carter was no longer a co-chief. Carter Dep., R. 68-41, Page ID # 4066. But he still coached students on what to include in their complaints about Dr. Josephson. Carter Email, R. 66-8, Page ID # 2256. Then he forwarded those to Lohr and Le, who added them to her tracking document. Le Documents, R. 65-39, Page ID ## 2106–07; Allan Tracking Document, R. 65-4, Page ID # 1955 (Nov. 28 entry).

In the fall, Le emailed Dr. Josephson his new work assignment, saying nothing about his performance. Le Email, R. 65-42, Page ID # 2133. Lohr was also no longer a co-chief. Lohr Dep., R. 68-37, Page ID # 3802. But he volunteered to review Dr. Josephson's productivity. Lohr Email, R. 67-14, Page ID # 2871. Defendants then ignored these figures, perhaps because they had consistently improved since July. Josephson Decl. ¶¶ 27, 61–63, 73–74, R. 64-3, Page ID ## 1851, 1857–58. After all, Defendants knew what they were about to do, despite this improvement.

III. Defendants refused to renew Dr. Josephson's contract, terminating him after 16 1/2 years.

In February 2019, Defendants announced they would not renew Dr. Josephson's contract. Boland told Le to schedule Dr. Josephson's annual review meeting to tell him this news. Boland Email, R. 65-32, Page ID ## 2049–50; Boland Email, R. 65-33, Page ID.2051. So the meeting was "a little bit of an ambush." Le Dep., R. 68-36, Page ID # 3796.

Once there, Boland informed Dr. Josephson Ganzel would send him a letter stating that his contract would not be renewed. Compl. ¶¶ 299–300, R. 19, Page ID # 244; Ganzel Letter, R. 65-47, Page ID # 2147. No one gave a reason. Boland said Defendants decided to go a "different direction," something she admitted was intended to communicate nothing. Boland Dep., R. 68-34, Page ID ## 3651–52, 3654–55; Le Dep., R. 68-36, Page ID ## 3747, 3798. Yet nonrenewals—especially for professors with over 16 years of service—are not common, automatic, or arbitrary. Pl.'s

Summ. J. Br., R. 64-1, Page ID # 1821 & n.262–64. This was the first Dr. Josephson heard about his performance in over six months.

Years later, Defendants claimed they acted based on Dr. Josephson's productivity.[7] They still do. Defs.Br., Doc. 30, at 38–40. But they did nothing to other professors whose productivity declined in mid-2018. Josephson Decl. ¶¶ 57–58, 70, 80, R. 64-3, Page ID ## 1856–58. After July, Dr. Josephson's figures improved, and they did not check his 2019 figures. *Id.* ¶¶ 27, 61–63, 73–74, Page ID ## 1851, 1857–58. Nor did they credit him for other non-billable work, often on urgent, complex, and sensitive cases. *Id.* ¶¶ 85–92, Page ID ## 1859–60.

IV. Dr. Josephson filed suit, culminating in this appeal.

Dr. Josephson filed suit in March 2019 and amended his complaint that May. Compl., R. 19, Page ID ## 208–57. The district court denied Defendants' motion to dismiss. Order, R. 23, Page ID ## 630–37.

After discovery, both sides moved for summary judgment in October 2021. After oral arguments, Order, R. 95, Page ID # 5630, they submitted tables detailing (and in Defendants' case, disputing) the role each official played in retaliating against Dr. Josephson. Pl.'s List, R. 94-1, Page ID ## 5612–27; Defs.' Resp. Ex. 1, R. 96-1, Page ID ## 5636–88.

The district court denied all summary judgment motions, finding that the parties "competing characterizations of the facts …. could not be

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[7] Boland Dep., R. 68-34, Page ID # 3608; Le Dep., R. 68-36, Page ID ## 3746–47; Ganzel Dep., R. 68-38, Page ID ## 3898–99.

further apart" and "there are still genuine disputes of material facts" about the motives for Defendants' actions. Order, R. 99, Page ID # 5768. It also denied Defendants' immunity claims. *Id.*, Page ID ## 5760–65.

After Defendants appealed, Dr. Josephson moved to dismiss the appeal. Mot. to Dismiss, Doc. 22. The motions panel referred the jurisdictional issues to this Court. Order, Doc. 27, at 2.

* * *

This Court "'must ignore [Defendants'] attempts to dispute'" these facts, "accept [Dr. Josephson's] 'version …[,]' and draw all inferences in [his] favor." *Rudolph*, 939 F.3d at 746 (quoting *Bunkley v. City of Detroit*, 902 F.3d 552, 560 (6th Cir. 2018); *Scott*, 550 U.S. at 378) (cleaned up).

SUMMARY OF THE ARGUMENT

For two independent reasons, this Court should affirm. First, Defendants ignore the narrow limits on this Court's interlocutory jurisdiction. They fail to raise an abstract issue about the law's clarity, even after Dr. Josephson's motion to dismiss this appeal put them on notice. They focus on arguments not made below, try to resurrect arguments this Court dismissed long ago, and generally challenge the sufficiency of the evidence—something not proper at this stage. Plus, they refuse to do what this Court must do when evaluating qualified immunity: accept Dr. Josephson's version of the facts. Instead, they argue qualified immunity based on their preferred facts.

Second, the district court rightly denied Defendants immunity. It is so clear Dr. Josephson can seek reinstatement that this Court certified Defendants' sovereign-immunity arguments frivolous. On qualified immunity, the district court rightly recognized this Court and the Supreme Court have long extended broad protections to faculty speech, given their unique societal role in the marketplace of ideas. No one questions that Dr. Josephson's speech on childhood gender dysphoria addressed a public concern. And *Pickering's* balancing test favors him. So the First Amendment clearly protected his speech. Since all Defendants conspired to generate "strong documentation" to "avoid Alan's reappointment," *see supra* Case II.F–G, the district court rightly sent this case to a jury.

That's reason enough to affirm and remand. But there's also the

crescendo of voices questioning if qualified immunity applies to calculated, counseled decisions for which Defendants face no risk of personal liability—and concerns that it has no ties to § 1983's text or history.

STANDARD OF REVIEW

This Court reviews *de novo* district court decisions denying sovereign or qualified immunity on summary judgment. *Ashford v. Univ. of Mich.*, 89 F.4th 960, 969 (6th Cir. 2024) (citing *Barnes v. Wright*, 449 F.3d 709, 714 (6th Cir. 2006)). At this interlocutory stage, it has jurisdiction only "to the extent that [D]efendant[s] limit[their] argument to questions of law premised on the facts taken in the light most favorable to [Dr. Josephson]." *Gillispie*, 18 F.4th at 915 (quotations omitted).

Defendants' claims notwithstanding, Defs.Br., Doc. 30, at 18, this Court is not limited to considering only six facts in its *de novo* review. *DiLuzio*, 796 F.3d at 611. After all, it "may affirm a decision of the district court for any reason supported by the record." *Thomas v. City of Columbus*, 854 F.3d 361, 364–65 (6th Cir. 2017) (quotation omitted).

ARGUMENT

I. This Court lacks jurisdiction over Defendants' fact-based qualified immunity arguments.

A. Defendants *still* identify no abstract legal issue, denying this Court jurisdiction.

Dr. Josephson detailed how this Court has interlocutory jurisdiction over the denial of qualified immunity only "to the extent that it turns on an issue of law," *Gillispie*, 18 F.4th at 915 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)), and how Defendants failed to raise one below, Mot. to Dismiss, Doc. 22, at 5–9. Defendants urged this Court to wait for full briefing. Defs.Resp., Doc. 24, at 4–9. But they failed to do what they must to invoke this Court's jurisdiction: identify an "abstract issue of law relating to qualified immunity." *Berryman*, 150 F.3d at 563 (quoting *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996)). Thus, this "case should proceed to trial." *Id.* at 565.

1. Defendants waived any qualified immunity arguments based on whether Dr. Josephson spoke as a citizen.

Defendants dedicate several pages to questioning whether Dr. Josephson spoke as a University employee. Defs.Br., Doc. 30, at 21–23. To be sure, whether his speech is protected is a legal issue. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 677 (6th Cir. 2001) (finding that protected status of speech is "properly reviewable on interlocutory appeal").

But below, Defendants never properly raised this issue as a basis for qualified immunity. Like officials at the University of Michigan, *Ashford,* 89 F.4th at 975, no one mentioned *Garcetti v. Ceballos*, 547 U.S. 410

(2006), or the capacity in which Dr. Josephson spoke in the qualified immunity arguments.[8] Thus, they "forfeited the argument" that Dr. Josephson's speech was not protected. *Ashford*, 89 F.4th at 975.

Two hinted at it in two sentences of their replies. Le Reply, R. 76, Page ID # 5265; Ganzel Reply, R. 78, Page ID # 5382. Both cited one sentence saying that applying *Garcetti* "has proven challenging." *Boulton v. Swanson*, 795 F.3d 526, 533 (6th Cir. 2015). They left out how that Court then said that the "Supreme Court put this issue to rest in *Lane v. Franks*, [573 U.S. 228] (2014)," three years before Dr. Josephson spoke at the Heritage Foundation. *Boulton*, 795 F.3d at 533. They also left out how this Court later rejected the same argument, *DeCrane v. Eckart*, 12 F.4th 586, 599 (6th Cir. 2021) ("Eckart thinks that this fact[—that it can be challenging to distinguish public from private speech—]resolves the qualified-immunity issue in his favor."), because its "cases … already set more specific ground rules to distinguish public from private speech." *Id.* It cited four cases from 2007 to 2012—all decided at least five years before Dr. Josephson spoke at the Heritage Foundation. *Id.* at 600.

So out of Defendants' 12 briefs below, two replies dedicated two sentences to an issue they now raise on appeal. "Arguments raised only in reply … are not properly raised before the district court, and so are also

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[8] Woods Br., R. 58-1, Page ID ## 957–59; Carter Br., R. 59-1, Page ID ## 1087–88; Lohr Br., R. 60-1, Page ID ## 1267–69; Ganzel Br., R. 61-1, Page ID ## 1334–36; Le Br., R. 62-1, Page ID ## 1443–44; Boland Br., R. 63-1, Page ID ## 1594–96.

not properly preserved for appeal." *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 275 (6th Cir. 2010). Defendants waived any arguments about the capacity in which Dr. Josephson spoke.

2. *Pickering's* balancing test does not save this appeal.

Below, a few Defendants tried to identify an unclear legal standard by claiming that the outcome of *Pickering's* balancing test is inherently unclear. Mot. to Dismiss, Doc. 22, at 5–6 & n.9 (citing Defendants' briefs). They raise it again here. Defs.Br., Doc. 30, at 23–24.

They rely on *Williams v. Kentucky*, 24 F.3d 1526, 1537 (6th Cir. 1994), where state officials raised the same argument. But this Court rejected it, as the employee there "spoke out on matters of great public concern," with "only minimal effect on the efficiency of the office." *Id.* The employee aired corruption concerns that officials claimed imperiled workplace efficiency and relationships, claims this Court rejected. *Id.*

Likewise, Dr. Josephson spoke on gender dysphoria, an issue of "profound" public concern. *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018). Defendants admitted his speech created no disruption. *See supra* Case I.B. So any "imprecision of the standard" makes no difference. *Williams*, 24 F.3d at 1537. Reasonable officials in 1994 knew taking adverse actions based on such statements was illegal; reasonable officials in 2019 did too.

Defendants' own case—plus others, *see infra* Argument III.C.3—

shows *Pickering's* balancing test injects no uncertainty into the law sufficient to merit qualified immunity—or an appeal.

3. Defendants raise no legal argument about causation.

Defendants note "legal arguments about the proper meaning of the First Amendment's causation element would fall within [this Court's] jurisdiction." Defs.Br., Doc. 30, at 39 (quoting *DeCrane*, 12 F.4th at 603). But they don't raise any. They fault the district court for "assum[ing] causation" and then present their own narrative. *Id.* Yet the district court was just viewing the facts in Dr. Josephson's favor, Order, R. 99, Page ID ## 5764–65, as is proper, *Rudolph*, 939 F.3d at 746. So like the *DeCrane* official, they made "a passing head fake at a potential legal issue." *DeCrane*, 12 F.4th at 603–04. That's not good enough.

Like the *DeCrane* official, Defendants argue Le, Lohr, and Carter lacked "final decisionmaking authority" and hint at the same for Ganzel and Boland. *Id.*; Defs.Br., Doc. 30, at 31, 35, 38–42. But they "[n]owhere suggest that the district court failed to apply the proper law on causation." *DeCrane*, 12 F.4th at 604. They do "not cite any law on this issue." *Id.* This just is "a pure sufficiency-of-the-evidence challenge," based on their "facts," that this Court "lack[s] jurisdiction to consider. *Id.*[9]

[9] To address what *DeCrane* does not, this Court applies the "cat's paw" doctrine in § 1983 cases. *E.g.*, *Paterek v. Vill. of Armada*, 801 F.3d 630, 651 (6th Cir. 2015); Pl.'s Summ. J. Resp., R. 72, Page ID ## 4615–16.

4. Defendants focus on the sufficiency of the evidence, which is beyond this Court's jurisdiction at this stage.

Below, Defendants' qualified-immunity arguments challenged the sufficiency of the evidence. Mot. to Dismiss, Doc. 22, at 6–7 & n.10–13. They make many identical arguments here:

Below	Here
"Lohr did not take any discrete adverse employment action against Josephson...." Lohr Br., R. 60-1, Page ID # 1268.	"Lohr was not involved in the non-renewal decision … and did not have the authority to make decisions concerning Josephson's employment." Defs.Br., Doc. 30, at 31.
"Carter was not the individual who made decisions about Josephson stepping down as Division Chief and ... who decided against renewal of Josephson's faculty appointment." Carter Br., R. 59-1, Page ID # 1087.	"Carter did not have the authority to make decisions concerning Josephson's employment." *Id.* at 35.
"Josephson has failed to show that his presentation at the Heritage Foundation or his expert testimony played a role in Boland's recommendation to Ganzel." Boland Br., R. 63-1, Page ID # 1595.	"Every reasonable person in Boland's shoes would have recognized that she could recommend the non-renewal of a faculty member's appointment because of concerns about his performance…. The same analysis applies for Ganzel as well." *Id.* at 40–41.
"[T]here is no authority to suggest that Dr. Ganzel's decision to rely on accurate information from Dr. Boland to accept her recommendation was unreasonable…." Ganzel Br., R. 61-1, Page ID # 1335.	

Defendants "cannot appeal a denial of … qualified immunity insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial." *Gillispie*, 18 F.4th at 916 (quoting *Adams v. Blount Cnty.*, 946 F.3d 940, 948 (6th Cir. 2020) (in turn quoting *Johnson v. Jones*, 515 U.S. 304, 320 (1995))). This off-limits category includes questions about "why an action was taken" and "who did it." *McDonald*

v. Flake, 814 F.3d 804, 813 (6th Cir. 2016) (cleaned up).

Defendants focus on these "who" and "why" questions. Defs.Br., Doc. 30, at 26–42. In 1995, the Supreme Court ruled that a district court's decision "concerning petitioners' involvement" in the violation "was not a final decision" and thus not appealable on an interlocutory basis. *Johnson*, 515 U.S. at 307, 313 (cleaned up). So too here.

B. Defendants *still* depend on their version of the facts, denying this Court jurisdiction.

Dr. Josephson highlighted how this Court has "jurisdiction only to the extent that [D]efendant[s] limit[their] argument to questions of law *premised on facts taken in the light most favorable to [him].*" *Gillispie*, 18 F.4th 915 (cleaned up) (emphasis added), and how Defendants failed to do so in their qualified-immunity arguments below. Mot. to Dismiss, Doc. 22, at 10–12. Nothing has changed.

At most, Defendants profess to accept the facts "found by the District Court." Defs.Br., Doc. 30, at 3. So they don't even "purport[ ] to adopt" Dr. Josephson's version of the facts, and even that's not good enough. *Anderson-Santos v. Kent Cnty.*, 94 F.4th 550, 554 (6th Cir. 2024) ("Because a concession in name only is no concession at all, … such concessions are insufficient to invoke our jurisdiction.").

For example, they say Le, Lohr, and Carter "did not have the authority to make decisions concerning Josephson's employment." Defs.Br., Doc. 30, at 35; *accord id.* at 31. But all three were integral players in

what Carter described as an effort—started before giving Dr. Josephson any formal productivity warning—to generate "strong documentation" to "avoid Allan's reappointment." Lohr Email, R. 65-36, Page ID # 2057. Le compiled her unprecedented "Allan Tracking Document," Lohr (then no longer a co-chief) volunteered to scrutinize Dr. Josephson's productivity (to provide a pretext), and Carter (also no longer a co-chief) coached people on what to put in their complaints. *See supra* Case II.C, F–G.

Defendants insist Boland and Ganzel terminated Dr. Josephson "because of concerns about his performance unrelated to his speech." Defs.Br., Doc. 30, at 40; *accord id.* at 38–42. Nonsense. When she learned Le, Lohr, and Carter were generating "strong documentation" to "avoid Allan's reappointment," Boland assured them "the Dean [*i.e.*, Ganzel] is supportive of what we and you are doing." Lohr Email, R. 65-36, Page ID # 2056. This campaign—which Ganzel helped precipitate, *see supra* Case I.C—was directly tied to Dr. Josephson's views on gender dysphoria, views that still triggered animosity just a month before Carter's and Boland's emails. Le Email, R. 67-7, Page ID # 2857.

In short, Defendants chose the well-worn path of seeking qualified immunity based on their account of their motivations and actions. This Court routinely rejects such attempts.[10] It should do so here.

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[10] *E.g.*, *Anderson-Santos*, 94 F.4th at 554–55 ("Leshan, in continuing to argue that there was no clearly-established constitutional violation based on his version of the facts, fails to present us with a legal issue and rele-

II. This Court should affirm the district court's refusal to grant Defendants sovereign immunity.

As Dr. Josephson noted, this Court "certified" Defendants' sovereign immunity arguments below as "frivolous." *League of Women Voters v. Brunner*, 548 F.3d 463, 474 (6th Cir. 2008); Mot. to Dismiss, Doc. 22, at 14–15. To the frivolous, Defendants now add the waived.

A. Defendants waived any arguments on the propriety of declaratory relief, which have nothing to do with immunity.

Defendants fault the district court for not applying a five-factor test to Dr. Josephson's declaratory relief claim, relying on three distinguishable cases. Defs.Br., Doc. 30, at 43–44. One addressed when to grant declaratory relief, not whether the Eleventh Amendment bars such claims. *Bituminous Cas. Corp. v. J & L Lumber Co.*, 373 F.3d 807, 813 (6th Cir. 2004). It never mentions that amendment or sovereign immunity. *Id.* Another hinged on the fact that "[t]here is no claimed continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 73 (1985). Here, there is

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gates his claim to a factual dispute over which we cannot exercise jurisdiction."); *Ashford*, 89 F.4th at 970 (refusing to consider arguments about defendants' involvement in penalizing plaintiff); *Anderson v. Holmes*, No. 21-2668, 2022 WL 577668, at *2–3 (6th Cir. Feb. 25, 2022) (dismissing qualified immunity appeal because officials relied on disputed facts); *Barry*, 895 F.3d at 444–45 (same because defendant "does not accept the facts in the light most favorable to" plaintiff, "relies on his own disputed version of the facts," and "applies his own factual conclusions and inferences" to plaintiff's claims); *Hardy*, 260 F.3d at 683 (rejecting qualified immunity arguments based on disputed facts as "inappropriate for consideration on interlocutory appeal"); *Booher v. N. Ky. Univ. Bd. of Regents*, 163 F.3d 395, 396–97 (6th Cir. 1998) (dismissing qualified immunity appeal because defendants did not "concede the best view of the facts to the plaintiff"); *Berryman*, 150 F.3d at 565 (same because "defendants' appeal attempts to persuade us to believe their version of the facts").

one each day Dr. Josephson remains terminated. In the last, the plaintiff, unlike Dr. Josephson, admitted declaratory relief was just a vehicle for damages. Yet still some declaratory relief claims survived. *Gies v. Flack*, 495 F. Supp. 2d 854, 863–64 (S.D. Ohio 2007).

But Defendants' "duplication" argument suffers from a more basic flaw: nobody raised it below.[11] If an argument raised in a reply is waived on appeal, then so is one omitted entirely. *Travelers*, 598 F.3d at 275.

B. Defendants studiously ignore well-established precedent affirming that Dr. Josephson can seek reinstatement.

While *Ex parte Young* allows plaintiffs to seek prospective equitable relief, Defendants say Dr. Josephson can't as they "did not violate any right of [his]." Defs.Br., Doc. 30, at 43, 45. That's question-begging.

Ex parte Young's "test … is a straightforward one": does the "complaint allege[ ] an ongoing violation of federal law and seek[ ] relief properly characterized as prospective"? *League of Women Voters*, 548 F.3d at 474 (cleaned up). Defendants speculate about Dr. Josephson's motives, Defs.Br., Doc. 30, at 43, but the "focus of the inquiry remains on the allegations only." *League of Women Voters*, 548 F.3d at 474.

Dr. Josephson clears this test. He alleges the "decisions that led to the violation of [his] constitutional rights remain in full force and effect"

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[11] Carter Br., R. 59-1, Page ID ## 1089–90; Lohr Br., R. 60-1, Page ID ## 1269–71; Ganzel Br., R. 61-1, Page ID ## 1336–37; Le Br., R. 62-1, Page ID # 1444; Boland Br., R. 63-1, Page ID ## 1596–97. *See generally* Woods Br., R. 58-1; Defs.' Replies, R. 74–79.

and he "is suffering irreparable harm from [them]." Compl. ¶¶ 336, 338, R. 19, Page ID # 248. (He remains terminated.) He seeks injunctive and declaratory relief. *Id.*, Page ID # 254. As Defendants' own case puts it: His "claims for reinstatement are prospective in nature and appropriate subjects for *Ex parte Young* actions." *Diaz v. Mich. Dep't of Corrs.*, 703 F.3d 956, 964 (6th Cir. 2013) (quoting *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002)).[12] The district court should be affirmed.

III. This Court should affirm the district court's refusal to grant any Defendant qualified immunity.

While this appeal is "frivolous," *Howlett v. City of Warren*, 852 F. App'x 899, 902 (6th Cir. 2021),[13] Defendants have succeeded in "unnecessarily protracting litigation." *Gillispie*, 18 F.4th at 919. While Dr. Josephson does not seek sanctions, *Berryman*, 150 F.3d at 564–65 (urging courts to consider them), he desires to avoid further waste of judicial resources. Thus, this Court should affirm the district court on the merits.

A. The district court defined the First Amendment right to be free from retaliation at the proper level of specificity.

Based on four Fourth Amendment cases, Defendants fault the lower court and Dr. Josephson for asserting a "clearly established right not to

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[12] *Williams*, 24 F.3d at 1543–44 (refusing to dismiss official-capacity declaratory and injunctive claims for reinstatement because the "Eleventh Amendment does not bar" them); *Cox v. Shelby State Cmty. Coll.*, 48 F. App'x 500, 504 (6th Cir. 2002) ("[T]he equitable and prospective remedy of reinstatement …. is not barred by the Eleventh Amendment.").

[13] *McDonald*, 814 F.3d at 816–17 (sanctioning fact-based interlocutory qualified immunity appeal as it was "obviously without merit").

suffer an abridgment of the freedom of speech." Defs.Br., Doc. 30, at 18–20 (quoting *DeCrane*, 12 F.4th at 599). This charge falls flat.

First, Defendants mischaracterize Dr. Josephson and the court. Neither asserted this broad right. The pages of the brief they cite discuss how the "rule against retaliation against public employees for their speech … is clearly established" before discussing each component of it. Pl.'s Summ. J. Resp., R. 72, Page ID ## 4628–29. Similarly, the district court ruled Dr. "Josephson's right to be free from retaliation for protected speech was clearly established." Order, R. 99, Page ID # 5764; *id.*, Page ID ## 5759, 5763, 5765 (referencing same right).

Second, Fourth Amendment cases on qualified immunity do not automatically apply in the First Amendment retaliation context. They depend on concepts far more fluid and fact-intensive than the ban on retaliating based on protected speech. That is, probable cause "is a fluid concept that is not readily, or even usefully, reduced to a neat set of rules," and that requires a "totality of the circumstances" review. *Dist. of Columbia v. Wesby*, 583 U.S. 48, 56–57, 60 (2018) (cleaned up). It "turn[s] on the assessment of probabilities in particular factual contexts." *Id.* at 64 (quotation omitted). Analyzing when a search or seizure is "reasonable under the circumstances," *id.* at 56, or the use of force becomes excessive requires a similar detailed review of the facts, the slightest change of which could affect the entire analysis. *E.g.*, *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 174–75 (6th Cir. 2004) (noting "hazy border between

excessive and acceptable force," factors to consider (including demeanor), and how this makes "difficult … to determine … how … excessive force … will apply to the factual situation the officer confronts" (cleaned up)). They involve "split-second judgments … in circumstances that are tense, uncertain, and rapidly evolving"—and often life-threatening. *Id.* at 174 (cleaned up). But usually, the officers' subjective intent does not matter. *Ashcroft v. al-Kidd*, 563 U.S. 731, 737 (2011). So prior precedent, absent very close factual similarity, can be of little utility given "the context-specific nature of the inquiry." *Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012); *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). For the "more discretion a constitutional guarantee gives a state actor, the less likely it will be clearly violated in a case without similar facts." *Cunningham v. Blackwell*, 41 F.4th 530, 540 (6th Cir. 2022).

First Amendment retaliation does not depend on such fluid concepts. Retaliation for protected speech is always unconstitutional. Plaintiffs don't have to show "excessive" or "unreasonable" retaliation, and there's no "reasonable retaliation" defense. Defendants had no probabilities to calculate and no split-second, life-threatening decisions to make as their retaliation unfolded over 16 months. For the First Amendment, their motives are critical. *Bloch v. Ribar*, 156 F.3d 673, 681–82 (6th Cir. 1998) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper."); *Wenk v. O'Reilly*, 783 F.3d

585, 595 (6th Cir. 2015) (same); *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999). So their police and Secret Service cases do not control.

Last, this Court has repeatedly recognized First Amendment retaliation claims as framed at the proper level of generality. It knows that "clearly established law should not be defined at a high level of generality," but in the same breath, it defined the "constitutional right at issue" as "the right not to be subjected to retaliation for engaging in First Amendment activity." *McElhaney v. Williams*, 81 F.4th 550, 556–57 (6th Cir. 2023) (cleaned up); *Paterek*, 801 F.3d at 650–51; *Wenk*, 783 F.3d at 598. The case Defendants quote reviewed (and rejected) qualified immunity claims arising out of First Amendment retaliation, without requiring more specific definition of the right. *DeCrane*, 12 F.4th at 593–604. The same is true in higher education cases. *E.g.*, *Cunningham*, 41 F.4th at 541–42; *Kesterton v. Kent State Univ.*, 967 F.3d 519, 524–25 (6th Cir. 2020); *Hardy*, 260 F.3d at 682 ("[O]ur review is limited to whether, in light of clearly established law, it was objectively reasonable for [defendants] to believe that not renewing Hardy's contract in retaliation for his in-class speech was lawful." (citing *Anderson*, 483 U.S. at 641)).

Thus, Dr. Josephson and the district court framed the right at issue at the proper level of specificity. The district court should be affirmed.

B. The district court rightly ruled that the First Amendment right to be free from retaliation is clearly established.

Defendants say the district court "undertook no … analysis" of Supreme Court or this Court's precedent when finding Dr. Josephson's right to be free from retaliation is clearly established. Defs.Br., Doc. 30, at 20–21. In fact, the district court relied on eight cases from the Supreme Court and this Court. Order, R. 99, Page ID ## 5765–66. More are available—in general and in the higher education context.[14] They show the law was

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[14] **General:** *McElhaney*, 81 F.4th at 557; *Hudson v. City of Highland Park*, 943 F.3d 792, 798 (6th Cir. 2019) ("We … have repeatedly clearly established … that employers may not retaliate against employees based on their protected speech." (relying on 1997 decision)); *Buddenberg v. Weisdack*, 939 F.3d 732, 741 (6th Cir. 2019) ("We have long recognized that a public employer may not retaliate against an employee for her exercise of constitutionally protected speech."); *Paterek*, 801 F.3d at 651 ("It is fundamental that the right to be free of such retaliation … is clearly established."); *See v. City of Elyria*, 502 F.3d 484, 495 (6th Cir. 2007) ("[A] public employee's right to speak on matters of public concern without facing improper government retaliation [is] settled"); *Hoover v. Radabaugh*, 307 F.3d 460, 469 (6th Cir. 2002) ("[A]s a matter of pure law, the rights here are clearly established: a reasonable official would know that terminating an employee with the motivation, even in part, of quieting the plaintiff's public speech … violates the Constitution."); *Bloch*, 156 F.3d at 682–83; *Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 580 (6th Cir. 1997) ("All public officials have been charged with knowing that public employees may not be disciplined for engaging in speech on matters of public concern...."); *Williams*, 24 F.3d at 1537 (finding this right clearly established by 1990).

Higher Education: *Ashford*, 89 F.4th at 975 ("It is well settled in our Circuit that retaliating against an employee for exercising this free speech right violates the Constitution." (citing cases showing right was clearly established since at least 2002)); *Kesterton*, 967 F.3d at 525 ("But we think the case law, by 2014, had put beyond debate that a coach at a state university cannot retaliate against a student-athlete for speaking out by subjecting her to harassment and humiliation."); *Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983).

clear years—if not decades—before Defendants retaliated against Dr. Josephson. The district court did not err.

C. The district court rightly ruled that the First Amendment protects Dr. Josephson's speech, based on decades of law.

Defendants say it was unclear whether the First Amendment protects Dr. Josephson's off-campus, off-the-clock speech on gender dysphoria. Defs.Br., Doc. 30, at 21–23. Not at all. The test was clear long before they acted: Did he (1) speak "as a private citizen," (2) on "matters of public concern," when (3) his interest in speaking outweighed the University's interest in "promoting the efficiency of [its] public services"? *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017) (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 337–38 (6th Cir. 2010)). They concede his topic—gender dysphoria—is a matter of public concern. *Janus*, 585 U.S. at 913–14. On the other prongs, longstanding precedent showed his speech was protected.

1. The district court rightly relied on the decades of precedent protecting faculty speech.

As the district court rightly found, the Supreme Court and this Court have long ruled that the First Amendment protects faculty speech. Order, R. 99, Page ID ## 5763–64. For universities are supposed to be the "marketplace of ideas," *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967), where the "vigilant protection of constitutional freedoms is nowhere more vital," *Shelton v. Tucker*, 364 U.S. 479, 487

(1960). So they cannot "impose any strait jacket" upon faculty, the "intellectual leaders in our colleges and universities." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Whether a university wants to squelch Marxism or dissent from its gender dysphoria orthodoxy, the First Amendment mandates that "[t]eachers … must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

This Court has long held likewise. When a professor criticized his university in print and advised a student to seek legal counsel, this Court found his speech to be protected and denied qualified immunity to the officials who retaliated against him. *Stern*, 706 F.2d at 745–49. It concluded that "a reasonable person should have known in 1970–71 that [his] speech was constitutionally protected." *Id.* at 749.

By 2001, nothing changed, as this Court ruled: "For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom." *Hardy*, 260 F.3d at 682 (quoting *Keyishian*, 385 U.S. 603). After all, it had just ruled that a vice president's critique of his university on affirmative action issues was protected speech. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 583–85 (6th Cir. 2000). So after surveying Supreme Court precedent, it declared: "the argument that teachers have no First Amendment rights when teaching or that the government can censor teacher speech without

restriction, is totally unpersuasive" and "fantastic." *Hardy*, 260 F.3d at 680. So "[r]easonable school officials should have known"—by 2001, if not 1995 or before—that a professor's speech that was "germane to the classroom subject matter and advance[d] an academic message[ ] is protected by the First Amendment"—although some objected to it. *Id.* at 682–83 (reviewing *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189–90 (6th Cir. 1995)). Defendants in 2017 to 2019 were without excuse.

Defendants protest these cases dealt with in-class speech, not Dr. Josephson's off-campus speech. Defs.Br., Doc. 30, at 21, 24–25. But this makes it more clear that his speech was protected. The modern public-employee speech doctrine arose from cases involving teachers' off-campus speech. *E.g.*, *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564 (1868) (teacher fired for writing letter to the editor). Its fundamental tenet is that employees may enjoy more free speech rights as citizens than in the employment context. *Id.* at 568. So for a professor, if speech is protected on campus, it is more clearly protected off.

Likewise, the unconstitutional conditions doctrine arose because a professor was denied a new contract for off-campus speech (*i.e.*, testifying at the state legislature). *Perry v. Sindermann*, 408 U.S. 593, 594–95, 597 (1972). Thus, this Court recognized in 2005—12 years before Dr. Josephson spoke at the Heritage Foundation—that professors do not "leave their First Amendment rights at the campus gates," which necessarily presumes they retain those rights off campus. *Johnson-Kurek v. Abu-Absi*,

423 F.3d 590, 594 (6th Cir. 2005).

Long before Dr. Josephson spoke in 2017, the Supreme Court and this Court made it abundantly clear the First Amendment offered him broad protections. Defendants unreasonably ignored them. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) ("We do not find it unreasonable to expect the defendants—who hold themselves out as educators—to be able to apply such a standard, notwithstanding the lack of a case with material factual similarities.").

2. The district court rightly recognized *Garcetti* changed nothing for Dr. Josephson.

Defendants insist Dr. Josephson's speech was unprotected as his Heritage Foundation remarks fell within his "official duties." Defs.Br., Doc. 30, at 21–23. But their cases confirm the district court's conclusion.

First, this argument makes no ultimate difference. It is waived, *see supra* Argument I.A.1, and they conceded Dr. Josephson's "service as an expert witness was not part of his job duties." Carter Br., R. 59-1, Page ID # 1072. So they admit some of his speech clears *Garcetti*.

It's also at odds with their concession that professors' in-class speech is clearly protected. Defs.Br., Doc. 30, at 21, 24–25. If Dr. Josephson's off-campus speech is part of his duties, then his in-class speech is even more so. Yet *Hardy* and many other cases hold to the contrary.

Plus, *Garcetti* explicitly refused to extend its "official duties" test to faculty speech "related to teaching and scholarship." *Garcetti*, 547 U.S.

at 425. It did so due to concerns the test would imperil faculty speech. *Id.* at 438 (Souter, J., dissenting). After all, if it applied, professors would lose all First Amendment protections over their teaching and writing, and universities could censor this speech without restriction, something this Court rejected as "totally unpersuasive" and "fantastic." *Hardy*, 260 F.3d at 680. Not even Defendants suggest Dr. Josephson's speech on childhood gender dysphoria—as an expert witness or as a Heritage Foundation panelist—was unrelated to his teaching and scholarship as a child psychiatrist. For this reason alone, *Garcetti* does not apply to his speech.

Also, *Garcetti* and its progeny curtail the limits of the "official duties" test. Under *Garcetti*, speech is part of one's official duties when it (1) "owes its existence to a public employee's professional responsibilities"; (2) is "commissioned or created" by the employer; (3) "is part of what [the employee] was employed to do"; (4) is a task the employee "was paid to perform"; and (5) "[has] no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 547 U.S. at 421–24.

None of these applies to Dr. Josephson's speech. The University did not commission or pay him to testify on gender dysphoria. He reported it as "[m]oonlighting," did it "on [his] own time" when it did "not interfere with University duties," and had to pay the University "taxes" on his earnings. Woods Email, R. 64-24, Page ID # 1930. His testimony led to his appearance at the Heritage Foundation, which covered all expenses for his trip. Josephson Dep., R. 68-29, Page ID # 3316. On his own time,

he explicitly expressed his views, not the University's. Heritage Found. Tr., R. 66-16, Page ID # 2304. And this mirrors citizen speech. It did not "owe its existence" to the University. *Garcetti*, 547 U.S. at 421–22.

Defendants say Dr. Josephson's duties included giving presentations and serving as the face of his Division. Defs.Br., Doc. 30, Page ID ## 22–23. But the Supreme Court requires more: "the critical question … is whether *the speech at issue itself* is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties," *Lane*, 573 U.S. at 240 (emphasis added). A general duty to give presentations—much less a vague expectation to serve as the Division's face—does not suggest his duties included giving this presentation to the Heritage Foundation. Defendants seek to do what *Lane* prohibits: convert "speech that simply relates to public employment or concerns information learned in the course of public employment" into *per se* unprotected speech. *Id.*

Defendants rely on two distinguishable cases. One involved a police department's multicultural liaison, who complained about remarks he heard at work from colleagues to other officials at work. *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 560–61, 567–68 (6th Cir. 2015). Unlike the liaison, Dr. Josephson's duties did not require him to speak at the Heritage Foundation. The "speech's audience" and "setting" had nothing to do with the University. *Id.* at 567. Its "impetus" was his expert witness work, not his University duties. *Id.* And unlike this liaison, a professor's duties include expressing his views to educate the public.

Sweezy, 354 U.S. at 250 (noting protection for professor's lecture).

The second involved an insurance examiner who questioned policy exclusions and pushed his point with clients. *Haddad v. Gregg*, 910 F.3d 237, 241–42, 249 (6th Cir. 2018). But this Court has refused to rely on its *Garcetti* analysis, pointing out that the examiner (unlike Dr. Josephson) "conceded that he was acting pursuant to his official duties." *DeCrane*, 12 F.4th at 600 (cleaned up). Instead, it looks at the "impetus for or motivation behind the speech," the "speech's setting" (with off-the-clock speech being more likely "as a citizen"), and its "audience" (with speech to "outside individuals" being more likely in one's private capacity). *Id.* Dr. Josephson's Heritage Foundation remarks arose from his expert witness work, were on his own time, and addressed the public. Such speech is so clearly protected that qualified immunity is improper. *Id.* at 599–600.

Last, Defendants highlight the alleged "difficulty in drawing lines with respect to where a professor's protected speech ends." Defs.Br., Doc. 30, at 25. This Court has faced this argument before in a case involving retaliation that occurred in 2016. *DeCrane*, 12 F.4th at 593, 599 ("[Defendant] thinks that this fact[—the challenge of distinguishing public from private speech—]resolves the qualified immunity issue in his favor."). But it rejected it. *Id.* at 599–600 (denying qualified immunity due to prior cases holding "that employees speak as private citizens (not public employees) at least when they speak on their own initiative to those outside their chains of command and when their speech was not part of

their official or de facto duties"); *accord Ashford*, 89 F.4th at 975 (relying on 2019 and 2011 precedent). It should do the same here.

3. The district court rightly ruled *Pickering's* balancing test favors Dr. Josephson.

Defendants claim *Pickering's* balancing test rendered it unclear if the First Amendment protects Dr. Josephson's speech. Defs.Br., Doc. 30, at 24. But even their case held the employee's speech was clearly protected. *See supra* Argument I.A.2. Since 1994, nothing has changed.

When the University of Michigan punished a police officer in 2020 for speaking to the media, this Court held that the *Pickering* balancing test favored the officer. *Ashford*, 89 F.4th at 973–74. His speech did "not … disrupt any important governmental interests." *Id.* at 973. Nor did Dr. Josephson's. *See supra* Case I.B. So this Court denied qualified immunity. *Ashford*, 89 F.4th at 974–76. If a police officer had a clearly established right to speak in 2020, a professor did well before 2019.

In 2001, almost 20 years before Dr. Josephson spoke, university officials argued *Pickering's* balancing favored them because the professor's speech posed the risk of "potential disruption." *Hardy*, 260 F.3d at 681. This Court rejected this, ruling a university cannot restrict a professor's speech merely to avoid "'the discomfort and unpleasantness that always accompany' a controversial subject." *Id.* at 682 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969)). So it rejected the officials' qualified immunity arguments. *Id.* at 682–83.

The year before, university officials argued the balancing test favored them because a vice president's speech delayed hiring new employees. *Johnson*, 215 F.3d at 585. Defendants made similar claims about Dr. Josephson. *See supra* Case I.D. This Court ruled that even if this were true, it "does not rise to the level of having a detrimental impact on close working relationships or undermining a goal or mission of the University." *Johnson*, 215 F.3d at 585. Instead, the vice president's speech furthered the university's goals. *Id.* Similarly, Dr. Josephson's speech about how best to care for gender dysphoric children—views that have since proven prescient, *see supra* notes 4–6—furthered the University's goal of providing the best care to children and their families.

As far back as the early 1970s, university officials argued that, because of *Pickering's* balancing test, "no person could reasonably predict in a given situation whether discharging an employee would violate the latter's [F]irst [A]mendment rights." *Stern*, 706 F.2d at 749. There as here, the professor's speech did not impede his teaching or "disrupt College operations." *Id.* at 748; *see supra* Case I.B. So this Court rejected the argument, ruling "a reasonable person should have known in 1970–71 that [the professor's speech] was constitutionally protected under *Pickering*." *Stern*, 706 F.2d at 749. What was clear in 1970 was clear in 2019.

Defendants say Dr. Josephson "relied heavily" on *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). Defs.Br., Doc. 30, at 24–25. Not so. For qualified immunity, he pointed out that it reaffirms what *Hardy* and

prior cases made clear: professors do not lose their First Amendment rights when they walk onto campus. Pls.' Summ. J. Br., R. 64-1, Page ID # 1841; Pl.'s Summ. J. Resp., R. 72, Page ID ## 4628–29 (same without citing *Meriwether*). Elsewhere, he appropriately cited it to highlight how *Garcetti* did not change this Court's precedent and how he addressed a matter of public concern, a point Defendants do not contest.[15] Pl.'s Summ. J. Br., R. 64-1, Page ID ## 1823–26; Pl.'s Summ. J. Resp., R. 72, Page ID ## 4606–07. Despite Defendants' claim, he does not claim that "*all* speech by faculty members is protected." Defs.Br., Doc. 30, at 25. He highlights how the First Amendment protects both (1) speech outside a professor's official duties (*i.e.*, the standard protection for public employees) and (2) speech related to his teaching and scholarship (*i.e.*, the additional protection afforded faculty due to the unique nature of their jobs).

Next, Defendants cursorily cite six faculty cases. Defs.Br., Doc. 30, at 24–26. Five have nothing to do with *Pickering's* balancing test. In two, the professor did not address a matter of public concern, which Defendants do not contest here. *Feterle*, 148 F. App'x at 533; *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019). In a third, the professor's grant-administering activities were part of his official duties. *Renken v. Gregory*, 541 F.3d 769, 773–75 (3d Cir. 2008). In the fourth, one professor

[15] Defendants note *Meriwether* did not involve qualified immunity. Defs.Br., Doc. 30, at 25. With no damages claim, it couldn't. Plus, they also cite such cases. *Feterle v. Chowdhury*, 148 F. App'x 524, 533 (6th Cir. 2005) ("We … need not reach the question of qualified immunity….").

failed to prove causation and the other could not show that refusing to sign a false statement clearly qualified as protected speech, an issue with no connection to Dr. Josephson. *Cunningham*, 41 F.4th at 542–43. In the fifth, the Ninth Circuit granted officials qualified immunity as there was "no Ninth Circuit law on point" to show that the professor's speech was protected. *Demers v. Austin*, 746 F.3d 402, 417 (9th Cir. 2014). It contrasted its situation with other circuits that had such precedent and thus rejected qualified immunity claims. *Id.* (discussing *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 565–66 (4th Cir. 2011)). This Court falls into that category. *See supra* Argument I.A.2, II.B, II.C.1–2. None of these cases cast doubt on Dr. Josephson's rights.

One case—from 2023—discusses *Pickering's* balancing test. *Heim v. Daniel*, 81 F.4th 212 (2d Cir. 2023). This out-of-circuit opinion could not have confused Defendants when they retaliated against Dr. Josephson four years earlier. It involved a failure to hire where the university based its decision on the adjunct's ability to produce the scholarship it wanted to develop in its department. *Id.* at 217–19, 232. That presents balancing considerations under *Pickering* having nothing to do with retaliating against a full professor with almost 16 years of leadership for his off-campus presentation. Defendants never asserted a similar interest—below or here. So *Heim* does not displace the decades of this Court's precedent showing that Dr. Josephson's speech was clearly protected.

D. The district court rightly ruled each Defendant violated Dr. Josephson's clearly established rights.

Defendants spend over a third of their brief insisting they never violated Dr. Josephson's rights. Defs.Br., Doc. 30, at 26–42. They pretend the district court denied qualified immunity ruling exclusively due to the six facts mentioned in one paragraph, Order, R. 99, Page ID ## 5764–65—except when they improperly inject their version of the facts. *See supra* Argument I.B. The court spent over a third of its opinion recounting the facts, Order, Page ID ## 5750–59, and highlighted the tables each side filed "describing their competing characterizations of the facts," *id.*, Page ID # 5768. This paragraph contains one of the many facts illustrating how each official participated in violating Dr. Josephson's rights, especially when accepting his version of the facts. *Rudolph*, 939 F.3d at 746.

Defendants note "[a]ssertions of wrongdoing by others cannot be attributed to imputed to each or all defendants." Defs.Br., Doc. 30, at 26. True, but Dr. Josephson detailed how each Defendant contributed to both the hostile environment and the termination. He did so chronologically,[16] on an action-by-action basis,[17] on a person-by-person basis,[18] and in a table.[19] Defendants dispute this, but this Court must accept Dr. Josephson's version of the facts. *Rudolph*, 939 F.3d at 746.

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[16] Pl.'s Summ. J. Br., R. 64-1, Page ID ## 1800–22; Pl.'s Summ. J. Resp., R. 72, Page ID ## 4572–4604
[17] Pl.'s Summ. J. Br., R. 64-1, Page ID ## 1828–33.
[18] Pl.'s Summ. J. Resp., R. 72, Page ID ## 4614–22.
[19] Pl.'s List, R. 94-1, Page ID ## 5612–27.

Because Defendants focus myopically on these six sentences, they tilt at straw men. No one argues it is *per se* illegal to criticize a colleague, document workplace concerns, create a curriculum or draft assignment, or terminate someone for performance reasons unrelated to protected speech, as they suggest. Defs.Br., Doc. 30, at 26–42. Rather, it is illegal to retaliate against a professor because of his protected speech by creating a hostile environment and then terminating him. Pl.'s Summ. J. Br., R. 64-1, Page ID ## 1828–33 (outlining adverse actions); Pl.'s Summ. J. Resp., R. 72, Page ID ## 4611–14 (same); Order, R. 99, Page ID ## 5759, 5765–68 (discussing same). The district court rightly found that these six facts—among all the others—"suggest that each Defendant may have violated his First Amendment rights." Order, R. 99, Page ID # 5764. If they took these actions because of his speech (and their repeated focus on and targeting of him and his views on gender dysphoria suggests they did[20]), then these acts were illegal, even if they would be permissible if taken for different reasons. *Bloch*, 156 F.3d at 681. Motives matter, and the jury should weigh them.

Defendants next insist Dr. Josephson cannot rely on any evidence of which he was unaware at the time, citing a constructive discharge case. Defs.Br., Doc. 30, at 30, 32, 36 (citing *Groening v. Glen Lake Cmty. Sch.*,

[20] Pl.'s Summ. J. Br., R. 64-1, Page ID ## 1834–40 (outlining causation evidence); Pl.'s Summ. J. Resp., R. 72, Page ID ## 4614–24 (same).

884 F.3d 626 (6th Cir. 2018)). For constructive discharge, this is true because plaintiffs must show the "working conditions were objectively intolerable." *Groening*, 884 F.3d at 630. But there is no doubt that termination (or nonrenewal) is an adverse action sufficient to chill a reasonable person. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010) ("Adverse action … has traditionally referred to actions such as … nonrenewal of contracts." (cleaned up)). Nothing prohibits Dr. Josephson from using all evidence obtained in discovery to prove that his speech prompted this decision. *E.g.*, *Wenk*, 783 F.3d at 596 (denying qualified immunity in part because defendant's emails showed "she harbored animus" and evidence suggested she "embellished or entirely fabricated other allegations"); *Paterek*, 801 F.3d at 647 ("Circumstantial evidence, like the timing of events or the disparate treatment of similar individuals, may support the inference of a retaliatory motive." (cleaned up)).

Defendants insist Le, Lohr, and Carter played no role in any employment decisions. Defs.Br., Doc. 30, at 28–31, 36. This requires accepting their version of the facts, which this Court cannot do. *See supra* Argument I.B. They rely on three cases, involving a prosecutor who publicly criticized a defense attorney, a city attorney who criticized a citizen, and a prosecutor who criticized police officers. *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005); *Hilton v. Mish*, 720 F. App'x 260 (6th Cir. 2018); *Stockdale v. Helper*, 979 F.3d 498 (6th Cir. 2020). Critically, none of these de-

fendants ever had any employment authority over the plaintiffs. In contrast, Le, Lohr, and Carter were Dr. Josephson's direct supervisors. Le remained so until he was terminated. Carter and Lohr, even after their co-chief stints ended, manufactured complaints against him and volunteered to scrutinize his productivity. *See supra* Case II.G. All worked to generate "strong documentation" to "avoid Allan's reappointment." *See supra* Case II.F–G. Thus, the district court rightly ruled all were involved and none deserves qualified immunity.

E. No Defendant merits qualified immunity, a historically dubious doctrine that should not apply here.

While qualified immunity remains the law, this case illustrates why the doctrine needs refinement. Those reasons underscore why the district court rightly rejected Defendants' claims.

More and more jurists recognize that police making "split-second, life-and-death decisions … to save innocent lives" deserve more deference than officials who "make the deliberate and considered decision to trample on a citizen's constitutional rights." *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J. concurring); *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J.) (same). Defendants fall into the latter category, as they generated "strong documentation" to "avoid Allan's reappointment," over 16 months while all had access to counsel. *See supra* Case II.F–G; *Villareal v. City of Laredo*, 94 F.4th 374, 407 & n.5 (5th Cir. 2024) (Willett, J., dissenting) (referencing defendants

"contrived a premeditated, retributive, slow-motion plan—over several months and with the benefit of 24/7 legal counsel"). A doctrine that insulates "difficult judgment calls," *Rudolph*, 939 F.3d at 756 (Thapar, J., concurring in part), should not extend further, lest "qualified immunity smack[ ] of unqualified impunity." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part).

Plus, this doctrine exists partly to ensure that the "specter of personal liability" does not inhibit officials from fulfilling their duty. *Malley v. Briggs*, 475 U.S. 335, 353 (1986) (Powell, J., concurring in part); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). But the First Amendment is "concerned about government chilling the citizen—not the other way around." *Horvath v. City of Leander*, 946 F.3d 787, 802 (5th Cir. 2020) (Ho, J., concurring in part). Also, Defendants face no such specter; they will be indemnified when Dr. Josephson prevails. *McKinney v. City of Middleton*, 49 F.4th 730, 757–58 (2d Cir. 2022) (Calabresi, J., dissenting) ("[I]ndemnification is the rule, and officers rarely pay anything.").

Last, a growing chorus of justices, judges, and scholars recognize "qualified immunity cannot withstand scrutiny." *Id.* at 756–58 (listing opinions, scholarship, and testimony). Some question certain prongs. *E.g.*, *Hoggard*, 141 S. Ct. at 2421 (statement of Thomas, J.) (questioning clearly established). Others question its effects. *E.g.*, *N.S. v. Kan. City Bd. of Police Comm'rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dis-

senting). Many highlight how it has no connection to § 1983. *E.g.*, *Hoggard*, 141 S. Ct. at 2421 (statement of Thomas, J.); *Oliver v. Anthony*, 19 F.4th 843, 852 (5th Cir. 2021) (Ho, J., concurring); *Schantz v. DeLoach*, 2021 WL 4977514, *12 (11th Cir. Oct. 26, 2021) (Jordan, J., concurring). Others note its perverse incentives, where ignorance of the law is no excuse for citizens but is for government officials. *Villareal*, 94 F.4th at 407 (Willett, J., dissenting). Still others highlight how recent scholarship reveals Congress set aside immunities when passing § 1983. *E.g.*, *McKinney*, 49 F.4th at 757–58 (Calabresi, J., dissenting); *Rogers v. Jarrett*, 63 F.4th 971, 979–81 (5th Cir. 2023) (Willett, J., concurring).

These broader concerns provide extra reasons for affirming the decision below and denying qualified immunity here.

CONCLUSION

In denying Defendants qualified immunity, the district court was right on the merits, and Defendants ignore the narrow limits on this Court's interlocutory jurisdiction. Either way, this Court should affirm the decision below and remand this case for trial.

Respectfully submitted the 24th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,996 words, excluding parts of the brief exempted by FED. R. APP. P. 32(f) and 6th Cir. R. 32(b).

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 Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Respectfully submitted the 24th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted the 24th day of April, 2024.

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DESIGNATION OF RELEVANT DOCUMENTS

Pursuant to 6th Cir. R. 28(b)(1)(A)(i) and 30(g), Dr. Josephson designates the following documents as relevant:

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26	Reply of Plaintiff-Appellee in Support of Motion to Dismiss	1–18
27	Order (from the Motions Panel Referring Jurisdictional Issues to the Merits Panel)	1–2

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