

No. 26-60184

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lauren Stokes,
Plaintiff-Appellant,

v.

Glenn Boyce, Chancellor of the University of Mississippi,
in his official and personal capacities,
Defendant-Appellee.

U.S. District Court for the Northern District of Mississippi
Case No. 3:25-cv-307

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The following listed persons, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal:

1. Lauren Stokes, plaintiff-appellant
2. Alysson Mills and Lilli Evans Bass, counsel for Lauren Stokes
3. Glenn Boyce, Chancellor of the University of Mississippi, in his official and personal capacities, defendant-appellee
4. Cal Mayo and Paul Watkins, counsel for Glenn Boyce, Chancellor of the University of Mississippi, in his official and personal capacities
5. Glenn Davidson, Senior District Judge, U.S. District Court for the Northern District of Mississippi

July 16, 2026

/s/ Alysson Mills

Alysson Mills

STATEMENT REGARDING ORAL ARGUMENT

Lauren Stokes, after work, re-posted on a private Instagram account someone else's thoughts about Charlie Kirk. The next morning her government employer fired her for it, and the district judge held she has no plausible right to relief, as a matter of law.

This case seeks to vindicate fundamental First Amendment rights that are in danger. The questions presented are important and urgent. Stokes respectfully requests oral argument.

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Constitutional Provisions

The Eleventh Amendment	<i>passim</i>
The First Amendment	<i>passim</i>

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The district court dismissed Stokes's case on March 16, 2026,¹ and Stokes timely filed a notice of appeal on March 24, 2026.²

STATEMENT OF THE ISSUES

1. Did Stokes plausibly allege a violation of the First Amendment? (yes)
2. Could the district judge dismiss Stokes's entire case under either Rule 12(b)(1) or Rule 12(b)(6)? (no)
3. Could the district judge grant qualified immunity if doing so required him to decide a question of fact? (no)
4. Did the district judge's denial of Stokes's motion for preliminary injunctive relief resolve the merits? (no)
5. Was the district judge's denial of Stokes's motion for preliminary injunctive relief erroneous? (yes)

¹ ROA.441

² ROA.442

STATEMENT OF THE CASE

This is an important case.

This case is one of many cases challenging a government employer's termination of an employee for a social media post relating to Charlie Kirk's death. To undersigned counsel's knowledge, it is the first such case to arrive at a court of appeal because it is the only such case to have been completely dismissed.

If the district judge is correct, a government employer may terminate an employee for no better reason than external hecklers disagree with her political point of view. No other facts matter. The First Amendment itself has nothing at all to say about it.

That is not the law, but the district judge's orders set a dangerous precedent that affects everyone, whatever their politics.

Facts

The following facts are taken from Lauren Stokes's complaint³ and the transcript of the hearing on her motion for preliminary injunctive relief⁴:

³ ROA.31

⁴ ROA.446

On Wednesday September 10, 2026, Lauren Stokes was employed by the University of Mississippi as an executive assistant to Charlotte Parks, the vice chancellor for development.⁵

Parks's job was to interface with donors. Stokes rarely interfaced with donors herself.⁶ Stokes's job was administrative only.⁷ She managed Parks's calendar, arranged Parks's travel, made dinner and lunch reservations for Parks, assembled materials that Parks might need for meetings, secured conference rooms, and tended to audiovisual needs.⁸

September 10 was a normal work day for Stokes. After work at the University, she went to a different job at the restaurant she shares with her husband.⁹ Incidentally Defendant Glenn Boyce, the University's chancellor, dined at the restaurant that evening.¹⁰

⁵ ROA.34

⁶ ROA.465

⁷ ROA.34

⁸ ROA.34; ROA.452

⁹ ROA.454

¹⁰ ROA.35; ROA.454

At some point that evening, Stokes re-posted on her private Instagram account the following post about Charlie Kirk, which was written by someone else:

For decades, yt supremacist and reimagined Klan members like Kirk have wreaked havoc on our communities, condemning children and the populace at large to mass death for the sake of keeping their automatic guns. They have willingly advocated to condemn children and adult survivors of SA to forced pregnancy and childbirth. They have smiled while stating the reasons people who can birth children shouldn't be allowed life-saving medical care when miscarrying. They have incited and clapped for the brutalizing of Black and Brown bodies. So no, I have no prayers to offer Kirk or respectable statements against violence. @thecollectress¹¹

Stokes left the restaurant around 7:30 p.m. and called her husband. He told her he had received some calls about the re-post. When Stokes got home, she took the re-post down and posted the following apology:

I am so truly and deeply sorry to those I have offended. We are lucky enough to know and employ people from all walks of life-trans, MAGA, cat lovers, dog lovers, republicans, independents, and democrats. In all facets we strive to be kind and hold space for all. My husband and I do not support violence of any sort. It was reposted in a heated moment (on the Internet?! Never heard of such!) I apologize to those I have offended and look forward to getting off the internet to reevaluate kindness, privacy, and respect for all¹²

¹¹ ROA.35; ROA.275

¹² ROA.35; ROA.276

But it was too late; Stokes was already being doxed.¹³ Someone had taken a screenshot of the private re-post and shared it with someone else. Eventually, someone else shared it publicly online. Once it was shared publicly online, it went viral. An angry social media mob trolled¹⁴ Stokes and called for retribution. Her personal information was posted and shared to encourage people to harass her online, which they did.¹⁵

At around 10:30 p.m., Parks texted Stokes to check on her. Parks wrote: “Lisa Stone just called me and said you are getting attacked online. I am so sorry.” Stokes thanked Parks for checking on her and apologized. Parks responded: “Gracious no! I am just worried about you. I hope people are more rational in the morning. These are crazy times.”¹⁶ Stokes was “humiliated that this was happening” but “felt really supported” by Parks.¹⁷

¹³ ROA.36. Webster’s defines “dox” as: “to publicly identify or publish private information about (someone) especially as a form of punishment or revenge.” Dox, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/dox> (last visited on July 14, 2026).

¹⁴ Webster’s defines “troll” as: “to antagonize (others) online by deliberately posting inflammatory, irrelevant, or offensive comments or other disruptive content.” Troll, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/troll> (last visited on July 14, 2026).

¹⁵ ROA.459

¹⁶ ROA.277

¹⁷ ROA.459

On Thursday morning, September 11, Parks and Stokes exchanged emails about work, and Stokes told Parks that she would go to the human resources office, HR, first thing to report that she had been doxed.¹⁸

At HR, at approximately 9:00 a.m., the University placed Stokes on paid administrative leave “in [her] best interest,” “for [her] safety.”¹⁹ HR asked the University Police Department, UPD, to speak with Stokes. Stokes recalled that “UPD assured me that I would be safe on campus.”²⁰

Nothing at all changed between 9:00 a.m. and 10:15 a.m. But at 10:15 a.m. Boyce decided he wanted “complete separation.”²¹

Accordingly, at approximately 10:30 a.m., Parks called Stokes and asked her to consider resigning. Parks called again at approximately 11:30 p.m. and told Stokes that she could have an hour to decide. When Parks called again at approximately 12:50 p.m., Stokes told her that she did not have an answer. Parks then told her that she was fired. Bradley Salters, from HR, was on the call and told Stokes that someone from the University would reach out to her after.²²

¹⁸ ROA.281

¹⁹ ROA.36; ROA.461; ROA.282

²⁰ ROA.461

²¹ ROA.463

²² ROA.463

Just minutes later, at 1:08 p.m., Boyce sent the following email to all “faculty, staff and students”:

Yesterday, a University of Mississippi staff member re-shared hurtful, insensitive comments on social media regarding the tragic murder of Charlie Kirk. These comments run completely counter to our institutional values of civility, fairness and respecting the dignity of each person. We condemn this action, and this staff member is no longer employed by the university.

All of us have a responsibility to take seriously our commitment to upholding a civil and respectful campus environment.²³

At the same time, Boyce issued the same statement as a press release and posted it on Facebook²⁴ which he says received “1.3 million views.”²⁵

Stokes, who was already suffering, was humiliated. She felt Boyce’s press release “condemned me to my whole community” and “made it seem like I had done something wrong when I hadn’t.”²⁶ In her words, Boyce made the matter “newsworthy.”²⁷

²³ ROA.36; ROA.294

²⁴ ROA.36

²⁵ ROA.154

²⁶ ROA.464

²⁷ ROA.464

Two hours after Boyce's press release, Stokes and her husband received a bomb threat at their restaurant.²⁸

Stokes sued, alleging a violation of her First Amendment.

Stokes waited for someone from the University to reach out to her, as represented, but they did not. On October 9 she finally received a letter. The letter advised her to "request a review of this termination" "within ten (10) business days."²⁹ Stokes determined that the review process, because it contemplated elevation to Boyce, did not apply to her situation.³⁰

She nevertheless filed a complaint in federal court within ten business days, on October 21.³¹

The complaint, which she amended on November 7, alleges Boyce terminated her in violation of her First Amendment rights and seeks relief from him in his official and individual capacities.³²

From Boyce in his official capacity, Stokes seeks declaratory and injunctive relief. Specifically, she seeks a judgment declaring that he

²⁸ ROA.465

²⁹ ROA.283

³⁰ ROA.467

³¹ ROA.7

³² ROA.31

violated her First Amendment rights and “an order reinstating her employment.”³³

From Boyce in his individual capacity, she seeks damages.

Stokes moved for preliminary injunctive relief.

On November 7, Stokes moved for preliminary injunctive relief. She asked to be reinstated to her job pending litigation.³⁴

Boyce moved to dismiss the entire case.

On December 10, Boyce moved to dismiss the entire case pursuant to Rules 12(b)(1) and 12(b)(6). (“[T]he Chancellor requests this Court dismiss this action against him.”³⁵) He made three principal arguments: 1. the Eleventh Amendment immunizes him in his official capacity from liability for damages and even declaratory relief; 2. he is entitled to qualified immunity in his individual capacity; and 3. Stokes did not plausibly allege a First Amendment claim.

³³ ROA.50

³⁴ ROA.53

³⁵ ROA.50

The district judge held an evidentiary hearing on Stokes's motion for preliminary injunctive relief.

The district judge held an evidentiary hearing on Stokes's motion for preliminary injunctive relief on February 13, 2026.³⁶

Stokes called seven witnesses, including Stokes and faculty, staff, and students from the University, at the hearing.

Stokes testified to her employment and termination.

Faculty, staff, and students testified that Stokes's re-post about Charlie Kirk did not disrupt the University on September 11. No classes were cancelled because of Stokes's re-post. No one even knew about Stokes's re-post. They learned about it only after Boyce sent an email to all faculty, staff, and students. ("I knew nothing about Lauren's post."³⁷; "I didn't know anybody that was talking about it"³⁸; "I don't remember anybody talking about her."³⁹; "I didn't even know who she was"⁴⁰) They described Boyce's email as unusual; he had never announced the termination of an employee via email before. ("Absolutely unheard of."⁴¹;

³⁶ ROA.446

³⁷ ROA.502

³⁸ ROA.509

³⁹ ROA.518

⁴⁰ ROA.531

⁴¹ ROA.495

“I right now cannot recall receiving another email like this.”⁴²; “In my four years at Ole Miss, I can’t think of anything similar to this.”⁴³; “I’ve never received an email like that.”⁴⁴) If anything disrupted campus that day, it was Boyce’s email, inasmuch as everyone talked about it after. (“They brought it up in class. Our professors brought it up. We were discussing it in my club organizations. It was – it was a real huge moment on campus, I think.”⁴⁵; “Everyone was talking about it, at least in my circles, yeah.”⁴⁶) They understood it to “sen[d] a message to the entire campus.”⁴⁷ (“[A] lot of folks were feeling unsettled [about it].”⁴⁸; “[P]eople ... were feeling fear about what can I say and can’t I say as a public employee.”⁴⁹)

Boyce did not appear at the hearing.⁵⁰ His counsel did not call any witnesses in his defense.⁵¹

⁴² ROA.502

⁴³ ROA.517

⁴⁴ ROA.530

⁴⁵ ROA.518

⁴⁶ ROA.531

⁴⁷ ROA.517

⁴⁸ ROA.510

⁴⁹ ROA.513

⁵⁰ ROA.540

⁵¹ ROA.543

The district judge denied Stokes’s motion for preliminary injunctive relief.

The district judge denied Stokes’s motion for preliminary injunctive relief on March 11.⁵² He offered three reasons for the decision:

First, he concluded that Boyce did not have to prove an actual disruption to the University’s operations to terminate Stokes.⁵³ He observed that “courts have consistently given substantial weight to government employers’ reasonable predictions of disruption, even when the speech involved is on a matter of public concern.”⁵⁴

Second, he concluded that, in any event, Stokes’s re-post did actually disrupt the University.⁵⁵ For that conclusion he relied solely on declarations from Boyce, Parks, and Lisa Stone, the University’s Vice Chancellor for Marketing and Communications.⁵⁶

He observed that Boyce had declared that the University received “a significant amount of hate mail, phone calls, and emails” that required that Boyce “act quickly”⁵⁷; and that Parks had declared that Stokes’s re-

⁵² ROA.418

⁵³ ROA.423

⁵⁴ ROA.422 (quoting *Waters v. Churchill*, 511 U.S. 661, 673 (1994))

⁵⁵ ROA.423

⁵⁶ ROA.423

⁵⁷ ROA.423

post caused “disruption to other employees” and necessitated that someone else “perform [Stokes’s] work duties.”⁵⁸

He purported to observe that Stone’s declaration “provided evidence that the impact upon the Development Office’s operations were significant and continuing without end in sight”⁵⁹ but Stone works in a different office and he did not point to any evidence that office was significantly impacted.

He did not address the actual testimony and evidence presented at the evidentiary hearing. He disregarded it entirely.

Finally, he concluded that, even if Boyce had violated the First Amendment by terminating Stokes, she was not irreparably injured, because “the loss of a job, even a government job, does not typically constitute irreparable harm in and of itself.”⁶⁰ “It is axiomatic,” he wrote, “that a terminated employee can be made whole by money damages.”⁶¹

⁵⁸ ROA.424

⁵⁹ ROA.424

⁶⁰ ROA.426

⁶¹ ROA.426

The district judge dismissed Stokes's entire case.

Five days later, on March 16, the district judge dismissed Stokes's entire case.⁶²

He held the Eleventh Amendment immunizes Boyce in his official capacity from not merely damages but also declaratory relief.⁶³

He held Boyce in his individual capacity is entitled to qualified immunity from liability for money damages.⁶⁴

He did not address Stokes's right to continue to pursue permanent injunctive relief from Boyce in his official capacity, but he concluded that she "failed to show a violation of her constitutional rights."⁶⁵ According to the district judge, the material facts are Stokes posted something on social media, it was "negatively received," and she was fired.⁶⁶ He wrote that Boyce had a duty "to ensure the efficient operation of the University" and "determined [Stokes's] post was sufficiently disruptive" therefore "lawfully fired [Stokes] as a result."⁶⁷

⁶² ROA.430

⁶³ ROA.433

⁶⁴ ROA.435

⁶⁵ ROA.440

⁶⁶ ROA.430-431

⁶⁷ ROA.439

His order stated simply “the Defendant’s motion to dismiss is GRANTED” and “the Plaintiff’s claims are DISMISSED WITH PREJUDICE.” The clerk of court immediately closed the case.

Stokes appeals.

Stokes timely filed a notice of appeal on March 24, 2026.⁶⁸

As of this filing, to her knowledge, no other case like this has been completely dismissed. No other district judge has held a government employer may, as a matter of law, fire an employee over a private social media post merely because it was “negatively received.”

⁶⁸ ROA.442

SUMMARY OF ARGUMENT

Stokes's re-post was after work, on a private account, and did not pertain to the University. It related to a subject of obsessive news interest and a matter of public concern to the nation. Stokes's interests in her speech could not be higher.

Stokes did not disrupt the University on September 11. No classes were cancelled because of her re-post. Her co-workers did not complain. The only alleged disruption was external heckling. Boyce's interests in firing Stokes could not be lower.

Whatever a government employer's interest in avoiding external hecklers, it does not outweigh an employee's interest in private political speech. The district judge got the law backwards. It is elementary that the government cannot punish speech "simply because it might offend a hostile mob." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 135 (1992). A reasonable university president would know that, and that is even before accounting for the blatant viewpoint discrimination in what Boyce did.

Neither Rule 12(b)(1) nor Rule 12(b)(6) authorized the district judge to dismiss Stokes's entire case.

Rule 12(b)(1) did not authorize a complete dismissal, because Stokes asks to be reinstated.

Rule 12(b)(6) did not authorize a complete dismissal, because disruption is a question of fact, and the district judge could not simply take Boyce's word for it. It is a fundamental tenet that a court must construe the facts and any ambiguities in any substantive law in *the plaintiff's* favor. The district judge did the opposite of what the law told him to do. On these alleged facts, he could not dismiss Stokes's entire case, and he could not grant qualified immunity.

To the extent the district judge believed his denial of Stokes's motion for preliminary injunctive relief resolved the merits of her claim to any relief going forward, he was wrong. A ruling on a motion for preliminary injunctive relief cannot resolve the merits, but in any event the district judge's ruling was fundamentally flawed.

The very notion that a government employer may fire an employee for nothing more than posting something that was "negatively received" is dangerous. A dismissal that disregards all other facts necessarily constitutionalizes the heckler's veto by insulating it from any inquiry. This Court cannot allow that precedent to stand.

STANDARDS OF REVIEW

The Court reviews a dismissal pursuant to Rule 12(b)(1) and Rule 12(b)(6) *de novo*. *Kling v. Hebert*, 60 F.4th 281, 283–84 (5th Cir. 2023). *See also City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (“We review the district court’s jurisdictional determination of sovereign immunity *de novo*.”).

It reviews a grant of qualified immunity *de novo*. *Carmona v. City of Brownsville*, 126 F.4th 1091, 1096 (5th Cir. 2025).

It reviews decisions on a motion for preliminary injunctive relief for abuse of discretion, “but ‘a decision grounded in erroneous legal principles is reviewed *de novo*.’” *LIA Network v. City of Kerrville, Texas*, 163 F.4th 147, 160 (5th Cir. 2025) (quoting *Women’s Med. Ctr. of Nw. Hou. v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001)).

ARGUMENT

1. Stokes plausibly alleges Boyce’s termination of her employment violates the First Amendment.

“We first consider whether the complaint plausibly alleges facts that, if true, describe conduct violating [Stokes’s] First Amendment rights.” *Barber v. Rounds*, 169 F.4th 577, 582-83 (5th Cir. 2026).

It does.

a. Government employees have First Amendment rights.

Government employees like Stokes “do not surrender all their First Amendment rights by reason of their employment.” *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). *See also Lindke v. Freed*, 601 U.S. 187, 196–98 (2024) (“Freed did not relinquish his First Amendment rights when he became city manager.”); *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 605 (1967) (“[P]ublic employment, including academic employment, may [not] be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.”).

Certainly “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in

connection with regulation of the speech of the citizenry in general,” *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), but here Stokes’s job was not the kind of job that gives a government employer greater power to restrict an employee’s speech. Stokes alleges, and no one disagrees, that her job was administrative only. She did not have policymaking authority. *Cf. Maldonado v. Rodriguez*, 932 F.3d 388, 394 (5th Cir. 2019). She did not purport to speak in any official capacity. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (“because that kind of speech is—for constitutional purposes at least—the government’s own speech”).

When Stokes re-posted the social media post in question, she did so after work, on a private Instagram account. The re-post did not relate to the University. The account did not purport to associate with the University or target any member of the University community. Stokes was not acting in her capacity as a government employee; she was acting in her capacity as a private citizen only. “The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” *Garcetti*, 547 U.S. at 419 (citing

Perry v. Sindermann, 408 U.S. 593, 597 (1972)). “So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983) (“Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government”))).

b. Political speech is entitled to the highest protection.

The speech in question related to a subject of obsessive news interest and a matter of public concern to the nation. It was made in the middle of a robust public debate, at that very moment wildly raging everywhere. It “reflected positions that represent ‘by no means an isolated segment of public opinion.’” *MacRae v. Mattos*, 606 U.S. ----, 145 S. Ct. 2617, 2620 (2025) (Thomas, J., respecting the denial of certiorari) (citation omitted).

Such speech lies at the heart of the First Amendment. First Amendment jurisprudence reflects the foundational understanding that “debate on public issues should be uninhibited, robust, and wide-open.” *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (quoting *N.Y. Times Co.*

v. Sullivan, 376 U.S. 254, 270 (1964)). “[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick*, 461 U.S. at 145 (internal quotation marks omitted)).

Protected speech can be in any form, including social media. It need not be dignified or refined. It can be crude and highly offensive. *E.g.*, *Snyder*, 562 U.S. at 454 (“Priests Rape Boys,” “Thank God for Dead Soldiers,” God Hates Fags”). “[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Matal v. Tam*, 582 U.S. 218, 246 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

c. A government employer has an extraordinarily high burden to justify firing an employee for private political speech.

When a government employer fires an employee for her speech, the law requires it to show the speech disrupted its actual operations. *E.g.*, *Pickering*, 391 U.S. at 572 (teacher’s speech did not disrupt her school’s actual operations); *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 378 (5th Cir. 2000) (“[The plaintiff’s] letter would not have impeded the Library’s general performance and operation: it did not have

any bearing on the day-to-day business of circulating books within the community.”); *Moore v. City of Kilgore*, 877 F.2d 364, 375 (5th Cir. 1989) (firefighter’s speech did not disrupt firefighters’ ability to fight fires). See also *Porter v. Califano*, 592 F.2d 770, 773 (5th Cir. 1979) (“In order for the government to constitutionally remove an employee from government service for exercising the right of free speech, it is incumbent upon it to clearly demonstrate that the employee’s conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment.”) (quoting *Smith v. United States*, 502 F.2d 512, 517 (5th Cir. 1974)).

Still the test, known as the *Pickering* test, is a *balancing test*. It weighs the interest in the employee’s speech against the government employer’s interest in disciplining the employee for it. This means that the fact of disruption itself, while necessary, is not enough. *Id.* (“The First Amendment balancing test can hardly be Controlled by a finding that disruption did occur.”). The government employer’s interest in avoiding the disruption also must outweigh the employee’s interest in speaking. *Id.* (“The point is simply that the balancing test articulated in

Pickering is truly a balancing test, with office disruption or breached confidences being only weights on the scales.”).

“The more central a matter of public concern the speech at issue, the stronger the employer’s showing of counter-balancing governmental interest must be.” *Jordan v. Ector Cnty.*, 516 F.3d 290, 299 (5th Cir. 2008) (citation omitted). In other words, when the interest in the speech is high, the government employer’s burden is heavy. Because the interest in private political speech is extraordinarily high, Boyce must make an extraordinarily strong showing of disruption to justify firing Stokes.

d. External heckling cannot justify firing an employee for private political speech.

The only disruption anyone points to here was entirely external. The University did not have to cancel any classes because of Stokes’s re-post. No one on campus even knew about the re-post, much less complained about it. Stokes’s co-workers did not refuse to work with her. The disruption was nothing more than “a[n] [alleged] significant amount of hate mail, phone calls, and emails” that, according to the district judge, required Boyce to “act quickly.”⁶⁹

⁶⁹ ROA.423

Whatever a government employer's interest in avoiding external hecklers, it does not outweigh an employee's interest in private political speech.

It is elementary that the government cannot punish speech "simply because it might offend a hostile mob." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 135 (1992).

"Outsider complaints" are not a stand-in for actual disruption. *Melton v. City of Forrest City, Arkansas*, 147 F.4th 896, 903 (8th Cir. 2025). To hold otherwise would constitutionalize the heckler's veto: "Enough outsider complaints could prevent government employees from speaking on any controversial subject, even on their own personal time." *Id.* See also e.g., *Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1252 (10th Cir. 2024) ("Expected public reaction that impacts external relationships does not constitute a detrimental impact and does not weigh in the District's favor.") (citing *Flanagan v. Munger*, 890 F.2d 1557, 1566–67 (10th Cir. 1989) ("Defendants' case revolves solely around evidence of the potential disruption of the department's external relationships and operations. Even if disruption of external operations could justify defendants' actions under *Pickering* and its progeny, their justification must fail under

another theory. The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive"))).

Even insider complaints, which do not exist here, are not a stand-in for actual disruption, when the complaint is simply someone does not like what someone else thinks. *E.g.*, *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 782 (9th Cir. 2022). “That some may not like the political message being conveyed is par for the course and cannot itself be a basis for finding disruption of a kind that outweighs the speaker’s First Amendment rights.” *Id.* at 783. *See also Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021) (university could not reprimand professor who objected to gender-pronoun policy; “allow[ing] universities to discipline professors, students, and staff any time their speech might cause offense” would “reduce *Pickering* to a shell”). “Feeling upset” is “an unavoidable part of living in our ‘often disputatious’ society,” but it is no justification for punishing nothing more than a different point of view. *L. M. by & through Morrison v. Town of Middleborough, Massachusetts*, 605 U.S. ---, 145 S. Ct. 1489, 1495 (2025) (Alito, J., dissenting from denial of certiorari).

Other district judges, in cases challenging terminations for social media posts relating to Charlie Kirk, have readily observed that alleged public reaction, including in the form of “hundreds of calls and messages,” is insufficient to establish the kind of disruption that would justify adverse action against an employee. *See Hook v. Rave*, No. 4:25-cv-04188-KES, 2025 WL 2720978, at *4 (D.S.D. Sept. 24, 2025) (“Defendants have not demonstrated that there was any disruption to on-campus activities, Hook’s teaching lessons, or the University’s operations.”); *Crook v. Creston Comm. Sch. Dist.*, No. 4:25-cv-00373-RGE-HCA, 2026 WL 1847417, at *7 (S.D. Iowa Jan. 13, 2026) (“The evidence of the timing of the District’s response to Crook’s post, reasonableness of the response, and actual impact the post had on the District’s efficiency weigh against a finding of disruption.”); *id.* at *9 (“four to six parents indicating a potential future intent to withdraw their children from a District of 1,300 students does not carry the day”). In those cases, the decisionmaker at least purported to investigate before making a final decision. Boyce, by contrast, allowed no space for consideration whatsoever.

“Creating room for free speech in a hierarchical organization necessarily involves inconveniencing the employer to some degree.

Speech concerning public affairs usually creates attendant inefficiencies in the running of the public entity.” *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 196 (5th Cir. 2005). “Indeed, our experience tells us that the more important the subject matter is to the public, the sharper the reaction will be by those whose conduct may be called into question.” *Jones v. Matkin*, 623 F. Supp. 3d 774, 790 (E.D. Tex. 2022) (quoting *Swilley v. Alexander*, 629 F.2d 1018, 1021 (5th Cir. 1980)). “It is precisely the probability of oppressive over-reaction by the powers that be which requires our constant vigilance of the First Amendment protections accorded all public employees.” *Id.*

e. Viewpoint discrimination is the most dangerous kind.

The district judge did not acknowledge much less address the viewpoint discrimination inherent in Boyce’s termination of Stokes, but “the core First Amendment principle of viewpoint neutrality applies in the *Pickering-Garcetti* context as elsewhere.” *MacRae*, 145 S. Ct. at 2620 (Thomas, J.). “[P]ublic employers cannot use *Pickering-Garcetti* balancing generally or unsupported claims of disruption in particular to target employees who express disfavored political views.” *Id.* at 2621. “[T]he basic thrust of the Supreme Court’s *Pickering* line of cases has

been ‘to ensure that public employers do not use authority over employees to silence discourse ... simply because superiors disagree with the content of employees’ speech.’” *James v. Texas Collin Cnty.*, 535 F.3d 365, 380 (5th Cir. 2008) (quoting *Rankin v. McPherson*, 483 U.S. 378 (1987)). “It undermines core First Amendment values to allow a government employer to adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee, portray this disagreement as evidence of disruption.” *MacRae*, 145 S. Ct. at 2621 (Thomas, J.).

Boyce’s termination of Stokes necessarily discriminated against her viewpoint. “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth Cnty., Ga.*, 505 U.S. at 134. But Boyce went even further: By calling the speech in question “hurtful, insensitive” and “completely counter to our institutional values,” Boyce communicated that the speech’s viewpoint was wrong. When he said “[w]e condemn this action, and this staff member is no longer employed,” he communicated that expressing the speech’s viewpoint, even privately, was a fire-able offense. His email to all faculty, students, and staff, amplified by the press release he posted on Facebook, intended to, and did, silence dissent.

Viewpoint discrimination is the most dangerous kind. “[T]he First Amendment does not permit one side of a debate to use the government to cancel the other side.” *Noble v. Cincinnati & Hamilton Cnty. Pub. Libr.*, 112 F.4th 373, 383 (6th Cir. 2024) (“[T]he First Amendment protects individuals who refuse to salute the flag, or even burn it, and who engage in homophobic protests at military funerals, despite that such actions deeply offend many people.”) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Texas v. Johnson*, 491 U.S. 397, 399 (1989); *Snyder*, 562 U.S. at 458)). “Discrimination against speech because of its message is presumed to be unconstitutional.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (citation omitted).

Viewpoint discrimination is especially dangerous in the university setting. “[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). *See also Healy v. James*, 408 U.S. 169, 180 (1972) (“the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First

Amendment protections should apply with less force on college campuses than in the community at large”); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (“These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities.”). Because “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’” *Healy*, 408 U.S. at 180, “the dangers of viewpoint discrimination are heightened in the university setting.” *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997) (citing *Rosenberger*, 515 U.S. 835 (“That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”)). *See also Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1129–30 (11th Cir. 2022) (concurring opinion) (“A university that turns itself into an asylum from controversy has ceased to be a university; it has just become an asylum.”).

Courts applying *Pickering* have repeatedly held a government employer may not terminate an employee solely on the basis of his views. *Fenico v. City of Philadelphia*, 70 F.4th 151 (3d Cir. 2023) (a police

department in Philadelphia could not discipline police officers whose social media posts openly denigrated minority groups solely on the basis of their views); *Brown v. City of Tulsa*, 124 F.4th 1251 (10th Cir. 2025) (a police department in Tulsa could not terminate an officer whose social media posts were racially inflammatory solely on the basis of his views); *Jorjani v. New Jersey Inst. of Tech.*, 151 F.4th 135, 144 (3d Cir. 2025) (a public university in New Jersey could not terminate a lecturer whose private speech glorified Hitler solely on the basis of his views: “NJIT posits that because Jorjani offered views it disliked, the First Amendment should not apply, and it is entitled to summary judgment. We cannot agree, lest we permit ‘universities to discipline professors, students, and staff any time their speech might cause offense.’”). *See also, e.g., Hiers v. Bd. of Regents of the Univ. of N. Texas Sys.*, No. 4:20-cv-321-SDJ, 2022 WL 748502, at *12 (E.D. Tex. Mar. 11, 2022) (“[E]ven if *Pickering* applies rather than some higher form of scrutiny, the facts alleged support a plausible conclusion that the university officials engaged in unconstitutional viewpoint discrimination when they discontinued Hiers’s employment.”).

“In short, courts may not inquire into whether political speech presents a ‘substantial disruption’ based on its *viewpoint* alone—like the district court did here.” *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 775 (6th Cir. 2025) (Thapar, C.J., and Nalbandian, C.J., concurring). “[P]ublic employers do not have a free hand to engage in viewpoint discrimination toward their employees.” *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 109 (3d Cir. 2022).

Stokes plausibly alleges Boyce’s termination of her employment violated the First Amendment.

2. The district judge could not dismiss Stokes’s entire case.

Boyce nevertheless moved to dismiss Stokes’s entire case pursuant to Rules 12(b)(1) and 12(b)(6), and the district judge granted his motion, dismissing Stokes’s entire case with prejudice.

But neither Rule 12(b)(1) nor 12(b)(6) authorized complete dismissal.

a. Rule 12(b)(1) did not authorize complete dismissal.

Rule 12(b)(1) authorizes dismissal for lack of subject matter jurisdiction. The alleged basis for a lack of subject matter jurisdiction

here is the Eleventh Amendment, but the *Ex parte Young* doctrine excepts relief that Stokes seeks from the Eleventh Amendment's reach.

The Eleventh Amendment recognizes states' sovereign immunity and, by extension, "deprive[s] federal courts of the power to adjudicate suits against a state." *Kling v. Hebert*, 60 F.4th 281, 284 (5th Cir. 2023) (quoting *Union Pac. R. Co. v. Louisiana Pub. Serv. Comm'n*, 662 F.3d 336, 340 (5th Cir. 2011)). It applies equally in suits against state officials in their official capacities, inasmuch as a suit against a state official is no different than a suit against the state itself. *Id.* (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989)).

When the Eleventh Amendment applies, it "operates like a jurisdictional bar." *Id.* But there is, of course, an important exception: The *Ex parte Young* doctrine permits suits against state officials in their official capacity for *injunctive or declaratory relief*. *E.g.*, *John Gannon, Inc. v. Texas Dep't of Transportation*, 178 F.4th 906, 910 (5th Cir. 2026) (*Ex parte Young* "allows private parties to bring suits for *injunctive or declaratory relief* against individual state officials acting in violation of federal law") (emphasis added) (quoting *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (quoting *Raj v. La. State Univ.*, 714 F.3d 322, 328

(5th Cir. 2013))). *See also La Union del Pueblo Entero v. Nelson*, 163 F.4th 239, 257 (5th Cir. 2025) (same; it “allows private parties to bring suits for *injunctive or declaratory relief* against individual state officials”) (emphasis added); *Ostrewich v. Tatum*, 72 F.4th 94, 100 (5th Cir. 2023) (same; “*injunctive or declaratory relief*”) (emphasis added).

The district judge held the Eleventh Amendment immunizes Boyce in his official capacity from liability for damages and declaratory relief. He did not address Stokes’s right to continue to pursue injunctive relief from Boyce in his official capacity. To the extent, however, that he believed the Eleventh Amendment completely immunized Boyce in his official capacity from any liability going forward, he was mistaken.

No one disputes that the Eleventh Amendment immunizes Boyce in his official capacity from liability for damages, but Stokes does not seek damages from Boyce in his official capacity; she seeks damages from Boyce in his individual capacity only. What Stokes seeks from Boyce in his official capacity is *injunctive and declaratory relief*. The Eleventh Amendment does not bar that pursuit.

i. The Eleventh Amendment does not bar prospective injunctive relief.

Stokes's complaint expressly asks for reinstatement. Reinstatement is, without a doubt, prospective injunctive relief. "In cases where someone has been fired in retaliation for exercising his First Amendment rights, reinstatement is the kind of prospective injunctive relief that *Ex parte Young* allows against an otherwise immune sovereign." *Kling*, 60 F.4th at 284 (citing *Anderson v. Valdez*, 913 F.3d 472, 479 (5th Cir. 2019)).

Rule 12(b)(1) did not authorize the district judge to dismiss Stokes's case to the extent she seeks reinstatement. The Eleventh Amendment does not immunize Boyce in his official capacity from liability for prospective injunctive relief, which includes reinstatement.

Stokes even pointed out, in her response to Boyce's motion to dismiss, that "Boyce does not dispute that she may obtain injunctive relief."⁷⁰ The district judge, however, did not address Stokes's right to pursue reinstatement going forward, presumably either because he overlooked it or he believed any claim to such relief lacked merit. Either

⁷⁰ ROA.229

way, he erred. Whatever he makes of the merits of Stokes’s claim is irrelevant to the inquiry because “the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim.” *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 646 (2002).

ii. The Eleventh Amendment does not bar prospective declaratory relief.

The district judge held the Eleventh Amendment immunizes Boyce in his official capacity from liability for declaratory relief, but he misunderstood the relief that Stokes seeks as retrospective only.

Numerous legal authorities expressly hold that *Ex parte Young* “allows private parties to bring suits for injunctive or *declaratory relief* against individual state officials acting in violation of federal law.” *John Gannon, Inc.*, 178 F.4th at 910 (emphasis added) (quoting *City of Austin*, 943 F.3d at 997 (quoting *Raj*, 714 F.3d at 328)); *see also La Union del Pueblo Entero*, 163 F.4th at 257; *Ostrewich*, 72 F.4th at 100. The district judge did not acknowledge any of those legal authorities. Instead he simply concluded that the declaratory relief in this case did not fall within the *Ex parte Young* exception because it is “fundamentally

retrospective because it does not relate to an ongoing violation of [Stokes's] federal rights.”⁷¹

The district judge misunderstood Stokes's request for declaratory relief by viewing it in a vacuum. He focused solely on the fact that Boyce already terminated Stokes. He presumed that a declaratory judgment would do nothing more here than declare that Boyce violated the law in the past. But the request for declaratory relief called for “a more nuanced analysis” than the district judge allowed. *Williams On Behalf of J.E. v. Reeves*, 954 F.3d 729, 737 (5th Cir. 2020) (observing that request for declaratory relief called for “a more nuanced analysis”). The bottom line is, “[a]s long as the claim seeks prospective relief for ongoing harm, the fact that a current violation can be traced to a past action does not bar relief under *Ex parte Young*.” *Id.* at 738 (citing *Papasan v. Allain*, 478 U.S. 265, 282 (1986)). The fact that Boyce already terminated Stokes does not prevent Stokes from seeking a judgment declaring that the termination violated the First Amendment such that she is entitled to reinstatement.

⁷¹ ROA.434

The district judge did not account for the fact that Stokes seeks reinstatement, which, as shown, is *prospective*. *King*, 60 F.4th at 284 (“reinstatement is the kind of prospective injunctive relief that *Ex parte Young* allows”). Reinstatement necessarily presupposes, first, a judgment declaring that Boyce’s termination of Stokes violated the First Amendment. Viewed in context, the declaratory relief Stokes seeks is not an end-run around the Eleventh Amendment; it travels hand-in-hand with her request for prospective injunctive relief. *E.g.*, *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500–01 (5th Cir. 2001) (observing that suit for declaratory relief was “indistinguishable from a suit to enjoin the [state official] from declining to [follow the law]”).

iii. A Rule 12(b)(1) dismissal is never with prejudice.

Finally, the district judge’s dismissal was with prejudice, but a Rule 12(b)(1) dismissal is never with prejudice, because a Rule 12(b)(1) dismissal is jurisdictional. This Court’s precedents “make clear that a jurisdictional dismissal must be *without prejudice*.” *Carver v. Atwood*, 18 F.4th 494, 498–99 (5th Cir. 2021) (emphasis added) (citing *Mitchell v. Bailey*, 982 F.3d 937, 944 (5th Cir. 2020) (“A court’s dismissal of a case resulting from a lack of subject matter jurisdiction is not a determination

of the merits” therefore “should be made without prejudice.”) (cleaned up))). “This rule applies with equal force to sovereign-immunity dismissals.” *Id.* (citing *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996) (“Because sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice.”)).

b. Rule 12(b)(6) did not authorize complete dismissal.

Rule 12(b)(6) also did not authorize complete dismissal.

Rule 12(b)(6) authorizes dismissal for the failure to state a claim upon which relief can be granted. The district judge did not separately address whether Stokes stated a claim upon which relief from Boyce in his *official* capacity can be granted. His opinion skipped that analysis and addressed instead whether Stokes stated a claim upon which relief from Boyce in his *individual* capacity can be granted. But the standards for the two kinds of relief are not the same: To obtain relief from Boyce in his official capacity, Stokes only has to show a violation of her constitutional right. To obtain relief from Boyce in his individual capacity, she has to show, in addition, that the constitutional right was clearly established; if it was not, Boyce is entitled to qualified immunity.

Although the district judge did not separately address whether Stokes stated a claim upon which relief from Boyce in his *official* capacity can be granted, in the course of addressing Boyce’s entitlement to qualified immunity, the district judge nevertheless held that Stokes “failed to show a violation of her constitutional rights.”⁷²

Whether acknowledged or not, the holding operates as a Rule 12(b)(6) dismissal of any claim Stokes has to relief from Boyce in any capacity. A Rule 12(b)(6) dismissal has the effect of deciding a plaintiff’s rights as a matter of law, *e.g.*, *Vardeman v. City of Houston*, 55 F.4th 1045, 1049–50 (5th Cir. 2022) (“A court may dismiss a complaint as a matter of law when the plaintiff fails “to state a claim upon which relief can be granted.”), which is what the district judge did when he concluded that Stokes “failed to show a violation of her constitutional rights.”⁷³ A Rule 12(b)(6) dismissal also is a dismissal with prejudice, *see* Fed. R. Civ. P. 41(b) (a dismissal, “except one for lack of jurisdiction, improper venue, or failure to join a party,” “operates as an adjudication on the merits”),

⁷² ROA.440

⁷³ ROA.440

which is what the district judge ordered (“the Plaintiff’s claims are DISMISSED WITH PREJUDICE”⁷⁴).

The problem is Rule 12(b)(6) did not authorize the complete dismissal of any claim Stokes has to relief from Boyce in any capacity, because the dismissal credits Boyce’s version of the facts. The district judge could conclude that Stokes “failed to show a violation of her constitutional rights”⁷⁵ only by disregarding the facts alleged in Stokes’s complaint and/or construing the facts and any substantive law in Boyce’s favor. That is, the district judge could do what he did only by violating the fundamental tenets governing Rule 12(b)(6) motions.

i. A Rule 12(b)(6) dismissal here violates fundamental tenets.

It is elementary that, when deciding a Rule 12(b)(6) motion to dismiss, a court must accept the facts as alleged in the complaint as true. *E.g., Ferguson v. Bank of New York Mellon Corp.*, 802 F.3d 777, 780 (5th Cir. 2015) (“We assess a Rule 12(b)(6) motion only on ‘the facts stated in the complaint and the documents either attached to or incorporated in

⁷⁴ ROA.441

⁷⁵ ROA.440

the complaint.”) (quoting *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996)).

It is obvious error to substitute a defendant’s version of the facts for the plaintiff’s. A court must construe the facts and any ambiguities in any substantive law in *the plaintiff’s* favor. *Vardeman v. City of Houston*, 55 F.4th 1045, 1050 (5th Cir. 2022) (“All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff’s favor.”) (quoting *Lewis v. Fresno*, 252 F.3d 352, 357 (5th Cir. 2001)). *See also Barber v. Rounds*, 169 F.4th 577, 582 (5th Cir. 2026) (“At the Rule 12(b)(6) stage, the court must accept the complaint’s well-pleaded allegations as true and construe them in the light most favorable to [Stokes], as plaintiff.”) (citation omitted); *Cortez v. Rubio*, 176 F.4th 373, 376 (5th Cir. 2026) (“[W]e accept the complaint’s well-pleaded facts as true and view them in the light most favorable to the plaintiff.”) (citations omitted).

The rules governing Rule 12(b)(6) motions “make[] it relatively easy for plaintiffs to subject defendants to discovery—even for claims that are likely to fail.” *Berk v. Choy*, 607 U.S. 187, 193 (2026). But that is “[b]y

design,” and the U.S. Supreme Court “consistently reject[s]” lower courts’ efforts to protect defendants from that burden. *Id.*

Stokes’s complaint tells a much fuller story, but the essential facts here, for Rule 12(b)(6) purposes, include at least the following: 1. Stokes’s tasks were administrative only; she did not have the kind of job that gives an employer greater power to restrict an employee’s speech. 2. Her re-post was after work, on a private account, and did not pertain to the University. 3. It related to a subject of obsessive news interest and a matter of public concern; it was protected speech, made in the middle of a robust public debate, at that very moment raging everywhere. 4. It was not even Stokes’s own speech; it was someone else’s that she merely re-posted. 5. Stokes herself did not disrupt anything; her hecklers did. 6. When, on the day in question, the University put her on administrative leave at 9 a.m., it did so to protect her. 7. When, immediately after, Boyce decided to fire Stokes, it was not because of anything Stokes did.

The district judge’s opinion, dismissing Stokes’s case in its entirety, did not account for any of the forgoing facts. According to the district judge, the material facts are Stokes posted something on social media, it

was “negatively received,” and she was fired.⁷⁶ Those facts alone, according to the district judge, justified Boyce’s termination of Stokes, as a matter of law. The district judge wrote that Boyce had a duty “to ensure the efficient operation of the University,” Boyce “determined [Stokes’s] post was sufficiently disruptive,” therefore Boyce “lawfully fired [Stokes] as a result.”⁷⁷

To the extent the district judge considered any facts at all, he simply substituted Boyce’s version of the facts for Stokes’s, something a court patently cannot do when deciding a motion to dismiss pursuant to Rule 12(b)(6). Whether an employee’s speech is sufficiently disruptive to justify a termination is a question of fact, improper for resolution on a motion to dismiss. The district judge’s opinion, however, leaves no doubt that he simply took Boyce’s word for it: “[Boyce] determined [Stokes’s] post was sufficiently disruptive”⁷⁸ therefore “[Boyce] lawfully fired [Stokes] as a result.”⁷⁹ The district judge construed the facts in Boyce’s favor, and drew inferences favorable to Boyce, when the law required him

⁷⁶ ROA.430-431

⁷⁷ ROA.439

⁷⁸ ROA.439

⁷⁹ ROA.439

to do the opposite. *EnvTech, Inc. v. DeBusk*, 178 F.4th 208, 217 (5th Cir. 2026) (“[W]e must also draw all reasonable inferences in the plaintiff’s favor”) (quoting *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009)). The law required him to construe the facts in Stokes’s favor and draw inferences favorable to Stokes.

A district judge cannot dismiss a case simply because he credits the defendant at any stage, but certainly not at the Rule 12(b)(6) stage. There has been no opportunity for discovery. The district judge held an evidentiary hearing on Stokes’s motion for preliminary injunctive relief, and seven witnesses testified, but Boyce did not appear. Boyce’s version of the facts is, as of now, unsupported; even the alleged “hate mail, phone calls, and emails” to which the district judge pointed in his opinion denying Stokes’s motion for preliminary injunctive relief are not in the record.

Rule 12(b)(6) did not authorize the district judge’s dismissal. It cannot be that Stokes has no plausible right to relief as a matter of law because the district judge takes Boyce’s word for it.

ii. A Rule 12(b)(6) dismissal here sets a dangerous precedent.

If Rule 12(b)(6) authorized the district judge's dismissal of Stokes's entire case, it would be because the law allows a government employer to fire an employee for nothing more than posting something that is "negatively received." But the law does not allow that. To counsel's knowledge, no other district judge has held a government employer may, as a matter of law, fire an employee over a private social media post merely because it was "negatively received."

The very notion that a government employer may fire an employee for nothing more than posting something that was "negatively received" is dangerous. Unfortunately, the district judge's dismissal of Stokes's entire case establishes that precedent. Crediting the government employer's version of the facts at the Rule 12(b)(6) stage—permitting the government employer himself to determine what is "sufficiently disruptive"—is no different than saying the employee's First Amendment interests are irrelevant to the law. It does not matter that the employee's speech may have been unrelated to their work and made privately and after hours. It does not matter that the employee's speech may have been on a matter of public concern and so lied at the heart of the First

Amendment. It does not matter even that the employee's speech may have "reflected positions that represent 'by no means an isolated segment of public opinion.'" *MacRae*, 145 S. Ct. at 2620 (Thomas, J.). In all events, the government employer gets to decide whether mere speech, which may have nothing to do with the government employer, is a fire-able offense. If the district judge is correct, the government employer may, as a matter of law, fire whoever he wants, so long as he has an alleged heckler to point to.

A Rule 12(b)(6) dismissal in a case such as this that disregards all other facts necessarily constitutionalizes the heckler's veto by insulating it from any inquiry. This Court cannot allow that precedent to stand.

3. The district judge could not grant qualified immunity.

This Court must also address the district judge's erroneous grant of qualified immunity.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Barber v. Rounds*, 169 F.4th 577,

581 (5th Cir. 2026) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The district judge held Boyce in his individual capacity is entitled to qualified immunity from liability for money damages because Stokes “failed to show [either] a violation of her constitutional rights or that the unlawfulness of [Boyce’s] conduct was ‘clearly established.’”⁸⁰ Stokes already showed she plausibly alleges the violation of a constitutional right: A government employer cannot, as a matter of law, terminate an employee merely because her private political speech was “negatively received.”

The remaining question, for qualified immunity purposes, is whether the right was clearly established, and it was. The law is sufficiently clear. In any event, for a district judge to grant qualified immunity here, he would have to decide questions of fact, something he cannot do at the Rule 12(b)(6) stage.

a. The constitutional right was clearly established.

“‘Clearly established’ means that the ‘contours of the right must be sufficiently clear that a reasonable official would understand that what

⁸⁰ ROA.440

he is doing violates that right.” *Barber*, 169 F.4th at 582 (quoting *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))).

Every reasonable leader of a public university understands an employee has First Amendment rights and he cannot terminate her for privately expressing a point of view.

Stokes’s job was administrative only; she did not have the kind of job that gives an employer greater power to restrict an employee’s speech. Her re-post was after work, on a private account, and did not pertain to the University. It related to a subject of obsessive news interest and a matter of public concern to the nation. It “reflected positions that represent ‘by no means an isolated segment of public opinion.’” *MacRae*, 145 S. Ct. at 2620 (Thomas, J.). Stokes’s interests in her speech could not be higher.

Stokes herself did not disrupt the University on September 11. No classes were cancelled because of her re-post. Her co-workers did not complain. There was no actual disruption. The only alleged disruption was external heckling.

On these facts, which a court must accept as true, drawing all reasonable inferences in Stokes's favor, there is no legitimate explanation for Boyce's decision to fire Stokes. The University had only just put Stokes on administrative leave, for her own safety, when, at 10:15 a.m., Boyce called for a "complete separation." Nothing had changed, certainly Stokes did not do anything, that justified her termination.

Whether it is even necessary to the instant analysis, the facts strongly suggest that what Boyce wanted was to publicly fire Stokes, not because she did anything wrong, but because he wanted credit for doing it. He apparently drafted his Facebook post publicly announcing the firing before the firing was even communicated to Stokes.

These are not facts that justify a termination of an employee. Boyce, and certainly the University's general counsel's office, to the extent that it advised him, should have known that Boyce could not fire Stokes for private political speech. The U.S. Supreme Court held *in 1987* that the First Amendment protected even a public employee who expressed approval of an attempted assassination of President Reagan. *Rankin v. McPherson*, 483 U.S. 378, 390–91 (1987) ("Where, as here, an employee serves no confidential, policymaking, or public contact role, the

danger to the agency's successful functioning from that employee's private speech is minimal."). The facts in *Rankin* are materially identical facts, but to the extent they are different, they are different in ways that help, not hurt, Stokes's case. The public employee in *Rankin* made her comments at work, her comments were her own, and her comments were hostile inasmuch as she said: "If they go for him again, I hope they get him." If the First Amendment protected the public employee in *Rankin*, it protects Stokes here.

The fact of social media does not change the analysis. There is no authority for the proposition that speech on social media is less protected. "It is [] beyond debate that when a public employee engages in protected speech, it is immaterial that social media serves as the vehicle for such speech." See e.g. *Jones v. Matkin*, 623 F. Supp. 3d 774, 790–91 (E.D. Tex. 2022) (citing cases). See also, e.g., *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180 (2021) (social media posts were protected speech).

Even entertaining the argument that social media changes the analysis, it remains that "certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier

rule will be beyond doubt.” *Andrew v. White*, 604 U.S. 86, 95 (2025) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004))). “After all, some things are so obviously unlawful that they don’t require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J., for the majority). See also *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (reversing Fifth Circuit’s grant of qualified immunity, notwithstanding alleged “ambiguity” in the law, where constitutional right was clear and no “necessity or exigency” justified its violation) (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (“a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful’”) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))).

Certainly, in the light of the pre-existing law, including but not limited to *Rankin*, Stokes’s constitutional right was clearly established at the time Boyce terminated her. A reasonable university president would have understood that he could not terminate her solely to placate

external hecklers, and that is before accounting for the viewpoint discrimination inherent in Boyce’s decision. When one accounts for the viewpoint discrimination in Boyce’s decision, the answer is even clearer. A public employer cannot “adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee, portray this disagreement as evidence of disruption.” *MacRae*, 145 S. Ct. at 2620 (Thomas, J.).

b. Questions of fact preclude the grant of qualified immunity at this stage.

In any event, disruption, or the real risk of it, is something that must be reasonably proved. A court cannot simply take Boyce’s word for it.

This Court recently reversed a district court’s grant of qualified immunity in a case in which the plaintiff plausibly alleged viewpoint discrimination. *See Biggers v. Massingill*, No. 23-11023, 2025 WL 429974 (5th Cir. Feb. 7, 2025). That plaintiff claimed he was silenced during a public meeting because a commissioner disagreed with his point of view. *See id.* at *2 (“Biggers alleged he was silenced by Massingill—not because he was disrupting those meetings—but because Massingill disagreed with Biggers’s views about the HCCC. That is a textbook violation of the

First Amendment.”). The commissioner claimed his behavior was “far outside the boundaries of civilized discourse and was patently disruptive.” *Id.* at *2 n.2. In a per curiam opinion, Judges Ho, Duncan, and Oldham observed that whether the plaintiff was disruptive was “obviously a ‘fact-reliant question unsuited for resolution at the motion to dismiss stage.’” *Id.* The case was not a termination case, but the same obvious principle applies equally here.

Other circuit courts recently have reversed grants of motions for qualified immunity where the evidence of disruption was thin.

The Tenth Circuit in *Brown v. City of Tulsa*, 124 F.4th 1251 (10th Cir. 2025), held a police department in Tulsa could not terminate an officer whose social media posts were racially inflammatory solely on the basis of his views. The court, reversing a premature grant of qualified immunity, observed that, “in a First Amendment retaliation claim in the public employment context, qualified immunity usually cannot be afforded at the motion to dismiss.” *Id.* at 1269.

The Eighth Circuit in *Melton v. City of Forrest City, Arkansas*, 147 F.4th 896 (8th Cir. 2025), held a mayor could not fire a firefighter who posted an anti-abortion image that caused an alleged “firestorm,” absent

a showing of actual disruption to the city’s ability to fight fire and protect public safety. Reversing a premature grant of qualified immunity, the court observed that, going forward, “[i]nsufficient evidence of a disruption would be ‘fatal to the claim of qualified immunity’ because there would be no governmental interest to weigh.” *Id.* at 904. *See also id.* (“Keep in mind that, in addition to the lack of evidence supporting the mayor’s prediction, his brief investigation could lead a reasonable jury to conclude that what he said masked the true reason for Melton’s firing, which was a disagreement with the viewpoint expressed in the image.”)

The Ninth Circuit in *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767 (9th Cir. 2022), held a school could not take adverse action against a teacher for wearing a MAGA hat merely because colleagues complained. Reversing a premature grant of qualified immunity, the court observed both that “disagreement with a disfavored political stance or controversial viewpoint, by itself, is not a valid reason to curtail expression of that viewpoint at a public school” and that “a reasonable school administrator at the time of the events in this case would have known that.” *Id.* at 786-87.

c. This case is not *McLin*.

The district judge relied on *McLin v. Twenty-First Jud. Dist.*, 79 F.4th 411 (5th Cir. 2023), to hold Boyce is entitled to qualified immunity. *McLin* is instructive, but the district judge's reliance on it was misplaced. The employer in *McLin* was a court. The employee in *McLin* was a clerk whose job was to interact with the public. The employee joked in a public post on Facebook about running over Black Lives Matter protesters with her horse trailer. Her colleague complained, and the court's chief judge terminated the employee's employment.

This Court, affirming the grant of qualified immunity, specifically emphasized the court's interest in workplace harmony. It gave the chief judge "a wide degree of deference" on whether the public Facebook post "affected working relationships necessary to the department's proper functioning." *Id.* at 419-20. It added: "Not only would a public Facebook post about running over Black Lives Matter protestors pose a threat to amicable workplace relationships, it strikes a blow against the [court] by undermining its efforts to stay true to the fact and image of a court whose 'paramount purpose [is] providing a fair and impartial open forum in which the public may resolve its disputes.'" *Id.* at 420 (citation omitted).

The district court’s opinion further explained: “Plaintiff did not make her post ‘private,’ or even limit her post to her Facebook ‘friends’; instead, she made her post ‘public,’ available to anyone capable of conducting an internet search. And, again, Plaintiff’s remarks most certainly may be characterized as overtly hostile. It is one thing to articulate a disagreement with protesters’ methods, it is quite another to publicly state ‘#IWillrunYouOver.’” *McLin v. Twenty-First Jud. Dist.*, 614 F. Supp. 3d 278, 291–92 (M.D. La. 2022).

This case is not *McLin*. Stokes’s re-post was not overtly hostile. It did not publicly threaten to run over anyone. It was private. There is no suggestion that it posed a threat to amicable working relationships. There is no suggestion that it undermined confidence in the integrity of the University which, as a public university, “is peculiarly the ‘marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972).

McLin does not dictate the outcome here. Given questions of fact, the district judge’s grant of qualified immunity in this case was, at minimum, premature.

4. The district judge's denial of Stokes's motion for preliminary injunctive relief did not resolve the merits.

Finally, to the extent the district judge believed his denial of Stokes's motion for preliminary injunctive relief resolved the merits of her claim to any relief going forward, he was wrong. A ruling on a motion for preliminary injunctive relief cannot resolve the merits, but in any event the district judge's ruling was fundamentally flawed.

a. A ruling on a motion for preliminary injunctive relief cannot resolve the merits.

“[T]he district court cannot itself determine to resolve the merits of the case on the record developed at the hearing on a request for preliminary injunctive relief.” *John v. State of La. (Bd. of Trs. for State Colleges & Universities)*, 757 F.2d 698, 704 (5th Cir. 1985) (citing cases). No one expects a party to prove her case in full at a hearing on a motion for preliminary injunctive relief. Any such hearing necessarily is informal, and the record it creates, especially if it is pre-discovery, typically is incomplete. From the U.S. Supreme Court:

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less

complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (cleaned up; citations omitted). “In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.” *Id.* “[T]he parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy.” *Id.* at 396.

Rule 65(a)(2) authorizes consolidation of a hearing on a motion for preliminary injunctive relief with a trial on the merits, but it requires, by its plain terms, an order. Longstanding jurisprudence furthermore requires “clear and unambiguous notice” to the parties before any such order’s entry. *Univ. of Texas*, 451 U.S. at 395 (quoting *Pughsley v. 3750 Lake Shore Drive Co-op. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)). See also *AttorneyFirst, LLC v. Ascension Ent., Inc.*, 144 F. App’x 283, 290 (4th Cir. 2005) (reversing judgment on the merits following hearing on motion for preliminary injunction). There was no order and no notice here. If

the district judge intended to consolidate Stokes's motion for preliminary injunctive relief with a trial on the merits, he never indicated it.

"The notice requirement is necessary because 'the facts adduced [at a preliminary injunction hearing] often will not be sufficient to permit an informed determination of whether a direction for the entry of judgment is appropriate.'" *aaiPharma Inc. v. Thompson*, 296 F.3d 227, 234 (4th Cir. 2002) (citations omitted). As a result, "a party addressing only issues of preliminary relief should not ordinarily be bound by its abbreviated and only partially informed presentation of the merits." *Id.*

Stated another way: "A litigant applying for a preliminary injunction should seldom be required either to forego discovery in order to seek emergency relief, or to forego a prompt application for an injunction in order to prepare adequately for trial." *Pughsley*, 463 F.2d at 1057. "Different standards of proof and of preparation may apply to the emergency hearing as opposed to the full trial." *Id.*

The sequence of events suggests the district judge believed that his denial of Stokes's motion for preliminary injunctive relief resolved the merits of her claim to injunctive relief going forward: He denied Stokes's motion or preliminary injunctive relief on March 11; he did not address

Stokes's right to pursue reinstatement going forward in his opinion granting Boyce's motion to dismiss on March 16; nevertheless, immediately upon granting Boyce's motion to dismiss, he entered an order stating "the Plaintiff's claims are DISMISSED WITH PREJUDICE." Presumably the district judge did not address Stokes's right to pursue reinstatement going forward because he viewed the matter as fully and finally decided.

Whatever his belief, the district judge's denial of Stokes's motion for preliminary injunctive relief had no bearing on the actual merits of Stokes's claim to any relief. That preliminary ruling does not and cannot justify any dismissal which otherwise lacks a basis.

b. The district judge's ruling was fundamentally flawed.

The district judge's denial of Stokes's motion for preliminary injunctive relief was also fundamentally flawed.

i. The district judge's assessment of the evidence was clearly erroneous.

For his conclusion that Stokes's re-post did actually disrupt the University, the district judge relied primarily on the fact that Boyce had

declared that the University received “a significant amount of hate mail, phone calls, and emails” that required that Boyce “act quickly.”⁸¹

He disregarded entirely faculty, staff, and students’ testimony that Stokes’s re-post did not disrupt the University on September 11. No classes were cancelled. No one even knew about it before Boyce sent an email about it.

The failure to account for the testimony and evidence presented at the hearing makes the district judge’s assessment of the evidence clearly erroneous.

ii. The district judge’s legal analysis was erroneous.

The district judge observed that “courts have consistently given substantial weight to government employers’ reasonable predictions of disruption, even when the speech involved is on a matter of public concern.”⁸² But the only disruption anyone points to here was external heckling, and that is not actual disruption. It is not entitled to weight, much less substantial weight.

⁸¹ ROA.423

⁸² ROA.422 (quoting *Waters v. Churchill*, 511 U.S. 661, 673 (1994))

The fact that the only disruption was external heckling ought to have made this a straightforward case because external heckling alone cannot justify firing an employee for private political speech. A government employer has no legitimate interest in punishing speech “simply because it might offend a hostile mob.” *Forsyth Cnty., Ga.*, 505 U.S. at 135. The district judge got the law backwards. He did not even acknowledge the viewpoint discrimination inherent in Boyce’s termination of Stokes. His legal analysis was erroneous.

iii. The district judge misunderstood irreparable injury.

The district judge held Stokes was not irreparably injured because “the loss of a job, even a government job, does not typically constitute irreparable harm in and of itself.”⁸³ “It is axiomatic,” he wrote, “that a terminated employee can be made whole by money damages.”⁸⁴

The district judge misunderstood the irreparable injury in this case. This is not an ordinary wrongful termination case. The injury from the loss of First Amendment freedoms is not reparable solely through

⁸³ ROA.426

⁸⁴ ROA.426

damages.⁸⁵ *See Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *7 (5th Cir. Feb. 17, 2022) (harm from loss of First Amendment freedoms is “independent” from harm from adverse employment decision itself). For this reason, in First Amendment cases, irreparable injury is presumed. This Court’s precedent unambiguously holds that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (“Most basically, Opulent Life has satisfied the irreparable-harm requirement because it has alleged violations of its First Amendment and RLUIPA rights.”)). Applying that unambiguous precedent here, Stokes’s irreparable injury in the absence of a preliminary injunction should have been presumed.

Stokes demonstrated a likelihood of success on the merits and her reinstatement, pending the resolution of this case, serves the public interest. *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539

⁸⁵ Often, because of qualified immunity, it is not even reparable through damages.

(5th Cir. 2013) (quoting *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)) (“[I]njunctions protecting First Amendment freedoms are always in the public interest.”). In addition to reversing the district judge’s complete dismissal of her case and premature grant of qualified immunity, Stokes encourages this Court to hold the district judge’s failure to reinstate her was an abuse of discretion.

CONCLUSION

For the reasons stated, Stokes respectfully asks that the Court reverse the district judge’s erroneous orders and remand this case for due proceedings as the First Amendment requires.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of filing to all counsel of record.

July 16, 2026

/s/ Alysson Mills

Alysson Mills

CERTIFICATE OF COMPLIANCE

1. This brief contains less than 13,000 words, exclusive of parts exempted by Fed. R. App. P. 32(a)(7)(b). The exact word count is 12,076, exclusive of parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Century Schoolbook font in 14-point for text and 12-point for footnotes.

July 16, 2026

/s/ Alysson Mills

Alysson Mills