

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
Case No.: 7:07-CV-00064

MICHAEL S. ADAMS,

Plaintiff,

v.

THE TRUSTEES OF THE UNIVERSITY OF
NORTH CAROLINA-WILMINGTON, et al.

Defendants.

PLAINTIFF'S RESPONSE
IN OPPOSITION TO
DEFENDANTS' SECOND MOTION
FOR SUMMARY JUDGMENT

HON. MALCOLM J. HOWARD

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INTRODUCTION

Defendants' renewed motion for summary judgment is more closing jury argument than legal brief. If a jury were present, it would be proper for Defendants to outline their evidence, to dismiss Dr. Mike Adams' credibility, and to argue for the credibility of their own witnesses. But we are not yet at trial, and no jury has been empanelled. Hence, not only are their arguments entirely premature, but they fail to do what Defendants must at this stage: Make the case that Dr. Mike Adams' claims fail *as a matter of law*.

After finding that the First Amendment protects Dr. Adams' viewpoints as expressed in his columns and public speeches, the Fourth Circuit specifically identified the remaining issues in this case. Defendants concede the first—whether Dr. Adams' interest in speaking outweighs the University's interest in providing services—because they do not contest it. It is just as well, for Fourth Circuit case law amply demonstrates that the balance would tilt in Dr. Adams' favor.

On the second issue—causation—both FED. R. CIV. P. 56 and Fourth Circuit precedent direct this Court to consider a single question:

Could a reasonable juror—taking all the facts and all the inferences from the facts in Dr. Adams' favor—conclude that his speech constituted a substantial factor in Defendants' decision to deny him promotion to full professor?

The answer is a resounding “yes.” Dr. Adams has presented evidence showing that standards were elevated, lies were told, policies were disregarded, and processes were rigged to derail his promotion—all by individuals who regularly expressed clear disgust for his conservative speech and his critiques of University misconduct. And they did this even though his body of work exceeded the written (and historically-applied) promotion criteria (and even their invented *ad hoc* criteria). Without question, genuine issues of material fact remain, and this case is ripe for a jury trial. FED. R. CIV. P. 56(a).

SUMMARY OF DISPUTED FACTS¹

This Court first addressed the facts of this matter when it denied Defendants' motion to dismiss. (Order, Mar. 31, 2008 [Doc. 117].) In the process, it underscored several critical components of Dr. Adams' case. At the time, those components were mere allegations, but discovery uncovered substantial supporting evidence, including evidence of previously unknown wrongdoing. In short, in the "put up or shut up" regime of Rule 56, Dr. Adams has put up more than enough evidence to bolster, amplify, and expand the material allegations of his complaint.

I. DR. ADAMS HAS A DISTINGUISHED RECORD AS A TEACHER AND SCHOLAR.

The core issue in this case is whether a professor with an outstanding, award-winning record in teaching, scholarship, and service can be denied promotion simply because the university disapproves of his political and religious viewpoint.

Discovery has amply confirmed Dr. Adams' record of excellence in teaching, scholarship, and service. In teaching, he received rave reviews from students, "outstanding" and "excellent" peer reviews, repeated awards, and consistent praise as a "master," "gifted," "accomplished," and "natural" teacher. As a scholar, he produced an "impressive" array of refereed articles, resulting in peer reviews that steadily climbed to "outstanding," achieved the Department of Criminology and Sociology's (Department) highest ratings, and received praise for such rapid accomplishments. For service, he received consistent applause for his work in the Department, the University, and the community, including community lectures, media appearances of all types, and periodic editorials. (Pls.' 1st MSJ Resp. [Doc. 135] at 1–2 ¶ 1.)

When Dr. Adams applied for promotion in 2006, his record spoke for itself. For teaching, his student evaluations were well above the Department average (MSJ Ex. 8 App. 7 [Doc. 140] at

¹ Dr. Adams incorporates the Statement of Material and Disputed Facts from his prior summary judgment response, plus the accompanying exhibits. (See Pl.'s Resp. Br. in Opp. to Defs.' Mot. for Summ. J. [Doc. 135], hereafter "Pl.'s 1st MSJ Resp.")

211; LaGrange Dep. [Doc. 140-10] at 11)—sometimes even achieving the Department’s top scores²—while he simultaneously maintained a “heavy caseload” of student advisees (Compl. Ex. 9 at 16; Compl. Ex. 11 at 19, Compl. Ex. 14 at 26; Compl. Ex. 45 at 96).

For research, he had published more peer-reviewed articles in his career (eleven) than seven of the nine members of the Department, including his current and previous chairs—Drs. Cook (eight) and Levy (six). (MSJ Ex. 8 App. 4 [Doc. 135-14] at 206.) Only two Department colleagues topped his five peer-reviewed publications since the last promotion. (MSJ Ex. 8 App. 5 [Doc. 135-15] at 208.) In fact, *no professor with a similar number of peer-reviewed publications had ever been denied promotion at the Department level.* (Adams Decl. [Doc. 135-10] ¶ 16.)

Regarding service, he had advised seven student organizations and had served on twenty-seven University or Department committees, while making over 125 public appearances as a speaker, lecturer, debater, moderator, interviewee, guest, host, reviewer, and writer in various local and national venues such as newspapers, radio shows, television shows, universities, conferences, and organizational meetings. (Compl. Ex. 45 at 108–20.) Additionally, Dr. Adams’ multiple columns and speeches on cultural, constitutional, and sociological issues constituted service to the wider community.³ (*Id.* at 112–20.) Thus, an elite student society awarded him his crowning service achievement, the Golden Seahawk. (*Id.* at 111.)

II. DR. ADAMS FACED EXPLICIT VIEWPOINT DISCRIMINATION.

After becoming a Christian conservative in 2000, Dr. Adams’ work environment changed

² (See Compl. Ex. 7 at 12; Compl. Ex. 8 at 14; Compl. Ex. 9 at 16; Compl. Ex. 11 at 19; Compl. Ex. 13 at 24; Compl. Ex. 14 at 26; Compl. Ex. 16 at 29; MSJ Ex. 8 App. 7 [Doc. 140] at 211.)

³ This was consistent with the Department practice of giving “service” credit to other professors for their own activism in discussing “popular culture” (MSJ Ex. 2 [Doc. 135-4] at 22); “gender and media” (*id.* at 24); “women, work, and family” (*id.* at 25, 28, 34, 36; MSJ Ex. 8 App. 2 [Doc. 135-12] at 162–63); “juvenile law” (MSJ Ex. 2 at 50); school violence (MSJ Ex. 8 App. 2 at 150); “meritocracy” (MSJ Ex. 2 at 42–43; MSJ Ex. 8 App. 2 at 178); “criminal justice” (MSJ Ex. 2 at 6, 8); “faith-based services” (*id.* at 12) and other topics in local public venues (*id.* at 10, 14, 32, 40, 46).

dramatically. In 2001, his cautions against “interject[ing] political and religious bias into the hiring process” prompted Dr. Snowden to defend such political discrimination and to remove him from the faculty e-mail list for supposedly “campaigning for Bush.” Later, an e-mail to a student about the September 11th attacks prompted a campus-wide furor that landed Dr. Adams on *Hannity & Colmes*. Two months later, Dr. Snowden accused him of “workplace terrorism” and a “hate crime” by claiming—without a shred of evidence—that he sprayed an “unknown gas” or “pepper spray” in her office. These charges, which remained open for five years, became one of the “stories of the university.” (Pl.’s 1st MSJ Resp. [Doc. 135] at 2–3 ¶¶ 3–4.) She later accused him repeatedly of sexually harassing students, again without a shred of evidence. (Snowden Dep. [Doc. 140-12] at 21–25, 61, 133–34; Adams Dep. [Doc. 140-6] at 162–66; MSJ Ex. 20 [Doc. 136-2].)

In 2002, Dr. Adams began writing columns that were ultimately published on Townhall.com. They not only critiqued the University and Department but also addressed other cultural and campus issues from a conservative perspective. (Pl.’s 1st MSJ Resp. [Doc. 135] at 3–4 ¶ 5.) But even as he added “national columnist” to his CV, he continued to publish peer-reviewed scholarship at the same rate as before (Compl. Ex. 45 at 101–03) (exceeding his peers (MSJ Ex. 8 Apps. 4–5 [Docs. 135-14, 135-15] at 206–09)), continued to receive excellent teaching evaluations from his students (MSJ Ex. 8 App. 7 [Doc. 140]), and continued to serve UNCW by advising students and student groups (Compl. ¶ 86; Compl. Ex. 35; Compl. Ex. 38 at 78–79; Compl. Ex. 44 at 93–94; Compl. Ex. 45 at 108–11).

However, Dr. Adams’ columns frequently frustrated his colleagues, who took issue with his conservatism, often in crude terms. By April 2004, Dr. Willis instructed Dr. Adams not to discuss the columns at work as they disturbed a secretary. When Dr. Adams explained his upcom-

ing absence from a dinner party due to a National Rifle Association dinner, Dr. Levy (the interim chair) mocked him: “Go on . . . to your fascist pig meeting.” Dr. Snowden called him a “pathological liar” who was “mentally unbalanced” in the local paper, and Dr. King derided him as a “wannabe right wing pundit.” Dr. Levy also reprimanded him for his columns, saying he should change his “caustic” and “meanspirited” tone to be more “cerebral” like William F. Buckley. (Pl.’s 1st MSJ Resp. [Doc. 135] at 4–5 ¶¶ 8–9.)

This institutional bias extended to Chancellor DePaolo and other high ranking University officials. Though Chancellor DePaolo publicly acknowledged Dr. Adams’ free speech rights, she privately “prompt[ed]” the Faculty Senate to add “collegiality” to the promotion criteria because of the alleged “personal attacks” in Dr. Adams’ columns. Though unsuccessful, this action constituted an unmistakable and explicit attempt to scuttle his promotion prospects due to his conservative columns. (*Id.* at 4–5 ¶¶ 7, 10.)

By 2005, the institutional bias against Dr. Adams intensified. Dr. Levy gave him a poor 2004 annual evaluation,⁴ stating that he was spending too much time focused on “political matters” and not enough on research (Compl. ¶ 95; Compl. Ex. 40)—a judgment she made *without even examining his scholarly output* (Levy Dep. [Doc. 140-11] at 62–63; MSJ Ex. 1 [Doc. 135-3] at 4). Had she done so, she would have discovered that his *eleven* career peer-reviewed publications to date—*five* of which he had produced since tenure—almost doubled her *six* peer-reviewed publications at the same stage of her career. Indeed, Dr. Adams’ scholarly research output exceeded all but two of the Department’s nine professors. (MSJ Ex. 8 Apps. 3–4 [Docs. 135-14, 135-15] at 206–08.) She also opined that his service to the Department and the University suffered due to his political activities. (Pl.’s 1st MSJ Resp. [Doc. 135] at 5–6 ¶ 11.) But that

⁴ This was Dr. Adams’ first evaluation after publishing *Welcome to the Ivory Tower of Babel* in May 2004. (Adams Decl. [Doc 135-10] ¶ 7), which contains several of his Townhall.com columns plus new material detailing campus abuses.

same year, the Pandion Society—a society of the most exceptional UNCW students—granted him the “Golden Seahawk,” a service award reserved for the “most outstanding leader among all individuals, departments, and organizations at UNCW.” (Compl. Ex. 45 at 111.)

In 2006 when Dr. Adams addressed transgender issues in several of his columns, the Gender Mutiny Collective—an anarchist group from Chapel Hill—intimated that he might pass on “transphobia”⁵ to his students. Without receiving a single complaint from UNCW students and without *any* knowledge of the organization, Chancellor DePaolo accepted this complaint at face value and ordered Dean Cordle and Dr. Cook (the new Department chair) to investigate whether Dr. Adams was “passing on transphobic views to students.” After a week-long secret investigation, involving Dr. Willis and Dr. Levy, Dr. Cook reported back that she had found no evidence against Dr. Adams. (Pl.’s 1st MSJ Resp. [Doc. 135] at 6 ¶ 13 & n.13.)

Had Chancellor DePaolo fully examined Dr. Adams’ teaching record, she would have found that he was one of the most highly rated teachers in the Department, scoring well above the Department average on student evaluations and sometimes with the highest scores in the Department.⁶ While often attracting the “highest course enrollment [numbers] among all of the [D]epartment’s disciplines” (Compl. Ex. 13 at 24; *accord* Compl. Ex. 11 at 19), he also consistently maintained a “heavy caseload” of thirty or more student advisees,⁷ and every year was identified by graduating seniors as having made distinctive contributions to their success at UNCW (Compl. Ex. 45 at 100).

In February 2006, Dr. Snowden *again* accused Dr. Adams of harassment without evidence. After this final false allegation, UNCW finally resolved her still-pending 2001 felony accusation,

⁵ Defendant Cordle and Dr. LaGrange were not even certain of what this term means.

⁶ (*See* Compl. Ex. 7 at 12; Compl. Ex. 8 at 14; Compl. Ex. 9 at 16; Compl. Ex. 11 at 19; Compl. Ex. 13 at 24; Compl. Ex. 14 at 26; Compl. Ex. 16 at 29; MSJ Ex. 8 at 211.)

⁷ (*See* Compl. Ex. 9 at 16; *accord* Compl. Ex. 11 at 19; Compl. Ex. 14 at 26; Compl. Ex. 45 at 96.)

with the campus police finding it wholly unsupported. (Pl.'s 1st MSJ Resp. [Doc. 135] at 6 ¶ 12.)

III. DR. ADAMS WAS DENIED PROMOTION DUE TO HIS POLITICAL EXPRESSION.

In its Order denying Defendants' Motion to Dismiss, this Court recounted Dr. Cook's explanation for the promotion denial (Order [Doc. 117] at 7–8), how Dr. Adams' contested it (*id.*), and how he alleged that his political views contributed to the denial (*id.*). Discovery confirmed and expanded on these facts, painting in vivid colors what Dr. Adams only sketched in his complaint.

In July 2006, when Dr. Adams formally applied for promotion to full professor, he was required to “have exhibited during [his] *career* distinguished accomplishment in teaching, a tangible record of research . . . , and a significant record of service.” Teaching received the greatest emphasis, followed by research, with service a distant third. (Pl.'s 1st MSJ Resp. [Doc. 135] at 6–7 ¶ 14.) Notably, the faculty handbook does not limit the consideration of an applicant's “career” to only his career at the University, instead looking at the entire body of his work.

Empirically, Dr. Adams' record was overwhelming in every area. For teaching, his above Department average student evaluations, multiple teaching awards and recognitions, and “heavy caseload” of student advisees testified to his dedication. Regarding research, his eleven career peer-reviewed articles (with five coming since receiving tenure) surpassed all but two of his colleagues at corresponding junctures in their careers. *No professor with a similar record had ever been denied promotion at the Department level.* His service spanned from student organizations to University and Department committees to his growing national demand as an author, speaker, and commentator. (*See supra* Summary I; Pl.'s 1st MSJ Resp. [Doc. 135] at 7–8 ¶ 16.)

Hence, sources *outside* of his Department recognized Dr. Adams' accomplishments: students generated his SPOT (*i.e.*, student evaluation) scores (Lagrange Dep. [Doc. 140-10] at 11); his teach-

ing awards and recognitions, with one exception,⁸ were conferred by students, the Dean of Students' Office, and the state legislature⁹; independent juries of editors reviewed and published his refereed journal articles; and an elite student society awarded his crowning service achievement, the Golden Seahawk. (Compl. Ex. 45 at 100–04, 111.)

In contrast, his *internal* Department peers' *subjective* evaluations of his work had been sliding. Despite his high student evaluations, his peers marked down his teaching *without even watching him teach*. (Pl.'s 1st MSJ Resp. [Doc. 135] at 7 ¶ 14.) Despite his publishing scholarly articles at a rate exceeding all but two members of the Department, they downgraded his research. Despite his extensive work with students and in spite of the fact that his columns and speeches provided the public with the benefit of his considerable sociological expertise, members of the Department slighted his accomplishments while openly applauding the “activism” of more liberal members of the faculty. (MSJ Ex. 2 [Doc. 135-4] at 6, 8, 10, 12, 14, 22, 24–25, 28, 32, 34, 36, 40, 42–43, 46, 50.)

This decline in internal evaluations coincided with Dr. Adams' increased public criticisms of Defendants. Just months before the promotion decision, Dr. Adams openly criticized UNCW and Chancellor DePaolo for wasting tens of thousands of tax dollars to bring rappers to perform on campus, exaggerating minority enrollment numbers, tolerating public obscenity and child pornography, entertaining the request of a transgendered professor to silence his views, lying about racial preference policies, engaging in religious discrimination, and silencing Christian opposition to homosexual activism. (MSJ Ex. 9 [Doc 140-2] at 219–35.)

This criticism stirred up considerable hostility against Dr. Adams—hostility expressed in

⁸ Dr. Willis nominated Dr. Adams for the Chancellor's teaching award in 1996. (Compl. Ex. 13 at 24.)

⁹ Teaching stipend (state legislature) (Compl. Ex. 13 at 24); Outstanding Professor Award (the Greek community) (Compl. Ex. 12, Compl. Ex. 15 at 28); and Faculty Member of the Year Award (Greek Affairs Review Committee and Office of the Dean of Students) (Compl. Ex. 45 at 100).

writing. Before meeting with the senior faculty about his promotion, Dr. Cook solicited their remarks. Though Dr. Adams received positive reviews from several faculty members, others applied incorrect standards to minimize his research, misrepresented his accomplishments, and considered prohibited criteria. Many unleashed a storm of disparaging comments about Dr. Adams' conservative books and columns. (Pl.'s 1st MSJ Resp. [Doc. at 135] at 8–9 ¶¶ 17–19.)

As Dr. Cook edited and retyped these remarks into a single document to direct the upcoming discussion with the senior faculty, she distorted the record by including predominantly negative comments, omitting positive comments, providing incorrect promotion standards, deflating Dr. Adams' publication numbers, and repeating statements she knew to be false. (*Id.* at 9 ¶ 20; MSJ Ex. 10 [Doc. 140-3] (highlighting comments Dr. Cook selected)).

Dr. Snowden—who had lodged multiple false complaints against Dr. Adams, including the incredible and false complaint that he had tear-gassed her office—could not attend the September 14th senior faculty meeting where Dr. Adams' promotion was to be discussed. Despite her obvious conflict of interest, the senior faculty unanimously voted to allow her to vote by proxy, and Dr. Cook (who was fully aware of Dr. Snowden's false claims against Dr. Adams) personally cast this proxy against Dr. Adams. (Pl.'s 1st MSJ Resp. [Doc. 135] at 9–10 ¶¶ 21.)

At the outset, the senior faculty were split “3 in favor, 2 opposed, and 4 ambivalent/unsure,” but by the meeting's end, the opposition to Dr. Adams turned into an unrecorded 7–2 vote against promotion. Based on this, Dr. Cook rejected Dr. Adams' promotion and announced this rejection in a *pro forma* memorandum the next morning. (*Id.*)

Stating that her decision reflected “an overwhelming consensus” from the senior faculty, Dr. Cook alleged that Dr. Adams was deficient in *all three areas*: teaching, research, and service. But this statement flatly contradicted what she had told Dean Cordle, the Provost, and UNCW General

Counsel. In a September 18th memorandum, she explained that Dr. Adams' *teaching* and *service* were adequate for promotion, but that his *research* was "inadequate."¹⁰ She also restated to Dean Cordle the artificially deflated publication figures (discounting his publications by one) and relayed the faculty's concern over "the negative affects [sic] of [Adams'] service record. . . ."—a statement that unmistakably refers to his columns and speeches. (*Id.* at 10–11 ¶¶ 22–23.)

Regardless of the justification given—whether Dr. Cook believed Dr. Adams was deficient in all areas (as she told Dr. Adams) or merely deficient in one (as she told Dean Cordle)—the result was the same: For the first time in Department history, an associate professor was denied promotion to full professor at the Department level with a teaching, research, and service record like Dr. Adams'. He was denied through a process where his political and ideological views were expressly mentioned as relevant, his conservative views and writings held against him, and colleagues with obvious conflicts of interest permitted to vote against him—by proxy. And these actions took place against the immediate backdrop of a Chancellor-initiated secret investigation of Dr. Adams alleged "transphobia," an investigation directly triggered by his columns. When Dr. Cook denied Dr. Adams' promotion there was no doubt where her Chancellor stood on the issue—or the reasons for her hostility.¹¹

In short, Dr. Adams is prepared to present voluminous evidence to a jury, evidence that *explicitly* demonstrates that Defendants considered his viewpoint when they denied his promotion.

ARGUMENT

Like this Court, the Fourth Circuit analyzed Dr. Adams' First Amendment retaliation claim

¹⁰ See *infra* note 30 & accompanying text (rebutting Dr. Cook's efforts to obscure and evade the plain meaning of what she wrote).

¹¹ The pervasive anti-conservative atmosphere that Dr. Adams endured later became the subject of a peer-reviewed study published by one of his colleagues, who gathered the data at UNCW. See Susan Bullers, et al., *Political Ideology & Perceptions of Bias Among University Faculty*, 8 SOCIATION TODAY, no. 2 (2010), available at <http://www.ncsociology.org/sociationtoday/v82/political.htm> (last visited Nov. 4, 2011).

using the *McVey* test, which conducts three inquiries:

(1) whether [Dr. Adams] was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether [Dr. Adams'] interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether [Dr. Adams'] speech was a substantial factor in [his] [adverse employment] decision.

Adams v. Trs. of Univ. of N.C.-Wilmington, 640 F.3d 550, 560–61 (4th Cir. 2011) (quoting *McVey v. Stacy*, 157 F.3d 271, 277–78 (4th Cir. 1998)); accord Order [Doc. 117] at 20–21; Order, Mar. 15, 2010 [Doc. 146] at 32–33. Since the First Amendment protects Dr. Adams' political speech, *Adams*, 640 F.3d) at 561–64, he “satisfied the first *McVey* prong as a matter of law” because his “speech was clearly that of a citizen speaking on a matter of public concern.” *Id.* at 565. This first factor was so clearly established that the Fourth Circuit held that Defendants *are not entitled to qualified immunity* if Dr. Adams can prevail on his claims. *Id.* at 565–66.

Hence, only two issues remain: the balancing of interests in *McVey's* second prong, and the substantial factor inquiry in its third. *Id.* at 565 (noting issues for remand). Defendants defaulted on the balancing inquiry, which is a question of law. And they failed to prove “there are no causal facts in dispute” in the third prong. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (4th Cir. 2000); accord *Love-Lane v. Martin*, 355 F.3d 766, 776 (4th Cir. 2004). Hence, their motion should be denied.

I. DR. ADAMS SATISFIES THE SECOND *MCVEY* FACTOR—THE BALANCING OF INTERESTS—BOTH BY DEFAULT AND ACCORDING TO FOURTH CIRCUIT PRECEDENT.

Though the Fourth Circuit specifically identified *McVey's* second prong as an issue for remand, *Adams*, 640 F.3d at 565, Defendants do not mention it—not even once. (*See generally* Mem. in Supp. of Defs.' 2d Mot. for Summ. J. [Doc. 168] (“Defs.' 2d MSJ Br.”) .) Thus, they abandoned any attempt to show that their interest in providing services outweighed Dr. Adams' interest in free speech. *Adams*, 640 F.3d at 565 n.8.

Their retreat is well-taken in light of Fourth Circuit precedent. After all, a “government employer must make a stronger showing of the potential for inefficiency or disruption when the employee’s speech involves a more substantial[] matter of public concern.” *Love-Lane*, 355 F.3d at 778 (quotation omitted). Dr. Adams’ speech is “clearly” a matter of public concern, *Adams*, 640 F.3d at 565, and he addressed issues—like unconstitutional policies,¹² racial and religious discrimination,¹³ and misconduct by public employees¹⁴—already determined to be of substantial or considerable importance.¹⁵ (MSJ Ex. 9 [Doc. 140-2] at 212–35.)

II. DR. ADAMS SATISFIES THE THIRD *MCVEY* FACTOR—CAUSATION—BECAUSE GENUINE DISPUTES ABOUT MATERIAL FACTS REMAIN.

To obtain summary judgment, Defendants must “show[] that there is no genuine dispute as to any material fact.” FED. R. CIV. P. 56(a). By remanding the causation issue, the Fourth Circuit identified it as material. *Adams*, 640 F.3d at 565; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (defining “material”). As it is a factual question, “it will serve as a basis for summary judgment only in those instances where there are no causal facts in dispute.” *Goldstein*, 218 F.3d at 352; *accord Love-Lane*, 355 F.3d at 776. To defeat this motion, Dr. Adams must simply put forward “evidence such that a reasonable jury could return a verdict for [him].” *Anderson*, 477 U.S. at 248. Thus, his burden is “considerably lighter at this stage of the proceedings,” *Goldstein*, 218 F.3d at 356, as this Court must consider all “facts and inferences drawn from the facts in the light most favorable to [him].” *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995); *accord Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

¹² See *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 317 (4th Cir. 2006) (discussing NCAA violations that pale in comparison to the constitutional violations Dr. Adams highlighted).

¹³ See *Love-Lane*, 355 F.3d at 799 (race discrimination is a “serious and substantial issue of public concern”).

¹⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (“Exposing governmental inefficiency and misconduct is a matter of considerable significance.”).

¹⁵ Plus, “the University community as a whole, is less likely to suffer a disruption in its provision of services as a result of a public conflict” than other public agencies. *Mills v. Steger*, 64 Fed. Appx. 864, 872 (4th Cir. 2003).

A. DR. ADAMS ONLY NEEDS TO SHOW THAT HIS EXPRESSION WAS A “SUBSTANTIAL FACTOR” IN DEFENDANTS’ DECISION TO DENY HIM PROMOTION.

Defendants first try to evade their difficult task by exaggerating Dr. Adams’ factual burden. They insist that he must prove that “but for” his columns, he would have received a promotion. (Defs.’ 2d MSJ Br. [Doc. 168] at 4–5.) To do this, they take various cases out of context and ignore plain statements from both this Court and the Fourth Circuit.

In three separate decisions, this Court and the Fourth Circuit outlined what Dr. Adams must show to reach a jury. The Fourth Circuit remanded so that this Court could determine whether he had demonstrated that his “speech was a substantial factor in [Defendants’] decision.” *Adams*, 640 F.3d at 560–61, 565. This Court held likewise, quoting the same language. (Order [Doc. 117] at 21 (quoting *McVey*, 157 F.3d at 277–78).) None of these cases articulate a “but for” standard. (Order [Doc. 146] at 33 (“sufficient causal nexus”).) It is too late in the game for Defendants to change the rules.

Attempting to do just that, Defendants present a string of quotations, taken out of context. For decades, the Fourth Circuit has used a three-step approach for causation in these cases. First, the employee must show that “‘the protected speech was a motivating factor or played a substantial role’ in inducing the adverse action.” *Peters v. Jenney*, 327 F.3d 307, 323 (4th Cir. 2003) (quoting *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 193 (4th Cir. 1994)).¹⁶ Second, if he does so, “the [public] employer [must] put forward evidence that it would have [taken the adverse action] even in the absence of the protected speech.” *Id.* (quoting *Hall*, 31 F.3d at 193). Articulating a legitimate reason is not enough (as in Title VII), *Hughes*, 48 F.3d at 1387 (distinguishing Title VII causation); it must demonstrate it “by proof,” *Stroman*, 981 F.2d at 156 (citing

¹⁶ *Accord Hughes*, 48 F.3d at 1385 (“[T]he employee has the initial burden of demonstrating that her free speech was a ‘substantial’ or ‘motivating factor’ in the adverse employment decision.” (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *Stroman v. Colleton Cnty. Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992) .

Mt. Healthy, 429 U.S. at 287), amounting to a “preponderance of the evidence,” *Hughes*, 48 F.3d at 1385 (citing *Mt. Healthy*, 429 U.S. at 287). Third, if a reasonable jury could conclude that the government’s reasons were a pretext covering actions “substantially motivated by [the employee’s] protected speech,” summary judgment must be denied and the case set for trial. *Goldstein*, 218 F.3d at 357. So some cases use “but for” as a shorthand description of this three-step process (the one outlined in *Mt. Healthy*), but not to describe plaintiff’s burden.¹⁷ *See, e.g., Stroman*, 981 F.2d at 156 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979)¹⁸); *Peters*, 327 F.3d at 323 (quoting *Hall*, 31 F.3d at 193.¹⁹

Courts applying this analysis—rather than just describing it—have consistently held plaintiffs to the “substantial factor,” not “but for,” test. When plaintiffs fail to show that their speech was a “substantial or motivating factor,”²⁰ courts grant summary judgment to defendants. *See, e.g., Hughes*, 48 F.3d at 1388; *Goldstein*, 218 F.3d at 358 (noting that plaintiff needed to “produce . . . evidence that the protected speech . . . was a ‘substantial factor’ in his suspension or that the articulated justifications for his suspension were a pretext”). When Defendants fail to prove their burden, the case goes to trial. *See, e.g., Worrell v. Bedsole*, 1997 WL 153830, at *4 (4th Cir. Apr. 3, 1997). When the real reasons are disputed or hinge on credibility, the case goes to trial as long as “the evidence and reasonable inferences are sufficient for a reasonable jury to conclude that [plaintiff’s] speech was a ‘substantial’ or ‘motivating’ factor.” *Id.*; *Love-Lane*, 355

¹⁷ Of course, other cases describe the causation analysis in terms of “substantial” or “motivating” factor. *See, e.g., Campbell v. Galloway*, 483 F.3d 258, 267 n.4 (4th Cir. 2007); *Pike v. Osborne*, 301 F.3d 182, 185 (4th Cir. 2002); *McVey*, 157 F.3d at 277–78; *Love-Lane*, 355 F.3d at 776, 779.

¹⁸ *Givhan* did not impose a “but for” standard, but merely reaffirmed *Mt. Healthy*’s decision to give defendants an opportunity to put forward evidence, as outlined in the second stage of this analysis.

¹⁹ *Accord Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990); *Ridpath*, 447 F.3d at 299, 318 (describing retaliation elements briefly in a motion to dismiss decision).

²⁰ Notably, the Fourth Circuit uses “substantial factor” and “motivating factor” interchangeably, as does the Supreme Court. *Mt. Healthy*, 429 U.S. at 287. Defendants repeatedly and erroneously refer to a non-existent species of factor: the “substantial motivating factor.” (*See, e.g., Defs.’ 2d MSJ Br. [Doc. 168] at 3, 6.*)

F.3d at 780–82; *Peters*, 327 F.3d at 323. So to get to a jury, Dr. Adams must simply show that “there is a genuine issue of material fact as to whether [his] speech was a substantial factor in the decision to [deny him promotion].” *Love-Lane*, 355 F.3d at 782.

B. DR. ADAMS PRESENTED AMPLE EVIDENCE FOR A JURY TO CONCLUDE THAT HIS EXPRESSION CAUSED DEFENDANTS TO DENY HIM PROMOTION.

Defendants claim that Dr. Adams faces “undisputed evidence” that they denied his promotion for legitimate reasons (Defs.’ 2d MSJ Br. [Doc. 168] at 4), and that he presented “no evidence” to the contrary (*id.* at 6). This statement is patently false. Dr. Adams has produced substantial amounts of direct and circumstantial evidence supporting his claims.

This evidence and the inferences from it must be construed in Dr. Adams’ favor. *Hughes*, 48 F.3d at 1382. Since even “thin,” “circumstantial,” and “sparse” causal evidence defeats summary judgment, *Pike*, 301 F.3d at 185, Dr. Adams’ case belongs before a jury. This is particularly true here as Defendants’ case hinges on their motives and their credibility. *Worrell*, 1997 WL 153830, at * 4 (citing *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)).

1. DR. ADAMS’ INTERNAL EVALUATIONS DECLINED AFTER HE BECAME VOCAL.

In 2004, the Fourth Circuit remanded a public school teacher’s retaliation claim, finding a factual dispute over whether she was demoted for speaking out against racial discrimination. *Love-Lane*, 355 F.3d at 768, 780. In part, the Court relied on the fact that her evaluations declined sharply after she began speaking. *Id.* at 780–81.

Like *Love-Lane*, Dr. Adams initially received excellent evaluations from two different Department chairs between 1994 and 2003. (Compl. Exs. 7–9, 11, 14, 16, 33, 34, 35.) But once he started to reveal his conservatism and criticize UNCW in 2002 (Compl. Ex. 32), his evaluations began to decline though his job performance remained substantially unchanged. (*See supra*

Summary II.) The slide did not start immediately,²¹ but the before and after comparison is stark. Before he began speaking publicly, Dr. McNamee praised him as a “superb teacher, dedicated advisor, active scholar, and responsible department citizen.” (Compl. Ex. 8 at 15.²²) Dr. Willis echoed this, calling him “one of the most skilled instructors in our department and in the university.” (Compl. Ex. 34 at 73.²³) But Dr. Adams’ next two chairs—who each personally read his columns—summarized his accomplishments more dimly.

- Dr. Levy: “[In 2004, Dr. Adams’] service to the department is noted mostly by his absence. . . . His service efforts are clearly visible as a frequent contributor to the community and wider nation on political matters in his role as columnist for the Heritage Foundation. . . . Dr. Adams appears to have slowed his productivity as his efforts are directed elsewhere.²⁴ His service efforts take place almost exclusively outside the department and university, especially as a national political columnist and speaker.” (Compl. Ex. 40 at 88–89.)
- Dr. Cook: “Dr. Adams [sic] performance as a teacher is ‘good’ within the framework of established criteria. . . . Dr. Adams [sic] research productivity during 2005 [w]as ‘good’. . . . Dr. Adams [sic] service contributions [were] ‘good’. . . . Dr. Adams [sic] work performance is satisfactory in all areas of review.” (Compl. Ex. 44 at 93–94.)

Noticeably gone are the accolades praising Dr. Adams’ teaching skills, research productivity (which exceeded their own (MSJ Ex. 8 App 4 [Doc. 135-14] at 206)), and service.

This contrast was magnified in the declining peer evaluation scores for Dr. Adams’ teaching. When students evaluated his teaching (in SPOT scores), he consistently scored “excellent” and above the Department averages (MSJ Ex. 8 App. 7 [Doc 140] at 211), at times even highest in

²¹ Defendants cling to this detail as if it unravels the entire argument. (Defs.’ 2d MSJ Br. at 6.) At most, they accentuate a disputed fact. A reasonable juror could easily note that the inflection point in Dr. Adams’ intra-Department popularity coincided with the start of his columns and that his stock within the Department and UNCW declined more and more as he continued to speak out.

²² (Accord Compl. Ex. 9 at 17; Compl. Ex. 11 at 20.)

²³ (Accord Compl. Ex. 14 at 27; Compl. Ex. 16 at 30; Compl. Ex. 33 at 71; Compl. Ex. 35 at 75.)

²⁴ Dr. Adams was actually publishing peer-reviewed articles at the same pace as before. (Compl. Ex. 45 at 101–03.) Defendants highlight Dr. Levy’s factually inaccurate statement (Defs.’ 2d MSJ Br. [Doc. 168] at 6), but she admitted that she merely presumed—without checking Dr. Adams’ actual performance record—that he had slowed his research and service and that he had done so due to his political activities. (Pl.’s 1st MSJ Resp. [Doc. 135] at 5 ¶ 11.) A reasonable juror could conclude that her failure to do due diligence stemmed from her dislike of his conservatism and his writings.

the Department.²⁵ But to his peers—*who never actually watched him teach* (LaGrange Dep. [Doc. 140-10] at 10–11)—his scores declined sharply after his 2002 article. From 2003 to 2008, his average peer scores plummeted from 7.3 to 5.3—a 27.4% drop and below the Department average. (MSJ Ex. 8 App. 6 [Doc. 135-16] at 210.) Dr. Cook cited this in her draft promotion denial: “[T]he discrepancies between the SPOTS [sic] scores and the peer evaluations generated some concern.” (MSJ Ex. 30 [Doc. 136-12].) Yet she failed to explain to the Provost that only the students had actually seen Dr. Adams teach.

A reasonable juror could also be concerned because this discrepancy demonstrates the chasm between the views of the unbiased students who sat under Dr. Adams’ teaching week after week and those of his ideological opponents whose out-of-class syllabi and class materials “evaluations” were colored by their dislike of his columns. (LaGrange Dep. [Doc. 140-10] at 10–11; Cook Dep. [Doc. 140-7] at 30–32.) Such a juror could note that all *external* indicators of Dr. Adams’ teaching, research, and service remained high, while the *internal* Department evaluations plunged after he became a vocal conservative.

2. DEFENDANTS DISCOURAGED HIM FROM SPEAKING.

The Fourth Circuit also granted Love-Lane a trial because her supervisor adopted a subordinate’s negative evaluation (chastising her for vocalizing her opinions) and “attempted to discourage . . . her speech.” *Love-Lane*, 355 F.3d at 781. Similarly, Dr. Adams’ supervisor—Dr. Levy—told him to change his “caustic” and “meanspirited” tone to become more “cerebral” like William F. Buckley and gave him a negative evaluation. (Pl.’s 1st MSJ Resp. [Doc. 135] at 5 ¶¶ 9, 11.) She later voted against his promotion. (Levy Dep. [Doc. 140-11] at 133–34.) The Chancellor herself took direct aim at Dr. Adams by trying to change the University’s promotion criteria to deter his columns. (*Id.* at 5 ¶¶ 10.) And Dr. Cook ratified the senior faculty’s “consensus”

²⁵ (See Compl. Ex. 7 at 12; Compl. Ex. 8 at 14; Compl. Ex. 11 at 19.)

to deny Dr. Adams' promotion, a consensus they reached after openly ridiculing his columns. (Pl.'s 1st MSJ Resp. at 8–11 ¶¶ 17–23.) To the Fourth Circuit, a reasonable juror could conclude based on this that Dr. Adams' speech played a substantial role in Defendants' decision.²⁶

3. DR. ADAMS WAS DENIED PROMOTION SHORTLY AFTER CRITICIZING DEFENDANTS.

During the months before his promotion denial, Dr. Adams' columns targeted UNCW, openly criticizing it and Chancellor DePaolo for wasting taxpayer dollars on rappers, exaggerating minority enrollment numbers, illegally tolerating obscenity and child pornography, entertaining requests from a transgendered professor to silence his views, lying about racial preference programs, engaging in religious discrimination, instituting racist policies, and silencing Christian opposition to homosexual activism. (MSJ Ex. 9 [Doc. 140-2] at 219–35.) These critiques ended about six weeks before Defendants denied his promotion. In the Fourth Circuit, this temporal proximity is sufficient to create a genuine issue of material fact on causation, especially when combined with the vitriol the Department displayed toward Dr. Adams before and during the promotion process. *See Constantine v. Rector & Visitors of George Mason Univ.*, 411 F.3d 474, 501 (4th Cir. 2005) (noting that four months between expression and adverse action suffices for causal nexus); *Price v. Thompson*, 380 F.3d 209, 213 (4th Cir. 2004) (same for nine months).

Defendants attempt to dodge this evidence, saying there is no evidence that they were aware of these columns. (Defs.' 2d MSJ Br. [Doc. 168] at 6–7.) But Dean Cordle, Dr. Cook, Dr. Levy, Chancellor DePaolo, and the senior faculty were *keenly* aware of Dr. Adams' columns before he applied for promotion. They admitted it in deposition and received numerous e-mails complaining about his columns. (Pls.' 1st MSJ Resp. [Doc. 135] at 4 ¶ 7 & n.7–8.) Indeed, Chancel-

²⁶ Defendants ignore this evidence when arguing that no one tried to stop Dr. Adams from writing or threatened to retaliate against him. (Defs.' 2d MSJ Br. [Doc. 168] at 6.) Besides, the evidence—especially when viewed in Dr. Adams' favor—shows that he faced ever-increasing animus due to his conservative expression that climaxed in a retaliatory promotion denial. So the absence of explicit threats is irrelevant, and at most creates a disputed fact.

lor DePaolo even initiated a secret investigation of Dr. Adams based on these complaints. (*Id.* at 6 ¶ 13.) Dr. Levy criticized his tone and erroneously faulted his columns for his allegedly declining job performance. (*Id.* at 5 ¶¶ 9, 11.) A jury could reasonably conclude that Defendants were aware of Dr. Adams' critiques and that this contributed to their decision.

Next, Defendants argue that “mere temporal proximity is not enough to show causation.” (Defs.’ 2d MSJ Br. [Doc. 168] at 7.) However, the case they cite—*Hughes*—only says that temporal proximity does not suffice when there is no “evidence of animus . . . on account of [plaintiff’s] free speech.” *Hughes*, 48 F.3d at 1388. But Dr. Adams faced a rising tide of animosity toward his conservative beliefs and expression that began when he when he became vocal and that culminated during the promotion process. (*See supra* Summary II–III.) In that scenario, the *Hughes* holding does not apply. *Worrell*, 1997 WL 153830, at *4 (distinguishing *Hughes*).

4. DR. COOK RATIFIED DISCRIMINATION-TAINTED NEGATIVE EVALUATIONS.

Defendants maintain—based solely on their own declarations—that they denied Dr. Adams’ promotion after a rarefied, erudite academic discussion. (Defs.’ 2d MSJ Br. [Doc. 168] at 8, 11–13.) Dr. Adams presented evidence that would allow a juror to draw a different conclusion.

For years, Dr. Adams served as the butt of his colleagues’ anti-conservative comments. Dr. Levy branded his National Rifle Association dinner a “fascist pig meeting,” Dr. King dubbed him a “wannabe right wing pundit,” and Dr. Snowden accused him of “sabotage” after he lampooned the National Organization of Women (Snowden Dep. [Doc. 140-12] at 76–77; MSJ Exs. 59–60 [Docs. 137-24, 137-25]). (This was after she labeled him a “pathological liar” who was “mentally unbalanced” in the local paper.”) (Pl.’s 1st MSJ Resp. [Doc. 135] at 4–5 ¶ 8.)

Such comments only intensified during the promotion process, as several senior faculty members unleashed their hatred for Dr. Adams’ opinions:

- Dr. Rice: “[Dr. Adams’] op-ed pieces . . . can hardly be considered scholarly. . . . [H]e

has also placed scholarship and research on a back burner and has instead turned to the cranking out of weekly pithy, self-validating, and largely ad hominem essay attacks published in decidedly anti-intellectual venues.” (MSJ Ex. 10 [Doc. 140-3] at 242–43.)

- Dr. Irwin: “. . . Welcome to the Ivory Tower of Babel . . . does not bring any scholarly data forward to the public and generally detracted from the scholarship at the department.” (*Id.* at 251.)
- Dr. Irwin: “He is legalistic in his outlook. . . .” (*Id.* at 252.)
- Dr. Levy: “He is asking to be promoted in Sociology [sic], not public service or political commentary. His work should reflect that.” (*Id.* at 244.)
- Unknown: “Everything he has produced are opinion pieces, slander and vicious gossip like his *Ivory Tower of Babel*. . . .” (*Id.* at 237.)
- Unknown: “His book, *Welcome to the Ivory Tower of Babel*, is . . . heavily ideological. . . . I find many of the pieces to be offensive because they insult the university with partial truths, misrepresentations, and exaggerations.” (*Id.* at 237.)

Defendants try to minimize this as a debate about the scholarly merits and peer-reviewed status of *Ivory Tower* and Dr. Adams’ columns. (Defs.’ 2d MSJ Br. [Doc. 168] at 7–8, 11–13.) But he listed the former as non-peer-reviewed and the latter as service, rendering their scholarly merit superfluous and Defendants’ spin frankly incredible. (Compl. Ex. 45 at 102, 110–11.) Instead, their disgust for his conservative writings blinded them to the fact that he had published more peer-reviewed work than seven of the nine members of the Department (including the current and previous chairs) and that students recognized him—through awards and SPOT scores—as one of the best (if not *the* best) professor in the Department. (*See supra* Summary I; MSJ Ex. 8 Apps. 4–5, 7 [Docs. 135-14, 135-15, 140] at 206–09, 211; Compl. Ex. 45 at 100.)

Amidst this avalanche of vitriol, Dr. Cook adopted the Department’s promotion denial as “[her] own” and cited the allegedly “negative affects [sic]” of his columns against him—unmistakably indicating that Dr. Adams’ speech motivated the denial. (Cook Dep. [Doc. 140-7] at 81–82; MSJ Ex. 30 [Doc. 136-12].)

In short, a decision-maker ratified increasingly negative evaluations amidst hostile comments. While Defendants contest this, these are the facts as taken in the light most favorable to

Dr. Adams. *Hughes*, 48 F.3d at 1382. To the Fourth Circuit, this evidence defeats summary judgment because a jury hearing it “could conclude that [plaintiff’s] speech was a substantial factor in the decision to [take the adverse action].” *Love-Lane*, 355 F.3d at 781.

5. DR. COOK MANIPULATED FACULTY FEEDBACK TO INFLUENCE THE FINAL DECISION.

Not only did Dr. Cook ratify the faculty’s discrimination, she contributed to it. She doctored their pre-meeting comments into a single document used to direct the promotion discussion. (Pl.’s 1st MSJ Resp. [Doc. 135] at 9 ¶ 20.) She excluded comments favorable to Dr. Adams but included virtually all the negative ones. (*See* MSJ Ex. 10 [Doc. 140-3] (highlighting the faculty comments Dr. Cook selected).) She also included statements she knew were false (Cook Dep. [Doc. 140-7] at 43 (“Q: [I]s that a true statement that everything he produced are opinion pieces, slander, and vicious gossip? A: No.”)) and which violated UNCW’s evaluation criteria. (*See infra* Argument II.B.6.) Finally, she *twice* included incorrect publication totals—“has only three pubs and one in press since 1998” (MSJ Ex. 10 at 237)—when he actually had five such publications. (Adams Decl. [Doc. 135-10] ¶ 13; Compl. Ex. 45 at 101–04.) This manipulation helped transform the close pre-meeting vote—“3 in favor, 2 opposed, and 4 ambivalent/unsure”—into an unrecorded 7–2 vote against him. (Pl.’s 1st MSJ Resp. [Doc. 135] at 9–10 ¶ 21.)

A reasonable juror—viewing these facts and the inferences from them in Dr. Adams favor, *Hughes*, 48 F.3d at 1382—could conclude that Dr. Cook used this edited compilation to give a “consistently negative interpretation[.]” to Dr. Adams’ performance (including the positive feedback from faculty) and to “influenc[e] the opinions and votes” of others. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1326–27 (6th Cir. 1988). Hence, he could conclude that discrimination and retaliation prompted Defendants’ decision, even under a “but for” standard. *Id.* at 1327–28.

6. DEFENDANTS FAILED TO FOLLOW THEIR OWN POLICIES.

Throughout Dr. Adams’ promotion, Defendants ignored the governing written policies. For

one thing, they applied “criteria” that violated written policy. They weighed teaching, research, and service “*equally*” (Cook Dep. [Doc. 140-7] at 90 (emphasis added)) even though UNCW policy places heavy weight on teaching as the “primary criterion,” followed by research, and service as distant third. (Pl.’s 1st MSJ Resp. [Doc. 135] at 6–7 ¶ 14; *see also* Cook Decl. Ex. 1 [Doc. 131-8] [UNCW 110] (“Teaching: 60%, Research: 20%, Service: 10%.”).) This especially handicapped Dr. Adams because his teaching awards, student advising caseload, and student evaluations demonstrate that teaching is his greatest strength. (*See supra* Summary I.)

For another, Defendants allegedly concluded research was Dr. Adams’ “primary weakness.” (Levy Dep. [Doc. 140-11] at 140–44; Cordle Dep. [Doc. 140-8] at 21–23; *accord* Compl. Ex. 50.) But they *only* considered publications *since his last promotion in 1998*. (Cook Dep. [Doc. 140-7] at 73; Levy Dep. at 112; Compl. Ex. 50; MSJ Ex. 10 [Doc. 140-3] at 242, 244, 251–57; MSJ Ex. 29 [Doc. 136-11].) UNCW policy required them to consider his “cumulative performance” (Cook Decl. Ex. 9 [Doc. 131-9] [UNCW 34]) “during [his] *career*” (Cook Decl. Ex. 8 [Doc. 131-9] [UNCW 72] (emphasis added)). Under either standard, though, he should have been praised rather than discredited because *only two professors exceeded his productivity*. (MSJ Ex. 8 App. 4–5 [Docs. 135-14, 135-15] at 206–09.)

Plus, Defendants weighed “collegiality” against Dr. Adams (Cordle Dep. [Doc. 140-8] at 26–29; MSJ Ex. 30 [Doc. 136-12]; MSJ Ex. 10 [Doc. 140-3] at 251–56), even though the Faculty Senate specifically rejected this criterion. (MSJ Ex. 7 [Doc. 135-9] at 82.)

“[D]iverging from the Department’s published policy” is evidence of discriminatory intent, even under a “but for” standard. *Gutzwiller*, 860 F.2d at 1326. So is relying on criteria “not listed in any University document” and refusing to weigh the relevant criteria according to university guidelines. *Roebuck v. Drexel Univ.*, 852 F.2d 715, 729 (3d Cir. 1988). This evidence

alone defeats Defendants' motion.

7. DEFENDANTS APPLIED DOUBLE STANDARDS TO DR. ADAMS.

In rejecting Dr. Adams' promotion, Defendants applied transparently higher standards to him than to others applying for full professor. His eleven peer-reviewed journals since 1998 *exceeded* the stated guidelines of the previous four Department chairs dating back to 1990. Drs. McNamee and Willis stated that ten peer-reviewed publications sufficed. Dr. Cook says one publication every two years meets the standard, while one every year exceeds it.²⁷ (Pl.'s 1st MSJ Resp. at 6–8 ¶¶ 14, 16.) Dr. Levy expects “more than one.” (Levy Dep. [Doc. 140-11] at 112–13.) History bears this out: *since 1983, no Department member with ten refereed publications has been denied promotion to full professor at the Department level, except for Dr. Adams.* (Adams Decl. [Doc. 135-10] ¶ 16.) Dr. Cook *said* research productivity was the “overriding concern” (Compl. Ex. 50), but Dr. Adams had published more career refereed journals at application time than *all but two* of his Department colleagues (including the past four Department chairs). (MSJ Ex. 8 App. 4 [Doc. 135-14] at 206.) Notably, Dr. Cook, Dr. Levy, and Chancellor DePaolo had only eight, six, and four refereed publications, respectively, when they were promoted to full professor. Likewise, only two professors exceeded his peer-reviewed publications after tenure. (MSJ Ex. 8 App. 5 [Doc. 135-15] at 208.)

Defendants betrayed further evidence of double standards by penalizing Dr. Adams for co-authoring publications (*see, e.g.*, MSJ Ex. 10 [Doc. 140-3] at 237–38, 242, 244, 251, 253–57), although *all* of the current full professors had many such co-authored writings at the time of their promotions (MSJ Ex. 8 Apps. 4–5 [Docs. 135-114, 135-15] at 207, 209). Indeed, Dr. Levy bragged about such joint accomplishments in her department annual report. (MSJ Ex. 51 [Doc.

²⁷ Dr. Cook clarified in her deposition that this standard applied also to a “case for promotion beyond associate professor to full professor. . . .” (Cook Dep. [Doc. 140-7] at 21–22.)

137-16].) Yet, instead of praising Dr. Adams, whose *three* single authored works exceeded the Department average of 2.1 and the totals of four full professors, he was penalized. (MSJ Ex. 8 App. 4 at 207.) They even quibbled over where Dr. Adams' name appeared in the order of co-authors. (Pl.'s 1st MSJ Resp. [Doc. 135] at 8 ¶ 17.) No promotion criteria permitted this distinction (*id.*), but only two of his colleagues appeared as first author on more articles than Dr. Adams. (MSJ Ex. 8 App. 4 at 207.) In other words, regardless of what *ad hoc* criteria Defendants invented, Dr. Adams' record of scholarship merited promotion.

Defendants attempt to conceal these glaring double standards behind the veil of academic deference. (Defs.' 2d MSJ Br. [Doc. 168] at 9–10, 13–14.) But for over three decades, the Fourth Circuit has made it clear that this deference does not apply to retaliation cases:

Federal courts . . . have never been hesitant to intervene on constitutional grounds in the . . . promotion of public employees, including academic personnel, where the asserted claim is that the action taken . . . was intended to penalize for the exercise of First Amendment rights.

Clark v. Whiting, 607 F.2d 634, 638–39 (4th Cir. 1979); *accord Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995) (noting that courts intervene when “promotion was denied because of a discriminatory reason” (quotation omitted)). And in the First Amendment context (unlike equal protection), comparative evidence is not impugned.²⁸ *Clark*, 607 F.2d at 638–41.

Next, Defendants insist—again based only on their declarations—that they considered the quality, not just the quantity, of Dr. Adams' work. (Defs.' 2d MSJ Br. [Doc. 168] at 9–10, 12–13.) But Dr. Cook—not Dr. Adams—provided the qualitative standard, saying that peer-reviewed articles were the “‘gold standard’ for academic research.” (Cook Decl. [Doc. 131-7] ¶ 15.) Thus, Dr. Adams' eleven career peer-reviewed publications (and five since tenure) clear her standard for quality. Furthermore, the record does not support Defendants' claims. The faculty

²⁸ Hence, Defendants' attempts to import the Fourth Circuit's Title VII and equal protection analysis below are misplaced. (Defs.' 2d MSJ Br. [Doc. 168] at 10, 13–14 (quoting *Adams*, 640 F.3d at 559, 566).)

members' written feedback was replete with comments about Dr. Adams' political writings. (MSJ Ex. 10 [Doc. 140-3] at 236–58.) But only two faculty discussed the quality of his peer-reviewed articles at all (Maume and Irwin), and Maume praised them. (*Id.* at 249–56.) For the rest, research boiled down to a numbers game, where they deflated the numbers. (*Id.* at 236–58.)

Defendants also discount the double standards because Dr. Cook was not the chair when other faculty were promoted, but this claim is fatally flawed. (Defs.' 2d MSJ Br. [Doc. 168] at 9.) There is no evidence that UNCW's promotion standards changed. Indeed, there is no publication, document, email, or single shred of evidence showing that Dr. Cook had raised or changed promotion standards. To argue otherwise is to apply *post hoc* justifications for clearly discriminatory actions. Hence, the history of how Defendants applied the promotion standards in the past helps determine whether they applied them fairly to Dr. Adams. Last, of the three cases that Defendants cite, only one addresses the academic context, and it involves a school with explicit numerical publishing standards for promotion and a chair who overtly raised the tenure criteria. *Lim v. Trs. of Ind. Univ.*, 297 F.3d 575, 578, 581 (7th Cir. 2002). As neither applies to UNCW or Dr. Cook, its reasoning is of little utility.

In short, none of Defendants' distractions hide two basic facts: Even setting aside the *explicit* discussions of Dr. Adams' protected speech, for the first time since 1983, the Department refused to promote a professor with ten peer-reviewed publications, and Dr. Adams had surpassed all but two of his colleagues' publication records with his eleven career articles (with five since tenure). A reasonable juror could conclude that his conservative speech played a substantial role in this historic event. After all, such double standards satisfy "but for" causation. *Roebuck*, 852 F.2d at 729–35; *Gutzwiller*, 860 F.2d at 1325–27.

8. DEFENDANTS TOLERATED BLATANT CONFLICTS OF INTERESTS.

Defendants further besmirched an already stained promotion process by tolerating egregious

conflicts of interest. Drs. Cook and Levy and the senior faculty *unanimously*²⁹ allowed Dr. Snowden—who falsely charged Dr. Adams with a felony, accused him of harassment, and slandered him (Pl.’s 1st MSJ Resp. [Doc. 135] at 3–4 ¶¶ 4, 8)—to vote by proxy. (*Id.* at 9–10 ¶ 21.) Dr. Cook knew that Dr. Snowden had made these false charges (*id.* at 6 ¶ 12) and instead of remedying this glaring conflict of interest, she—as the Department Chair—*personally* cast the proxy against Dr. Adams. (Cook Dep. [Doc. 140-7] at 78.)

9. DEFENDANTS OFFERED SHIFTING EXPLANATIONS FOR THEIR DECISION.

Last, Dr. Cook actively misled Dr. Adams when explaining the decision. (Pl.’s 1st MSJ Resp. [Doc. 135] at 10–11 ¶¶ 22–23.) For on September 18th, she emailed to the Provost, University Counsel, and Dean Cordle, a draft of a summary of the promotion meeting that she intended to send to Dr. Adams. In it, she explained that he *met the promotion standards for teaching and service* and that these conclusions “accurately reflect[] the sentiments of the senior faculty and my own.” (MSJ Ex. 30 [Doc. 136-12] (“[The teaching] record was adequate, though the discrepancies between the SPOTS scores and the peer evaluations generated some concern. . . . [The service] record was adequate, though concerns were raised regarding your lack of service to the university or to the scholarly community by way of professional associations with the discipline.”)³⁰ But her subsequent memo to Dr. Adams stated that he was *deficient in all three areas*. (Compl. Ex. 50 (“The overriding concern regarding your record to date is in the area of scholarly research productivity. . . . While your teaching record is the strongest aspect of your application for promotion thus far, it does not satisfy [the promotion] standard. . . . Your service record to the university and to the academic disciplines ... is judged to be insufficient for promotion.”).)

²⁹ (Cook Dep. [Doc. 140-7] at 14, 16, 17, 77–78; MSJ Ex. 29 [Doc. 136-11].)

³⁰ Dr. Cook’s *post hoc* explanations, *Adams*, 640 F.3d at 555–56, conflict with what she actually wrote, for her first paragraph clearly states that she was considering Dr. Adams’ “application for promotion to the rank of Professor,” not discussing the abstract adequacy of his record. (MSJ Ex. 30 [Doc. 136-12].)

When Dr. LaGrange heard Dr. Cook's explanation, he replied, "Bull s***! That's not the way we voted!" (Adams Dep. [Doc. 140-6] at 110; Compl. ¶ 111; *see also* LaGrange Decl. [Doc. 131-5] ¶ 25 ("I did not believe that the sentiment of the group was that he was deficient in teaching, research, and service.")) Dr. Cook's deception is potent evidence for a jury to infer discriminatory bias. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

In sum, Dr. Adams has presented a multitude of factors that show Defendants denied his promotion because of his conservative speech, particularly when the facts and inferences are viewed in his favor. *Hughes*, 48 F.3d at 1382. Viewed individually, each one highlights disputed facts. Viewed cumulatively, a reasonable jury could conclude that Dr. Adams' speech played substantial, motivating, or even "but for" role in Defendants' decision.

C. DEFENDANTS CANNOT PROVE THAT THEY WOULD HAVE DENIED DR. ADAMS' PROMOTION ABSENT HIS PROTECTED SPEECH.

Defendants claim they presented "substantial evidence" that they denied Dr. Adams' promotion for legitimate reasons. (Defs.' 2d MSJ Br. [Doc. 168] at 11.) But this is not a Title VII case, and "substantial evidence" is not enough. *Hughes*, 48 F.3d at 1387 (distinguishing Title VII causation). They must demonstrate their legitimate reasons "by proof," *Stroman*, 981 F.2d at 156 (quoting *Mt. Healthy*, 429 U.S. at 287), specifically a "preponderance of the evidence," *Hughes*, 48 F.3d at 1385–86 (citing *Mt. Healthy*, 429 U.S. at 287). This they cannot do.

For one thing, their "substantial evidence" amounts to nothing more than their own declarations—conveniently drafted well after the critical events to revise history—and self-selected documents accompanying them. (Defs.' 2d MSJ Br. [Doc. 168] at 11–14.) And they merely regurgitate previously contested (and arguably rebutted) arguments—including academic defe-

rence (*see supra* Argument II.B.7) and their “bias-free” promotion meeting (*see supra* Argument II.B.4–8)—and repeat the very policy violations that provide evidence of retaliation (*see supra* Argument II.B.7).

For another, given the volume of Dr. Adams’ testimony and the numerous instances of conflicting testimony (which begs for credibility determinations), a reasonable jury—particularly one with a “jaundiced eye”—could conclude that Defendants’ “substantial evidence” is nothing more than a “pretext for [a promotion denial] substantially motivated by [Dr. Adams’] protected speech.” *Goldstein*, 218 F.3d at 357. Hence, Defendants simply cannot do what they must to obtain summary judgment: show that “there are no causal facts in dispute.” *Id.* at 352; *Love-Lane*, 355 F.3d at 776.

CONCLUSION

Defendants claim legitimate reasons for denying Dr. Adams’ promotion. But Dr. Adams presented at least nine different factors that show his conservative speech played a substantial—or even “but for”—role in the decision. When this Court views the evidence in Dr. Adams’ favor, it is clear that material facts remain in dispute. Hence, Dr. Adams respectfully requests that this Court deny Defendants’ motion and set this case for trial.

Respectfully submitted this 4th day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, I electronically filed Plaintiff's Response in Opposition to Defendants' Second Motion for Summary Judgment 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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