IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ALLAN M. JOSEPHSON,

Plaintiff,

v.

TONI M. GANZEL, *et al.*,

Defendants.

Case No: 3:19-cv-00230-RGJ-CHL

THE HONORABLE
REBECCA GRADY JENNINGS

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In their response, Defendants claim a license to silence faculty whose views they dislike. They insist *Garcetti's* "official duties" test encompasses any professor's remarks on any topic related to his expertise. They cite no higher education cases and ignore how *Garcetti,* the Sixth Circuit, and other courts reject this position. *Meriwether v. Hartop*, 992 F.3d 492, 504–07 (6th Cir. 2021). Next, they convert *Pickering's* balancing test into a heckler's veto, arguing their own intolerance somehow immunizes them from judicial scrutiny. Again, they cite no higher education cases and ignore how a heckler's veto represents "odious viewpoint discrimination." *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015). Last, they insist their actions had nothing to do with Dr. Josephson's speech—just with the reactions and controversy it sparked. They focus on an ellipsis when the omitted material merely expands on the objections to Dr. Josephson's remarks. Defs.' Resp., Doc. 71, PageID.4209–10. Yet "[l]isteners' reaction is not a content- [or viewpoint-] neutral basis for regulation" of speech. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Child Evangelism Fellowship of N.J., Inc. v. Safford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination."). They seek what the law prohibits: a license to discriminate.

Defendants also distort Dr. Josephson's claims. He never sought "to be free from criticism and disagreement" or to restrict others' free speech. Defs.' Resp., Doc. 71, PageID.4209, 4222. He seeks what the Constitution has long protected: the freedom to express his views on "matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940). Nowhere should this be more respected than on Defendants' campus, where its "essentiality" is "self-evident." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

Per the undisputed facts, Defendants harassed and terminated Dr. Josephson, and his speech motivated those actions. In fact, they admit they would not have

treated him as they did but for his speech. They do not contest that they normally utilize performance improvement plans, followed by probation, and that Dr. Josephson's performance improved after July 2018. Yet they failed to follow the University's typical practice and treated him like no one else because of his speech. Thus, this Court should deny their motions and grant Dr. Josephson summary judgment.

Argument

I. The statute of limitations has no impact on Dr. Josephson's claims or on the undisputed evidence.

Defendants try to distract from their unlawful conduct that indisputably occurred within the filing period—the retaliatory termination—by devoting nearly their entire brief to the hostile environment, including contentions (this Court rejected) that the statute of limitations bars Dr. Josephson's claims.

A. The statute of limitations does not limit the evidence this Court may consider.

Defendants say Dr. Josephson "spends a significant amount of time to impose liability for [ ]his 'demotion.'" Defs.' Resp., Doc. 71, PageID.4232. But the demotion is not the basis for liability; rather, "[t]he motive for the demotion is *evidence* of the motive for subsequent adverse actions." Pl.'s Summ. J. Br. ("Pl.'s Br."), Doc. 64-1, PageID.1835.

Also, acts that cannot be the basis of a claim due to the statute of limitations "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue[.]" *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("Nor does the statute bar . . . using the prior acts as background evidence in support of a timely claim.").

This Court should consider the entire story when evaluating Dr. Josephson's claims. He had an excellent record for almost fifteen years, with perfect evaluations the three years before he spoke at the Heritage Foundation. Afterwards, Defendants swiftly demoted him. They dared not terminate him then—that would be too obvious.[1] So

[1] *See* Pl.'s Dep. Ex. 71 (recommending no change to Dr. Josephson's salary in the first year after his demotion to "avoid the chance of successful litigation").

they launched a campaign, waged by each Defendant and sanctioned by Dean Ganzel, to collect "strong documentation" to "avoid Allan's reappointment." This created a hostile environment that would deter any reasonable person from exercising constitutional liberties. The demotion was a "discriminatory act which is not made the basis for" any claims, but it "constitute[s] relevant background evidence" regarding the lawfulness of acts within the statutory period. *Evans*, 431 U.S. at 558. So the statute of limitations does not bar evidence relevant to the termination or hostile environment.

B. The statute of limitations does not bar liability for acts that contribute to the hostile environment and extend into the filing period.

Defendants portray the hostile environment as "effects of the time-barred demotion." Defs.' Resp., Doc. 71, PageID.4234. They attempt a sleight of hand, focusing on "effects" Dr. Josephson that does not challenge and ignoring the separate hostile acts that he does. They identify a command to "increase his clinical workload," the loss of a "salary supplement," removal from "various committees," and loss of administrative roles. *Id.* But Dr. Josephson raises none of these as creating the hostile environment (other than the assignment of clinical hours *in excess* of the four-hour increase specified in the demotion letter). Instead, he points to uncontested evidence showing how Defendants ostracized him, imposed discriminatory requirements not spelled out in the demotion letter, maintained an open-ended investigation against him,[2] and refused to investigate misconduct directed toward him. Pl.'s Br., Doc. 64-1, PageID. 1833; Pl.'s Resp., Doc. 72, PageID.4583–84. He also spelled out how each Defendant contributed to this environment. Pl.'s Resp., Doc. 72, PageID.4616–22.

As the acts Dr. Josephson cites for his hostile environment claims are independent of the demotion and extend into the filing period, they are actionable. *Morgan*, 536

[2] Defendants claim Le compiled her "Allan Tracking document" to prepare for this lawsuit. Defs.' Resp., Doc. 71, PageID.4230. Yet she admitted she started this document in the fall of 2017. Le Dep. 104:15–17; Carter Dep. 201:2–8. She did not know Dr. Josephson was seeking legal counsel until July 2018. Pl.'s Dep. Ex. 122, Doc. 65-39, PageID.2119 (noting receipt in "7-2018"); Le Dep. 121:25–123:10, 125:11–126:1, 165:22–166:22 (confirming same). But she e-mailed a virtually identical spreadsheet to Lohr weeks earlier. Pl.'s Dep. Ex. 134, Doc. 65-46, PageID.2144–46.

U.S. at 117; Pl.'s Br., Doc. 64-1, PageID.1828–29; Pl.'s Resp., Doc. 72, PageID.4615.

II. Defendants unconstitutionally retaliated against Dr. Josephson.

Dr. Josephson "engaged in a constitutionally protected activity" (*i.e.*, speaking) and suffered an "adverse action" (*i.e.*, a hostile environment, termination) that "was motivated at least in part as a response to the exercise of [his] constitutional rights." *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 585–86 (6th Cir. 2008).

A. Dr. Josephson expressed views the First Amendment protects.

Dr. Josephson's speech on gender dysphoria is constitutionally protected because he spoke "as a citizen" on "matters of public concern," and 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).

1. Dr. Josephson spoke "as a citizen" when he discussed how best to treat gender dysphoria in children.

Defendants claim Dr. Josephson's Heritage Foundation speech is unprotected as it was part of his "official duties." Defs.' Resp., Doc 71, PageID.4241–43. But they concede he spoke "as a citizen" when serving as an expert witness, testifying on the same subjects addressed in his speech. Carter Br., Doc. 69-1, PageID.1072 ("Dr. Josephson's service as an expert witness was not part of his job duties[.]")

On the Heritage Foundation speech, Defendants are simply wrong. *Garcetti* declined to extend its "official duties" test to faculty speech "related to scholarship or teaching," *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); *id.* at 438 (Souter, J., dissenting). Defendants' position casts a net so broad it would encompass every lecture and conference presentation, stripping professors of constitutional protection. Yet since at least 2001, the Sixth Circuit has "rejected as 'totally unpersuasive' 'the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction.'" *Meriwether*, 992 F.3d at 505 (quoting *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001)); Pl.'s Br., Doc. 64-1, PageID.1823–25; Pl.'s Resp., Doc. 72, PageID.4605–07. Defendants have

no answer to this, as their response never mentions *Hardy* or *Meriwether*.

Rather, they cite two distinguishable cases. Defs.' Resp., Doc. 71, PageID.4241–42. The first involved a multicultural liaison officer in a public safety department, 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, 568 (6th Cir. 2015). The second involved an insurance examiner who questioned some policy exclusions and pushed his point with clients. *Haddad v. Gregg*, 910 F.3d 237, 241–42, 249 (6th Cir. 2018). In contrast, Dr. Josephson's speech addressed an emerging topic affecting all of child psychiatry, and he spoke to the general public. Plus, he is a professor, not a police liaison or an insurance examiner. His job is to express his professional views, and the First Amendment has long protected that role. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (noting protection for professor's lecture).

Defendants point to how Dr. Josephson described his role. Defs.' Resp., Doc. 71, PageID.4242–43. But the Heritage Foundation invited him due to his expert testimony, which Defendants insisted be done on his time; he spoke for himself; and nothing connects his job with this event. Pl.'s Resp., Doc. 72, PageID.4595–96, 4606–07.

In short, under *Hardy* and *Meriwether* or under a correct application of the "official duties" test, Dr. Josephson spoke "as a citizen" at the Heritage Foundation.

2. Dr. Josephson's speech on treating gender dysphoria in children addressed matters of public concern.

Defendants say Dr. Josephson's remarks "were not core political speech." Defs.' Resp., Doc. 71, PageID.4244. But this is not the test. "[T]he First Amendment does not protect speech . . . only to the extent it can be characterized as political." *Connick v. Meyers*, 461 U.S. 138, 147 (1983). Speech addresses a matter of public concern when it "relates 'to any matter of political, social, or other concern to the community.'" *Meriwether*, 992 F.3d at 508 (quoting *Connick*, 461 U.S. at 146).

Dr. Josephson's speech easily clears this test. Gender dysphoria, even in the first

grade, is "undoubtedly a matter of profound value and concern to the public." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018) (cleaned up). Dr. Josephson testified about whether gender dysphoric students should use the opposite sex's showers, locker rooms, and restrooms. Pl.'s Br., Doc. 64-1, PageID.1805. This issue affects "every American who uses the restroom at any restaurant, buys clothes at any department store, or exercises at any gym," not to mention "virtually every school, college, dormitory, athletic activity, and locker room in America." *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 337–38 (5th Cir. 2019) (Ho, J., concurring). Recent events confirm this. Pl.'s Resp., Doc. 72, PageID.4607–08.

Defendants suggest that debated medical treatments are not public concerns. Defs.' Resp., Doc. 71, PageID.4244. Not so. For example, a medical school professor's "advocacy of forceps-assisted vaginal delivery as opposed to Cesarian section delivery is a matter of public concern." *Kerr v. Hurd*, 694 F. Supp. 2d 817, 842 (S.D. Ohio 2010). The same is true here as medical and psychiatric associations have published statements on how to treat gender dysphoric children, transgender surgeons and courts have publicly questioned the merits of "affirmative care," and even patients have raised concerns. Pl.'s Br., Doc. 64-1, PageID.1825–26. Dr. Josephson addressed "a topic which has been in the news on several occasions" (*a.k.a.*, a matter of public concern). *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001).

3. The *Pickering* balancing test favors Dr. Josephson.

Defendants' analysis of the *Pickering* balancing test falters out of the starting blocks because they claim Dr. Josephson's speech gets little protection. Defs.' Resp., Doc. 71, Page ID.4245. But because he addressed matters of public concern, they must make a "particularly strong showing that [his] speech interfered with workplace functioning," which they cannot do. *Cockrel*, 270 F.3d at 1053 (cleaned up).

Their analysis stumbles again by failing to acknowledge how the academic setting heightens Dr. Josephson's interests and undercuts theirs. After all, "the robust tra-

dition of academic freedom in our nation's post-secondary schools . . . alone offers a strong reason to protect [Dr. Josephson's] speech." *Meriwether*, 992 F.3d at 509. Thus, universities are "less likely to suffer a disruption" in providing services than other public agencies. *Mills v. Steger*, 64 F. App'x 864, 872 (4th Cir. 2003).

Defendants cite a harmony interest, recapitulating how they and others reacted to Dr. Josephson's speech. Defs.' Resp., Doc. 71, PageID.4245–46. The Sixth Circuit already rejected this argument. Pl.'s Resp., Doc. 72, PageID.4610–11. This supposed interest "would allow universities to discipline professors . . . any time their speech might cause offense. That is not the law." *Meriwether*, 992 F.3d at 510.

Defendants claim an interest in "close working relationships," Defs.' Resp., Doc. 71, PageID.4246, citing a case about a 911 operator and where "team dynamics" were important. *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 540 (6th Cir. 2020). Academia is far different. "[A]nyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams." *Bauer v. Sampson*, 261 F.3d 775, 779–81, 785 (9th Cir. 2001).

Defendants claim an interest in maintaining "regular operation" and avoiding a "nonstop conversation." Defs.' Resp., Doc. 71, PageID.4246–47. Equating Dr. Josephson's sincere effort to identify the best treatments for vulnerable children to the most offensive racial slur reveals their desperation. *Id.*; *Bennett*, 977 F.3d at 534–35. They testified no classes, appointments, or other events were cancelled or postponed due to Dr. Josephson's expression; Ganzel pointed only to disagreeing faculty. Pl.'s Br., Doc. 64-1, PageID.1802–03, 1827. Academic disagreement is not disruption. *Meriwether*, 992 F.3d at 510 (noting "students' interest in hearing even contrarian views").

Last, Defendants cite their "mission" of caring for LGBT patients. Defs.' Resp., Doc. 71, PageID.4247–48. But this is not a license to restrict speech. *McGlone v. Bell*, 681 F.3d 718, 735 (6th Cir. 2012) (reversing because defendants did not "elaborate[ ]

on an [educational mission]" or explain "how the policy . . . prevents interruption of [it]"); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990) (finding "educational mission" is so vague as to give "virtually unlimited discretion"); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (noting "free and unfettered interplay of competing views is essential to the institution's educational mission").

That is particularly true here. Dr. Josephson was advancing the University's mission by identifying treatments that would best serve gender dysphoric children. No Defendant treats this condition or claims any expertise in it.[3] Rather, the disagreement with Dr. Josephson's remarks started in the LGBT Center and its "Ally of the Year," highlighting its ideological nature. Pl.'s Br., Doc. 64-1, PageID.1803–05; Pl.'s Resp., Doc. 72, PageID.4573–78. Yet everything he said was consistent with professional guidelines and the scientific literature. Pl.'s Br., Doc. 64-1, PageID.1804–05.

The vital need for free speech in academia is "almost self-evident" because "no field of education is so thoroughly comprehended by man that new discoveries cannot yet be made." *Keyishian*, 385 U.S. at 603. That is especially true in child psychiatry and on developing issues like treating gender dysphoric children. Defendants' mission is to preserve an environment where the best interests of patients is protected, not to punish one professor who differs with its in-house activists and their faculty allies.

B. Each Defendant took adverse actions against Dr. Josephson.

1. Both terminating Dr. Josephson and creating a hostile work environment are adverse employment actions.

Defendants do not contest that both creating a hostile work environment and refusing to renew Dr. Josephson's contract constitute adverse employment actions. *See* Pl.'s Br., Doc. 64-1, PageID.1828–29, 1833; Pl.'s Resp., Doc. 72, PageID.4612–14.

2. Each Defendant is liable for his or her role in the termination.

Defendants say Dr. Josephson's claims fail because he "aggregate[s] a bunch of

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[3] Carter Dep. 25:18, 36:9–10, 37:17–19, 56:7–22, 209:16–20, 213:20–22, 215:11; Lohr Dep. 31:18–19, 35:3, 71:21; Le Dep. 21:9–10, 29:12; Woods Dep. 13:1–5; Boland Dep. 10:7–12; Ganzel Dep. 10:2, 11:18–23.

actions by disparate individuals [to] impose liability against all parties." Defs.' Resp., Doc. 71, PageID.4236. As to the termination, this is untrue, as he identifies one specific action—the non-renewal—and details how each Defendant is legally responsible for it. Pl.'s Br., Doc. 64-1, PageID.1834–38; Pl.'s Resp., Doc. 72, PageID.4616–22.

Defendants do not contest that "the Sixth Circuit has expressly held that an 'influential recommender' sued in his or her individual capacity may be liable for a First Amendment retaliation claim, despite the fact that the individual may not be a final decision-maker." *Williams v. City of Franklin*, 586 F. Supp. 2d 890, 896 (M.D. Tenn. 2008) (cleaned up). Dr. Josephson has identified each Defendant's participation in the campaign to collect "strong documentation" to furnish the influential recommendation that would "avoid [his] reappointment." Pl.'s Resp., Doc. 72, PageID.4616–22.

Regarding Ganzel, Defendants dispute applying the "cat's paw" theory to § 1983. But the Sixth Circuit has applied it to an employer, *DeNoma v. Hamilton Cnty. Court of Common Pleas*, 626 F. App'x 101, 105–06, 110 (6th Cir. 2015) and assumed it applies, *Arendale v. City of Memphis*, 519 F.3d 587, 604 n.13 (6th Cir. 2008). It has never rejected this theory in a § 1983 case. As the claims against Ganzel in her official capacity are really "against [her] office" for permitted prospective relief, *Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992) (cleaned up), she cannot evade responsibility by portraying herself as a rubber stamp to Boland. *Smith v. Bray*, 681 F.3d 888, 897 (7th Cir. 2012) (collecting "cat's paw" employer liability case under § 1983).

Moreover, no "cat's paw" is necessary, since Ganzel sanctioned the campaign to "avoid Allan's reappointment" and personally expressed her opposition to his speech, which is evidence of causation of a retaliatory act. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 308 (6th Cir. 2012); Pl.'s Br., Doc. 64-1, PageID.1834–36.

3. Defendants created a hostile environment that would deter reasonable people from exercising constitutional rights.

Defendants claim no hostile environment exists because it was not "sufficiently

severe or pervasive to alter the conditions of the . . . employment and create an abusive working environment." Defs.' Resp., Doc. 71, PageID.4252 (cleaned up). But this standard does not apply to Dr. Josephson's First Amendment retaliation claims.

First, Title VII does not set the constitutional liability standard because Congress cannot define what violates the Constitution. Pl.'s Resp., Doc. 72, PageID.4612–13.

Second, the analogous Title VII provision supports Dr. Josephson. Defendants point to cases about adverse actions taken due to "race, color, religion, sex, or national origin." But the Title VII standard for "adverse action" due to a protected status differs from the more lenient anti-retaliation one. The "substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). The "antiretaliation provision . . . seeks to prevent harm . . . based on what they do, *i.e.*, their conduct." *Id.*

A First Amendment retaliation claim is more like a Title VII antiretaliation claim than a status discrimination claim. Unsurprisingly, under Title VII's antiretaliation provision, the standard for whether an action is "materially adverse" mirrors the constitutional standard. *Id.* at 68 (noting under Title VII, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination'"); *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (finding act is adverse under § 1983 if it "would deter a person of ordinary firmness from continuing to engage in [constitutionally protected] conduct"). As undisputed facts show, Defendants' actions would have deterred a reasonable person from continuing to speak.[4] *See* Pl.'s Br., Doc. 64-1, PageID.1829–33.

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[4] Defendants dismiss their discriminatory requirement that Dr. Josephson not treat LGBTQ patients, claiming his "own contemporaneous notes" do not mention this. Defs.' Resp., Doc. 71, PageID. 4235. This is not true. His notes say: "No more pts, finish case," Pl.'s Dep. Ex. 195, Doc. 66-27, PageID.2833, and he explained this means he was instructed not to treat LGBT patients after finishing the one case he then had, Josephson Decl. ¶¶ 4–6, Doc. 64-3, PageID.1849. And *Defendants'* notes prepared before the meeting contain this instruction. Pl.'s Dep. Ex. 63, Doc. 65-10, PageID.1970–71.

4. Each Defendant is liable for his or her role in creating the hostile environment.

Defendants claim § 1983's personal participation requirement means Dr. Josephson must "establish not that Defendants collectively subjected him to a hostile work environment but that *each defendant individually* did so." Defs.' Resp., Doc. 71, PageID.4239. This confuses rules about responsibility under § 1983 with those about what constitutes a hostile environment.

Section 1983 does not require that each Defendant *complete* a constitutional violation *singlehandedly*. An official can be liable for being "deliberately indifferent" to unlawful acts or conditions, even without creating the conditions or undertaking the acts. *Thomas v. City of Chattanooga*, 398 F.3d 426, 433 (6th Cir. 2005). An officer can be liable for executing a warrant when others give materially false information to support the probable cause determination. *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984). Section 1983 requires personal participation in the unlawful conduct, but not that each official singlehandedly and independently violate one's rights.

This reflects the nature of a hostile environment, which "cannot be said to occur on any particular day" and consists of many acts, none of which is "actionable on its own." *Morgan*, 536 U.S. at 103. Each Defendant who personally contributes to the "campaign of harassment" is responsible; each is liable when the environment, though "trivial in detail," becomes "substantial in gross." *Thaddeus-X*, 175 F.3d at 398 (cleaned up).

5. Dr. Josephson has detailed how each Defendant personally participated in the adverse actions taken against him.

Despite Defendants' claims, Defs.' Resp., Doc. 71, PageID.4236–38, Dr. Josephson painstakingly detailed how each Defendant violated his rights.[5] He documented how his Heritage Foundation speech represented an inflection point in his career and how each Defendant contributed to the hostile environment and termination. Pl.'s Br.,

[5] Defendants fault Dr. Josephson for referencing information he learned during discovery. Defs.' Resp., Doc. 71, PageID.4250–51. But he outlined how Defendants ostracized him, imposed discriminatory requirements on him, and refused to investigate misconduct towards him—all of which he knew of at the time. *See, e.g.*, Pl.'s Br., Doc. 64-1, PageID.1829–32. Evidence of interactions outside his presence reveals each Defendant's motive and role in mistreating him.

Doc. 64-1, PageID.1800–22; Pl.'s Resp., Doc. 72, PageID.4572–4604. Of course, he references non-parties, but only to illustrate the extent of the hostility and to establish that each Defendant knew the root of the sudden (but prolonged) opposition to him was his views. Dr. Josephson also detailed which actions created the hostile environment, Pl.'s Br., Doc. 64-1, PageID.1829–33, and itemized how each Defendant contributed to it and the ensuing termination. Pl.'s Resp., Doc. 72, PageID.4616–22.

C. Defendants retaliated against Dr. Josephson because he exercised his constitutional rights.

1. Dr. Josephson's speech was a motivating factor in Defendants' adverse actions against him.

To establish causation, Dr. Josephson need only show that "the adverse action was motivated at least in part by his protected conduct." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006). This he has clearly done.

a. Defendants do not contest that Dr. Josephson's speech was a motivating factor in their mistreatment of him.

Notably, Defendants do not contest this "motivating factor" step in the analysis. Dr. Josephson explained how everything from Defendants' own words, to their opposition to his remarks, to their timing (*i.e.*, when their mistreatment of him began), to their investigatory tactics, to their inconsistent standards, illustrate how his speech played at least a role in their actions. Pl.'s Br., Doc. 64-1, PageID.1834–39; Pl.'s Resp., Doc. 72, PageID.4578–4595, 4616–22. Defendants concede the point, mentioning "motivating factor" only once in their response. Defs.' Resp., Doc. 71, PageID.4239.

b. Defendants' own briefing underscores how Dr. Josephson's speech was a motivating factor in their mistreatment of him.

But Defendants do not merely concede the point by omission; their response affirmatively shows they were motivated "at least in part" by Dr. Josephson's speech. *Scarbrough*, 470 F.3d at 255. They repeatedly highlight their fears about how Dr. Josephson's speech might impact the University's reputation, preferred messaging, and mission; might hurt students' feelings; or might generate "negative PR" and "negative attention." Defs.' Resp., Doc. 71, PageID.4212–15, 4246–48. These are synonyms

for objecting to his views. Pl.'s Resp., Doc. 72, PageID.4575–78. Regulating speech due to how others might respond is a heckler's veto (*a.k.a.*, "odious viewpoint discrimination"). *Bible Believers*, 805 F.3d at 248; *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

Defendants point to the disclaimer Le and others demanded at the faculty meeting. Defs.' Resp., Doc. 71, PageID.4216–17. But she admitted the "gestalt of the conversation" was objecting to Dr. Josephson's views. Pl.'s Resp., Doc. 72, PageID.4580–81. They reference concerns about Dr. Josephson's ability to lead. Defs.' Resp., Doc. 71, PageID.4220, 4222–23. Yet Woods formed these concerns immediately after hearing of Dr. Josephson's views, Pl.'s Resp., Doc. 72, PageID.4575, 4578, and specifically tied the faculty's loss of confidence to his views and expression, *id.*, PageID.4582.

No matter what turn of phrase Defendants employ, they all drive home the same point: Dr. Josephson's speech played at least a role in their mistreatment of him.

c. Defendants double down on their inconsistent standards, highlighting how Dr. Josephson's speech was a substantial factor in their mistreatment of him.

As if to prove Dr. Josephson's point about inconsistent standards illustrating how his speech was a substantial factor in his mistreatment, Pl.'s Br., Doc. 64-1, PageID. 1838–39, Defendants admit his productivity improved after July 2018. *Id.*, PageID. 1821, 1839–40; Defs.' Resp., Doc. 71, PageID.4226 (admitting "this is true"). But then they try to move the goalposts, claiming for the first time in their response that "RVUs are not the metric used to assess faculty productivity." Defs.' Resp., Doc. 71, PageID.4226. Instead, they now claim to measure productivity by the "number of outpatient visits"—a measure they never applied in their six motions. *Id.* This is untrue and contrary to the evidence. They repeatedly testified they measured productivity in terms of RVUs and hours.[6] They *never* assessed the number of outpatient appointments.[7] Instead, they relied on "Child Psych Productivity Report[s]" that analyzed

[6] Lohr Dep. 112:20–113:18; Le Dep. 153:17–154:8; Boland Dep. 42:15–25.

[7] Lohr Dep. 112:20–113:18; Le Dep. 67:7–13; Pl.'s Dep. Ex. 93, Doc. 65-25, Page ID.2028–30; Pl.'s Dep. Ex. 96, Doc. 65-28, PageID.2036–39; Josephson Decl. ¶¶ 1–108, Doc. 64-3, PageID.1849–63.

each faculty member's "charges, payments, and wRVUs."[8] Nor did they ever document any concerns about the number of Dr. Josephson's appointments or specify appointment targets on his work assignments.[9] This is simply a *post hoc* rationalization.

But even under this new metric, Defendants' analysis is flawed. Their own documents show each professor's outpatient responsibilities differed.[10] Le admits comparing appointment totals means nothing.[11] Dr. Josephson's outpatient responsibilities did not change from 2017 to 2018.[12] During this time, his appointment figures from one year to the next remained virtually the same or increased.[13] There was no reason to terminate him based on number of appointments.

They recycle a list of Dr. Josephson's flaws, one that includes nothing from August 2018 forward. Defs.' Resp., Doc. 71, PageID.4225–26. Again, they fail to mention how they did nothing to other underperforming faculty, how these alleged flaws are illusory, and how they ignored Dr. Josephson's improved productivity from July 2018 forward. Pl.'s Resp., Doc. 72, PageID.4588–91. Now, they ignore how he adjusted his schedule as directed, errantly conflating hours of availability with hours of treatment.[14] But in 2018, they recognized that he followed their directions.[15]

In sum, Dr. Josephson's productivity calculations remain undisputed.[16] By any standard—even Defendants' new one—his productivity improved from July 2018 for-

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[8] Pl.'s Ex. 308; Pl.'s Ex. 309; Pl's Ex. 310; Pl.'s Ex. 311; Pl.'s Ex. 312; *accord* Pl.'s Dep. Ex. 93, Doc. 65-25, Page ID.2028; Pl.'s Dep. Ex. 96, Doc. 65-28, PageID.2036, 2038.

[9] Pl.'s Dep. Ex. 93, Doc. 65-25, Page ID.2028–30; Pl.'s Dep. Ex. 96, Doc. 65-28, PageID.2036–39; Pl.'s Ex. 266, Doc. 68-14, Page ID.3223–25; Pl.'s Dep. Ex. 129, Doc. 65-42, PageID.2135–36.

[10] Pl.'s Ex. 263, Doc. 68-11, Page ID.3214–16 (setting Brady's outpatient services duties at 51% of her time); Pl.'s Ex. 265, Doc. 68-13, Page ID.3220–22 (same for Gallehr at 45%); Pl.'s Ex. 266, Doc. 68-14, Page ID.3223–25 (same for Dr. Josephson at 35%); Pl.'s Dep. Ex. 129, Doc. 65-42, PageID.2135 (same for Dr. Josephson at 20%); Pl.'s Ex. 269, Doc. 68-17, PageID.3232–34 (same for Peters at 45%); Pl.'s Ex. 270, Doc. 68-18, Page ID.3235–38 (same for Schultz at 52%); Pl.'s Ex. 271, Doc. 68-19, PageID.3239–41 (same for Stocker at 60%); Pl.'s Ex. 272, Doc. 68-20, Page ID.3242–44 (same for Threlkeld at 30%).

[11] Defs.' Ex. 30, Doc. 71-30, PageID.4485 (admitting the "greater percentage of time allocated to outpatient visits," the "*more* outpatient visits" a faculty member attains).

[12] *Compare* Pl.'s Dep. Ex. 120, Doc. 72-19, PageID.4683 (noting Dr. Josephson's "[d]irect patient care and other activities" constitute 35% of his time in 2017), *with* Pl.'s Dep. Ex. 127, Doc. 72-20, PageID. 4685 (noting same responsibilities constituted 35% of his time in 2018).

[13] Pl.'s Ex. 313.

[14] Josephson Decl. ¶¶ 26, 81–84, Doc. 64-3, PageID.1851, 1859; Josephson 3d Decl. ¶¶ 4–7.

[15] Pl.'s Dep. Ex. 96, Doc. 65-28, PageID.2036, 2038.

[16] Josephson Decl. ¶¶ 30–80, Doc. 64-3, PageID.1852–58.

ward, showing that his speech was a substantial factor in his mistreatment.

2. Defendants cannot prove that they would have made the same decisions in the absence of Dr. Josephson's speech.

Thus, Defendants "must show, by a preponderance of the evidence, that they 'would have taken the same action[s] even in the absence of the protected conduct.'" *Cockrel*, 270 F.3d at 1056 (quotation omitted). And they don't even try.

Undisputed facts prove Defendants normally would implement a performance improvement plan, followed by probation, for a professor (or even an administrative assistant) with sub-par performance. Pl.'s Br., Doc. 64-1, PageID.1818. Yet they never used either for Dr. Josephson, *id.*, and mention "performance improvement plan" and "probation" nowhere in their response. Since Defendants do not dispute that absent his speech, they would have treated him far differently (a point on which they bear the burden of proof), this Court should grant Dr. Josephson summary judgment.

III. No Defendant is entitled to qualified immunity.

Defendants should not receive qualified immunity because (1) they violated Dr. Josephson's rights (2) that were "clearly established." *Bible Believers*, 805 F.3d at 257. They dub this a "blanket assertion," Defs.' Resp., Doc. 71, PageID.4254, underscoring how they placed all their eggs in the liability basket, Pl.'s Resp., Doc. 72, PageID.4628–29. And it's not true. For Dr. Josephson carefully detailed how each Defendant violated his rights. *Id.*, PageID.4616–22; Pl.'s Br., Doc. 64-1, PageID.1828–40.

In the process, Dr. Josephson relied on clearly established law. Over 25 years ago, the Sixth Circuit held that the right to be free from retaliation is clearly established. Over 20 years ago, it set the threshold for hostile environment claims under § 1983 and denied qualified immunity to officials who retaliated against a professor for his speech. Pl.'s Br., Doc. 64-1, PageID.1840–41; Pl.'s Resp., Doc. 72, PageID.4628–29. Defendants do not identify one case that casts doubt on these clear rules.

CONCLUSION

Put simply, this Court should grant Dr. Josephson summary judgment.

Respectfully submitted this 3rd day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2021, I filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to the following attorneys of record:

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