

No. 25-1816

In the United States Court of Appeals
for the Third Circuit

NORMAN WANG,
Appellant

v.

UNIVERSITY OF PITTSBURGH, ET AL.,
Appellees

On Appeal from the Judgment of the U.S. District Court for the
Western District of Pennsylvania, No. 2:20-cv-01952-MJH
(Hon. Marilyn J. Horan, U.S.D.J.)

BRIEF FOR APPELLANT NORMAN WANG AND
VOLUME ONE OF THE APPENDIX
(Pages Appx0001-Appx0112)

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I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. §§1331, 1343(a), and 1367, and 42 U.S.C. §2000e-5(f)(3). This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1291. The District Court issued a final order on March 26, 2025, granting summary judgment in favor of all remaining defendants, with certain earlier dismissals merging into the final judgment. Appellant filed a timely notice of appeal on April 24, 2025.

II. STATEMENT OF ISSUES FOR REVIEW

1) Did Dr. Wang's First Amended Complaint adequately allege the statements at issue in Wang's defamation claims were actionable and had been made with the requisite intent?

Where preserved: Raised at Appx0159, Appx0172, Appx0197, Appx0218, Appx0224; response at Dkt. 64; ruling at Appx0001.¹

2) Did the District Court err in granting summary judgment to Drs. Gladwin, Saba, and Berlacher on Wang's 42 U.S.C. §1983/First Amendment claim?

Where preserved: Raised at Appx0496, Appx1105; response at Dkt. 199; ruling at Appx0087.

3) Did Wang's Third Amended Complaint adequately allege a claim for relief against University of Pittsburgh ("Pitt") for First Amendment retaliation against Wang?

Where preserved: Raised at Appx0347; response at Dkt. 100; ruling at Appx0059.

4) Did Wang's First Amended Complaint adequately allege there was state action as to University of Pittsburgh Medical Center ("UPMC") and

¹ Citations to "Appx__" are to pages of the Appendix. Citations to "Dkt." are to documents in the record that were not included in the Appendix.

University of Pittsburgh Physicians (“UPP”) with respect to Wang’s First Amendment claim?

Where preserved: Raised at Appx0218; response at Dkt. 64; ruling at Appx0001.

5) Did the District Court err in granting various motions to dismiss, and granting summary judgment to Pitt, UPMC, and UPP on Wang’s retaliation claims under Title VII and the Pennsylvania Human Relations Act, and to Pitt and UPMC on Wang’s Title VI and 42 U.S.C. §1981 retaliation claims?

Where preserved: Raised at Appx0218, Appx0224, Appx0452, Appx0496, Appx1105; response at Dkt. 64, 168, and 199; rulings at Appx0001, Appx0072, Appx0087.

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellant is not aware of any related cases or proceedings.

IV. INTRODUCTION

This case presents extraordinary facts. Dr. Norman Wang, an Associate Professor and model employee at the University of Pittsburgh (“Pitt”) School of Medicine, was subject to what the U.S. Department of Education has rightly called “a campaign of denunciation and cancellation” because he published an academic article in a leading medical journal opposing race-conscious selection in medical education. No one at Pitt or the University of Pittsburgh Medical Center (“UPMC”), where Wang also works, commented when the article appeared in March of 2020. But that abruptly changed during the summer of 2020, when protests were raging across the country in the aftermath of George Floyd’s death, and corporations and academic institutions were racing to outdo each other to demonstrate their commitment to diversity, equity, and inclusion.

Unfortunately for Wang, his article hit too close to home at Pitt and UPMC—which were themselves engaged in the very discrimination he criticized. Senior officials of Pitt, and others at UPMC acting in concert with them, engaged in a series of hostile, retaliatory actions against Wang. Specifically, they removed him from a fellowship directorship, prohibited him from having any contact with medical students, residents, and fellows, and publicly denounced him as a “racist” who published an article with “many ... misquotes,” *no scientific validity*, and other “misrepresentations” (none of which were true). Further, they violated Pitt’s

publication review policies to pressure a medical journal to retract Wang's article, which did so without even informing Wang of the demonstrably false assertions made against him.

The defendants' course of retaliation, defamation, and ostracization at work caused an immediate and knowing injury to Wang's professional and personal reputation, leading some of the defendants to speculate whether Wang could be induced to resign, and another to wonder whether their actions might lead him to commit suicide.

What's even more extraordinary is how the District Court improperly ruled upon significant factual disputes without a trial. The court dismissed fact-based defamation claims on a 12(b)(6) motion, rejecting well-pled facts that should have been accepted as true. And the court later granted summary judgment after accepting all of the defendants' disputed factual positions and failing to mention any of Wang's 108 additional material facts filed in opposition. This Court should reverse certain decisions below and remand for further discovery followed by a trial on the merits.

V. STATEMENT OF THE CASE AND FACTS

A. Relevant Factual History

1. The Parties and Their Relationships

This case's narrative is somewhat complicated by facts relevant to whether certain defendants engaged in state action. Some initial background on the parties is therefore necessary. A chart summarizing this background is provided at the end of this section.

a. Pitt, UPMC, and UPP

The University of Pittsburgh is a "State-related institution in the Commonwealth system of higher education," 24 Pa. Stat. §2510-202, comprised of various schools including the School of Medicine ("Medical School").

UPMC exists, in part, for the purpose "of operating for the benefit of, to perform the functions of and to carry out the purposes of the University of Pittsburgh of the Commonwealth System of Higher Education." Appx2828. In 1998, Pitt and UPMC reorganized their relationship pursuant to a set of Relationship Agreements. Appx2837. Under these agreements, Pitt appoints one-third of the directors of UPMC, and one of these directors is always Pitt's Senior Vice Chancellor for Health Sciences. Appx2837; Appx2845. During the relevant time period, Dr. Anantha Shekhar held this position, as well as the title of Dean of the School of Medicine. Appx1926-1927 (Shekhar Deposition).

Pitt and UPMC jointly function as an “academic medical center.” Pitt oversees all academic priorities, particularly faculty-based research. Appx1950-1952, 1960-61 (Shekar Dep.); Appx2832. UPMC oversees clinical activity. A wholly-owned subsidiary of UPMC, UPP, manages the clinical practice of Pitt’s Medical School faculty physicians. Appx2837.

The Academic Affiliation Agreement defines the operational relationship between Pitt, UPMC, and UPP. Appx1897-1909; Appx2837. Section 3.4 of this agreement states: “The University reserves to itself authority and responsibility for all matters not specifically transferred to [UPMC] hereunder, including all traditional matters of University governance such as academic appointments, promotions, tenure, student affairs, curriculum, publications, research, and research integrity policies.” Appx1901. Importantly, Pitt (the State-related institution) has exclusive authority over publications, research, research integrity, and relationships with medical students. Appx1965-1966 (Shekhar Dep.). Pitt has a research integrity policy, which applies to dually employed faculty. Appx1966-1974. Pitt also has a responsibility to defend the academic freedom rights of its faculty, like Dr. Wang, concerning their publications and research. Appx1966.

b. Dr. Norman Wang

Dr. Norman Wang, an Associate Professor at the Medical School, has been dually employed by Pitt and UPP since 2008. Appx2794 (Wang Declaration). As

is the standard practice for dually employed faculty, he has a contract on Pitt letterhead signed by Pitt and UPP. Appx1122-1125. He has a separate contract with UPP. Appx1127-1136. Wang's employment contracts divide his work by percentages into the categories of "Clinical," "Research," and "Teaching." Appx1123; Appx2591. "Research" is work done on behalf of Pitt. Appx1987-1988 (Shekhar Dep.). Wang is a cardiologist specializing in electrophysiology. He sees patients and performs procedures at certain UPMC hospitals. Since 2008, Wang has published scores of peer-reviewed articles in the field of cardiology. Until August 2020, Wang taught medical students, residents, and fellows, during inpatient consulting while on hospital rounds, in the electrophysiology lab, by giving lectures within the group, and by mentoring research projects. Appx2794-2795 (Wang Dec.). In 2017, Wang was appointed Director of the Clinical Cardiac Electrophysiology Fellowship Program. Wang reports to one person, Dr. Samir Saba, in both Wang's Pitt capacity and in his UPMC capacity. Appx2439-2440 (Wang Dep.); Appx2795 (Wang Dec.). Until July 31, 2020, Wang was viewed as a model employee. Appx2578-2579.

c. Drs. Saba, Gladwin, and Berlacher

Dr. Samir Saba is dually employed by Pitt and UPP. Appx1399 (Saba Dep.). In his Pitt capacity, he is a Professor of Medicine and the Chief of the Division of Cardiology. The Division of Cardiology is part of Pitt, not UPMC.

Appx1173-1174 (Gladwin Dep.); Appx1400-1401 (Saba Dep.); Appx1682-1683 (Berlacher Dep.). In his UPMC capacity, he is a Co-Director of the Heart and Vascular Institute (“HVI” or the “Institute”), a clinical service line combining cardiology, cardiothoracic surgery, and vascular surgery. Appx1402 (Saba Dep.) In 2020, Saba reported to Dr. Mark Gladwin in Saba’s Pitt capacity, and to Dr. Steve Shapiro (Executive VP of UPMC and President of UPP) in Saba’s UPMC capacity. Appx1173-1174, 1235 (Gladwin Dep.); Appx2018 (Shekhar Dep.).

In 2020, Gladwin was dually employed by Pitt and UPP. In his Pitt capacity, he was a Professor of Medicine and Chair of the Department of Medicine. Although there is only one Department of Medicine, the Department is funded by both Pitt and UPMC, and Gladwin had specific areas of responsibility for each institution. On the Pitt side, Gladwin was responsible for academic matters, including research. On the UPMC side, Gladwin was responsible for clinical matters. Appx1155-1158, 1167-1168 (Gladwin Dep.); Appx2883 (Gladwin offer letter). The Institute was carved out of the Department of Medicine, and was outside of Gladwin’s authority. Appx1171, 1246, 1249-1250, 1263-1266, 1279-1281, 1348. In 2020, Gladwin reported to Dr. Shekhar in Gladwin’s Pitt capacity, and to Shapiro in Gladwin’s UPMC capacity. Appx1173.

Dr. Kathryn Berlacher is dually employed by Pitt and UPP. In her Pitt capacity, she was an Assistant Professor of Medicine in the Division of

Cardiology. In her UPMC capacity, she has various titles including Program Director, Cardiology Fellowship Program, and Subspecialty Education Coordinator, Cardiology. All of these titles are listed on her Pitt faculty profile on Pitt's website without any mention of UPMC. Appx1636-1641 (Berlacher Dep.). Berlacher has a general supervisory responsibility over all cardiology fellowship programs, including those that have their own program director. In addition, she is responsible for residents. Appx1641-1643, 1663-1664. Berlacher reports to one person, Saba, in both her Pitt capacity and her UPMC capacity. Appx1643-1644.

d. Dr. Shekhar

Shekhar oversees Pitt's six health sciences schools and is an officer of Pitt. He reports to Pitt's Chancellor and Board of Trustees. In 2020, Pitt's Chancellor was Patrick Gallagher. Appx1927-1929, 2026-2027, 2151 (Shekhar Dep.). Although a member of the UPMC Board, as well as the boards of several UPMC subsidiaries, including UPMC Medical Education, Shekhar is not employed by UPMC or UPP. Appx1929-1931. In 2020, Shekhar had regular weekly telephone calls with Gallagher, typically lasting half an hour. Starting in the first week of August 2020, they discussed the events concerning Wang, and Gallagher would convey this information to Pitt's Board. Appx2026-2027, 2032-2033, 2103-2105, 2161-2164.

e. The Graduate Medical Education Program

Graduate medical education (“GME”) concerns the training of residents and fellows after their graduation from medical school. Residents and fellows are employees of the GME program, and work under the supervision of more senior physicians. Medical students are not a part of GME. Appx1662-1663 (Berlacher Dep.); Appx2321-2322 (Bump Dep.). At UPMC, residents and fellows are employed by UPMC Medical Education, a wholly-owned subsidiary of UPMC, and are taught by faculty who are dually employed by Pitt and UPP. Appx1990 (Shekhar Dep.); Appx2320-2322 (Bump Dep.). All GME programs must be accredited by the Accreditation Council for Graduate Medical Education (“ACGME”). Appx2229, 2328, 2332-2333, 2342-2343. Under ACGME requirements, the sponsoring institution must have a Designated Institutional Official (“DIO”) and a Graduate Medical Education Committee (“GMEC”). Since 2019, Dr. Gregory Bump has been the DIO and Chair of the GMEC. A dual employee, Bump is also Associate Dean for Graduate Medical Education at the Medical School, and reports to Shekhar. Appx1993-1994 (Shekhar Dep.); Appx2210-2216, 2340-2342 (Bump Dep.). Individual GME programs are each run by a program director. The program directors, dually employed faculty, must be approved by the GMEC and the ACGME. Appx2235-2236, 2273-2274, 2319-2320 (Bump Dep.). Pitt maintains multiple pages on its website about the GME

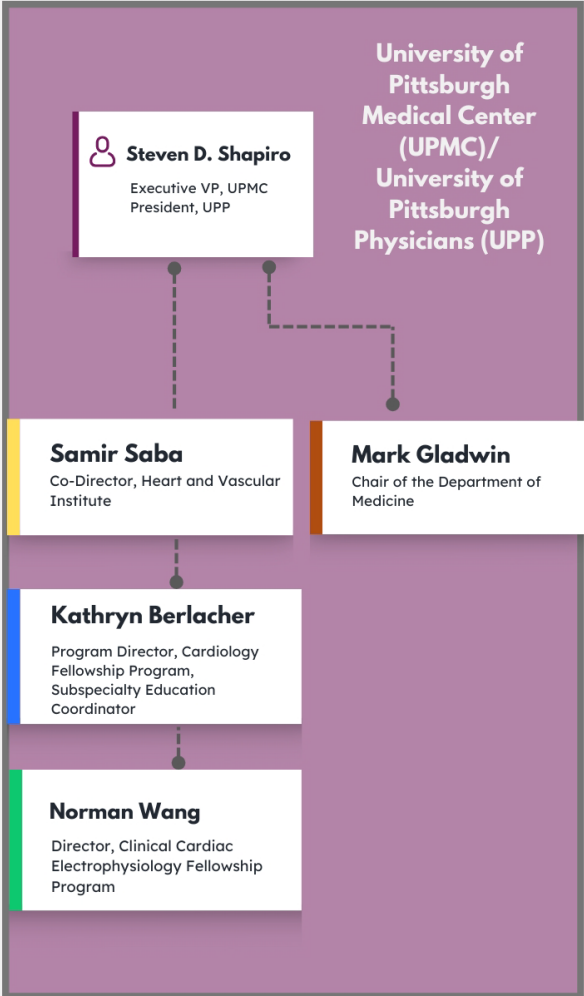
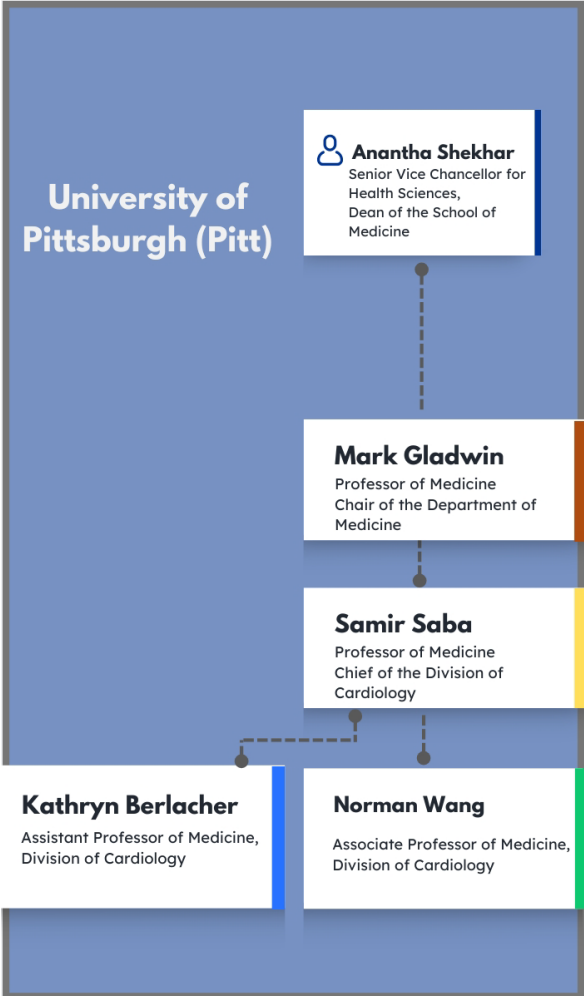
programs. On these pages, the programs are often presented as operated by Pitt. Appx2888-2897; Appx2899-2904; Appx2906-2914; Appx2312-2318 (Bump Dep.). Critically, these GME programs could not operate without the Pitt affiliation. Appx1994 (Shekhar Dep.).

f. AMA, Wiley, and Dr. Simon²

The American Heart Association, Inc. (“AHA”) and Wiley Periodicals LLC (“Wiley”) are the publishers of the Journal of the American Heart Association (“JAHA”). Dr. Marc Simon was a professor in the Division of Cardiology at the Medical School. Appx138.

² AHA, Wiley, and Simon were named as defendants in Wang’s First Amended Complaint (Appx0136) and were dismissed pursuant to Rule 12(b)(6) (Appx0051-0052).

Academic Medical Center



2. Wang Publishes An Academic Article Opposing Race-Conscious Selection Policies Affecting Cardiology

In 2019, Wang was concerned about new diversity and inclusion initiatives that were impacting cardiology. The American College of Cardiology (“ACC”) had a Diversity and Inclusion Initiative. The ACGME had announced it would be using a new diversity metric to evaluate GME programs (and subsequently began using it). Appx2449-2454 (Wang Dep.).

Berlacher was the ACC Pennsylvania Chapter Governor, and had publicized her support for the ACC’s diversity initiative. She was also the founder of a high school program called “I Look Like a Cardiologist” that was only open to people of certain races. Appx1686-1693 (Berlacher Dep.); Appx2467 (Wang Dep.); Appx2928-2932 (interview). ACGME’s new diversity metric was expressed in ACGME’s 2019 Common Programs Requirements Section I.C.³ Appx2944. Wang was concerned that, as had already proven to be the case with the Liaison Committee of Medical Education at the medical school level, ACGME had the power to impose diversity metrics on GME programs. Appx2452-2453, 2504-2505.

³ On May 8, 2025, ACGME suspended the operation of Requirement I.C., apparently in response to President Trump’s Executive Order 14279, *Reforming Accreditation To Strengthen Higher Education*, 90 Fed. Reg. 17529 (Apr. 23, 2025). (See <https://www.acgme.org/newsroom/2025/5/acgme-board-executive-committee-action/>.)

Wang was aware of the following statement appearing in the cardiology fellowship 2019 Annual Program Evaluation: “Diversity is central to our mission and we again commit to focusing our efforts and resources to work towards creating a more diverse workforce.” Appx2469-2471, 2493 (Wang Dep.), Appx2995 (evaluation). Other doctors in the division had expressed concern to Wang that discrimination was taking place. Appx2463-2465, 2473-2476.

In 2019, Wang wrote an academic article on diversity and the cardiology workforce, tracing the history of the use of race as a factor in determining admission into medical schools, residency programs, and fellowships. The article asserted that these programs were applying different standards based on race to achieve the goal of increasing the percentages of underrepresented races in the medical profession generally, and cardiology in particular, and raised legitimate scholarly questions about the legality, effectiveness, and wisdom of doing so. The article looked at ACC’s diversity initiative and ACGME’s diversity metric in the context of GME. Finally, the article opined that the cardiology field was violating antidiscrimination laws with the use of race as a factor in hiring, recruitment, promotion, and admissions. Appx2629-2645 (article); Appx2484-2487 (Wang Dep.). Though denounced by defendants in the coming months, Wang’s article advanced standard legal conclusions about the use of racial preferences in

education which were strengthened further in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

Wang submitted his article to JAHA. Following peer review, JAHA agreed to publish Wang's article as a 17-page "White Paper" under the title, *Diversity, Inclusion, and Equity: Evolution of Race and Ethnicity Considerations for the Cardiology Workforce in the United States of America From 1969 to 2019*. The article was placed online on March 14, 2020. Appx2485-2486 (Wang Dep.); Appx2629-2645 (article); Appx2795 (Wang Dec.). Wang received no negative feedback about his article before July 31, 2020. Appx2487-2488.

3. Appellees Launch a Campaign of Denunciation and Cancellation Against Wang

On July 29, 2020, Dr. Vaughn Clagette, a Pitt Trustee, began distributing links to Wang's article and demanding that action be taken against Wang. Appx2011-2013, 2018-2021 (Shekhar Dep.); Appx2657-2660 (email). Clagette's complaints reached Saba and Berlacher on July 29 and Gladwin and Shekhar on July 30. Appx1232-1236 (Gladwin Dep.); Appx1483-1487 (Saba Dep.); Appx1714-1715 (Berlacher Dep.); Appx2011-2014, 2018-2020 (Shekhar Dep.). They understood that Wang's article, although expressed at an industry-wide level, was a criticism of race-conscious selection policies at Pitt and UPMC. Appx1339-1340 (Gladwin Dep.).

UPMC was in fact employing race to favor “underrepresented in medicine” (URM) candidates. Residents and fellows were being selected for the GME programs based on a review process that employed preferences for students of certain races. The same was true for the selection of faculty. Appx1224-1225, 1301-1309 (Gladwin Dep.); Appx2283-2285, 2296, 2349-2354 (Bump Dep.); Appx3013 (email). Dr. Joon Lee, a former head of cardiology, summarized the situation in an email to Shekhar: “Diversity in the training program has been at the soul of the culture of HVI for many years and the training program has been breaking the mold with nearly 50% women and URM numbers several fold over the average cardiology training program in the country.” Appx2044-2045 (Shekhar Dep.); Appx3017-3018 (email). Lee later posted the following tweet about Wang: “this is eerily similar to anti-affirmative action groups using rejected Asian students to sue Harvard in [an] attempt to stop affirmative action admission policy.... We must reject these efforts and work together.” Appx3022. In short, Lee rejected what the Supreme Court soon required in *Students for Fair Admissions*.

Shekhar found the paper “incredibly offensive and racist (with an added element of resentment from an Asian[’]s lens),” and felt “particularly compelled to rebut this repulsive pseudo scholarly article.” Appx2662 (email). Saba, Berlacher, Gladwin, and Shekhar were all parties to emails about Wang’s article on July 30.

Gladwin and Shekhar spoke by telephone. Shekhar also spoke with Saba. Appx1234-1238 (Gladwin Dep.); Appx1510-1513 (Saba Dep.); Appx1722-1724 (Berlacher Dep.); Appx2023-2024, 2037-2039 (Shekhar Dep.). Late on July 30, Shekhar was copied on an email stating: “HVI is going to take all leadership away.” Shekhar replied: “thanks for some action on the side of his leadership role within GME.” Appx2657.

Early on Friday, July 31, Saba asked Wang to attend a meeting in Saba’s office at 8:00 a.m. Saba used this same office in both his Pitt capacity and his UPMC capacity. Berlacher was also present. Appx2795-2796 (Wang Dec.). After Wang walked in, Saba said he had become aware of the paper Wang had written and was very disturbed by it. Saba started criticizing the article, saying that people had talked to him about misquotes, and falsely asserted the article ascribed certain traits or characteristics to groups. Berlacher accused Wang—who is Asian—of being a racist. Saba said, “You know what we are trying to do here, Norm.” Wang took this to mean they were engaging in race discrimination in the GME programs. Wang responded by talking about what the law required. Saba asked Wang what his goal was in writing the paper. Wang said, “I just wanted us to follow the law.” Saba responded by saying, “laws can change.” Wang spoke to Berlacher about their contracts with the GME fellows, which say that they don’t discriminate based on race. Berlacher did not respond. Saba said that, because of

Wang's views in the paper, Wang could not be program director anymore.

Appx2487-2496, 2531-2532 (Wang Dep.); Appx2796 (Wang Dec.).

After the meeting, Saba sent emails reporting on what had taken place to Gladwin and Shekhar. Appx2671. Saba then sent an email about Wang to two HVI listservs, copying Gladwin and blind copying Shekhar. The email announced that Wang had been removed as program director, and that the views in his paper "do not reflect, in any way, the views of the division of cardiology, the HVI or UPMC." Appx2026-2027 (Shekhar Dep.); Appx2675-2676 (email). On August 1, Saba sent Wang an email informing him that he was removed as program director. Saba signed the email with a signature block identifying Saba's roles both with Pitt and with UPMC. Appx2679.

Emails and discussions about what to do about Wang continued through the weekend and into the next week. Appx0597-0603 (email); Appx1738-1747 (Berlacher Dep.). With the encouragement of a large group of dually-employed faculty, Berlacher took the lead in posting negative comments about Wang to Twitter. Appx3034-3035, 3044 (emails). She posted an initial tweet (on August 2) using her account as program director: "@PittCardiology I'm looking at you. What do we stand for? What do you think of this OPINION piece that misinterprets data and misquotes people? @JAHA_AHA this is scientifically invalid and racist." She then replied to her own tweet using the official Pitt Cardiology Twitter account:

“@PittCardiology stands for diversity equity and inclusion across the board. This article uses misquotes, false interpretations and racist thinking to defend a single person’s conclusion. We are outraged that @JAHA_AHA published this shameful and infuriating piece.” Appx1762-1770 (Berlacher Dep.); Appx2682 (tweet). Other, similar tweets by Berlacher followed. Appx0609; Appx2686.

For about two weeks, Wang was the biggest thing on medical Twitter. It was very uncomfortable for him to go to work. Colleagues whom he had been friendly with for over ten years just stopped talking to him. Appx2516-2518; 2577-2578 (Wang Dep.). In an email to Berlacher and other faculty on August 2, Saba predicted “that the social environment here will become untenable for Norm and this will lead to him leaving UPMC,” and cautioned that there were risks in “pushing from above for Norm to be ostracized.” Appx0597. On August 3, Berlacher received a text from another doctor in the division concerning Wang: “One more thing crossed my mind... I’m sure you guys are on it is the issue of his overall suicide risk.... it must not be easy to get all this push back and come back to work. Just a thought.” Appx3051-3052.

On August 4, Berlacher (with Saba co-signing) sent Wang an email notifying him that, “[d]ue to [his] recent publications, expressed beliefs and [his] ongoing stance to defend them”:

we can no longer have you serve in any medical education role in the institution, specifically pertaining to the general cardiology and electrophysiology fellows, while also including medical students and residents. This relates to any and all supervisory and evaluative capacities for trainees, including but not limited to serving as the attending of record on service or during a procedure, teaching didactics, precepting clinics, and mentoring research projects.

Appx2706. Saba obtained Bump's approval before sending this email. Appx1540 (Saba Dep.). Because the email precluded Wang from having any "educational" contact with medical students, residents, or fellows, he could no longer consult with patients at UPMC's main teaching hospital, UPMC Presbyterian. After this adverse employment action, Wang was assigned only to hospitals other than Presbyterian. Appx2422-2424, 2522-2526, 2551 (Wang Dep.).

On August 5, Saba sent an email to JAHA requesting Wang's article be withdrawn. There were seven signatories to this email: five doctors affiliated with Pitt or UPMC—Saba, Berlacher, Shekhar, Clagette, and Conrad Smith—and two doctors from ACC's Task Force on Diversity and Inclusion. Appx1554-1559 (Saba Dep.); Appx1693-1694, 1809 (Berlacher Dep.); Appx2708-2717 (email). The signatories asserted that the article contained "blatant scientific falsehoods and misquotes." Appx2708. This was false. Wang's article contains no scientific falsehoods and no misquotes. Under this external pressure in a charged political environment, JAHA retracted Wang's article on August 6. Appx2797. Wang's

paper was retracted without affording him any input, which is highly unusual.

Appx2542-2543 (Wang Dep.).

On August 6, Shekhar emailed a statement about Wang's article to a Medical School listserv, and his staff posted the statement to Pitt's official Twitter account. Shekhar stated that the views expressed in Wang's article were "against equity and inclusivity" (they are not), and "do not reflect the values of the University and its School of Medicine." Appx2068-2069, 2076-2077 (Shekhar Dep.); Appx2751 (email); Appx2769 (tweet). On August 6, Saba sent an email about Wang's article to two HVI listservs, Gladwin, Shekhar, and others. Saba stated that the views expressed in Wang's paper "do not, in any way, reflect the views of the division of cardiology, the Heart and Vascular Institute (HVI), or UPMC," and that Wang had been "removed ... from all supervisory and recruiting roles in medical education." Appx2761-2762. On August 7, Gladwin sent an email about Wang's article, using a Medical School listserv, to the entire faculty of the Medical School from his Pitt email. Appx1321-1322 (Gladwin Dep.). Gladwin announced that the perspective in Wang's article "was antithetical to our values and deeply hurtful to many of our URM faculty," and that, "We have taken immediate action and removed the person from their [sic] leadership position." Appx2764-2765.

Shortly after Wang was removed as program director, Bump edited a draft annual update for the electrophysiology fellowship that Wang had prepared for uploading to ACGME's website. Bump removed Wang's language on "Diversity," which had focused on nondiscrimination, and replaced it with new language listing the steps being taken "to achieve diversity," including the "[h]olistic review of applicants at the time of interview and during ranking." Appx2236-2244, 2367-2368 (Bump Dep.); Appx3083 (email); Appx3144-3145 (update).

4. After Inquiries Regarding Academic Freedom, and the Launch of a Federal Investigation, Pitt Attempts to Disguise Its Involvement

Dr. Maria Kovacs is a Professor at the Medical School and the Co-Chair of Pitt's Tenure and Academic Freedom Committee ("TAFC"). One of the functions of the TAFC is to defend the academic freedom rights of Pitt faculty. Appx2114-2115, 2124 (Shekhar Dep.). On August 10, 2020, Kovacs reached out to Wang and expressed concern with the way Wang, a Pitt faculty member, had been treated by Pitt. Appx2535-2537 (Wang Dep.). On August 27, Kovacs sent an email to Shekhar, attaching copies of Saba's August 1 email and Berlacher's August 4 email (the latter of which precluded Wang from having contact with, *inter alia*, medical students). Appx2114-2117, 2176 (Shekhar Dep.); Appx3177-3179 (email); Appx3181 (email). On September 2, the American Association of

University Professors (“AAUP”) emailed a letter about Wang to Gallagher, copying Shekhar, who forwarded the letter to Gladwin, Saba, and Berlacher. Appx2126-2128 (Shekhar Dep.); Appx3185-3186 (email); Appx3188-3221 (letter). Gladwin replied to Shekhar on September 3, stating: “Our most challenging position is that his writings directly conflict with our institutional priorities to educate, recruit and retain a diverse workforce and thus *we* cannot allow him to teach medical students and fellows, and to select residents for EP fellowship.” Appx3183-3184 (emphasis added).

On September 15, Shekhar participated in a Zoom meeting about Wang with the members of the TAFC. Appx2121-2124 (Shekhar Dep.). On October 7, Pitt received a letter from the U.S. Department of Education announcing the Department had opened an investigation of Pitt because Pitt had targeted Wang “with a campaign of denunciation and cancellation.” Appx3223-3234.

On October 14, Kovacs emailed Shekhar a memorandum from the TAFC with follow-up to the September 15 meeting. The memorandum requested, *inter alia*, the full reinstatement of Wang’s teaching and research mentoring responsibilities and a letter of acknowledgement and apology for Pitt’s failure to follow due process in connection with the accusations regarding Wang’s published article. Appx2123-2124 (Shekhar Dep.); Appx3237-3238 (memorandum). Pitt has a Research Integrity policy that provides a formal procedure for adjudicating

allegations of “Research Misconduct” in connection with “Research,” and provides due process rights for accused members of Pitt’s faculty. Pitt did not follow the policy in Wang’s case. Appx1967-1973 (Shekhar Dep.).

Shekhar realized that it would be difficult for Pitt to deny involvement with the part of the adverse action that precluded Wang from having contact with medical students (about which Shekhar had known for months), and Shekhar modified that prohibition using grandiose language celebrating academic freedom. On October 22, Shekhar issued a memorandum on Pitt letterhead to Medical School leadership. The memorandum states: “[T]he University’s policies reflect an academic environment in which freedom of speech and academic freedom are valued and afford faculty certain rights and procedural due process. The University, not UPMC, has governance over research, students, and teaching at the School of Medicine.” Appx3240. On October 27, Shekhar issued a memorandum on Pitt letterhead to Gladwin, Saba, and Berlacher. The memorandum states: “At the School of Medicine, Dr. Wang is permitted to teach and to mentor matriculated medical students. He is permitted to conduct research, publish articles, and undertake any other faculty activities.” Appx912. On October 27, Shekhar sent a letter on Pitt letterhead to Wang. The letter states: “there are no restrictions on your ability to teach and mentor matriculated students at the School of Medicine, should you desire to do so going forward. Additionally, you are in no way

prohibited from conducting research, publishing articles, representing yourself as a member of the School of Medicine faculty, or undertaking any other faculty activities.” Appx0913. The October 27 letter was the first time anyone told Wang he was no longer prohibited from contacting medical students. Appx2518-2521 (Wang Dep.).

On November 10, Shekhar sent a letter on Pitt letterhead to the AAUP regarding Wang. Appx3242-3245. That letter, the contents of which Shekhar confirmed at deposition, identified the recipients of his October 27 memo (Gladwin, Saba, and Berlacher) as the individuals involved in the “personnel decisions regarding Dr. Wang.” Appx3243, ¶b (letter); Appx 2150-2151 (Shekhar Dep.). On the same day, Shekhar issued a memorandum on Pitt letterhead responding to the TAFC regarding Wang. Appx3247-3248.

B. Relevant Procedural History

Wang initiated this action on December 15, 2020. Appx0119.

On March 19, 2021, Wang filed a First Amended Complaint asserting, *inter alia*: (1) retaliation in violation of the First Amendment and §1983 against Pitt, UPMC, UPP, Gladwin, Saba, Berlacher, and Does 1-5; (2) retaliation in violation of Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §1981 against UPMC and Pitt; and (3) defamation against Pitt, UPMC, UPP, Saba, Berlacher, AHA,

Wiley, and Simon, and Does 6-10. Appx0136-0156. Wang demanded trial by jury. Appx0157.

Appellees moved to dismiss most of the claims pursuant to Rule 12(b)(6). Appx0159; Appx0172; Appx0197; Appx0218; Appx0224. On December 21, 2021, the District Court granted all of the motions to dismiss, some with and some without leave to amend. Appx0001; Appx0054.

On January 11, 2022, Wang filed notice of his intent to stand on the allegations of the First Amended Complaint as to all the dismissed claims except the First Amendment claim against Pitt, which Wang would replead. Appx0282. Wang filed a Second Amended Complaint (“SAC”) the same day, asserting, *inter alia*: (1) retaliation in violation of the First Amendment and §1983 against Pitt, Gladwin, Saba, and Berlacher, and (2) retaliation in violation of §1981 against UPMC. Appx0270.

UPMC answered. Appx0293. Pitt, Gladwin, Saba, and Berlacher moved to dismiss pursuant to Rule 12(b)(6). Appx0284; Appx0289. On April 4, 2022, the District Court denied Gladwin, Saba, and Berlacher’s motion to dismiss but granted Pitt’s motion to dismiss, with leave to amend. Appx0302; Appx0315.

On May 18, 2022, Wang filed a Third Amended Complaint (“TAC”) asserting: (1) retaliation in violation of the First Amendment and §1983 against Pitt, Gladwin, Saba, and Berlacher, and (2) retaliation in violation of §1981 against

UPMC. Appx0317. UPMC, Gladwin, Saba, and Berlacher answered. Appx0352. Pitt moved to dismiss the First Amendment claim against it pursuant to Rule 12(b)(6). Appx0347. On August 31, 2022, the District Court granted Pitt's motion to dismiss without leave to amend. Appx0059; Appx0071.

On May 9, 2023, after completing administrative prerequisites to filing employment discrimination claims, Wang filed a motion for leave to file a Fourth Amended Complaint adding a new claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. §955, against Pitt, UPMC, and UPP. Appx0363. The District Court granted the motion on June 14, 2023 (Appx0374), and Wang filed his Fourth Amended Complaint later that day, asserting: (1) retaliation in violation of the First Amendment and §1983 against Gladwin, Saba, and Berlacher; (2) retaliation in violation of §1981 against UPMC; and (3) retaliation in violation of Title VII and the PHRA against Pitt, UPMC, and UPP. Appx0379.

Pitt alone filed a motion to dismiss pursuant to Rule 12(b)(6). Appx0452. On August 22, 2023, the District Court granted Pitt's motion to dismiss in part, holding that Wang's published article did not constitute protected opposition activity within the meaning of Title VII and the PHRA, and this part of his retaliation claim would be dismissed without leave to amend. Appx0072; Appx0085.

On March 29, 2024, both UPMC, UPP, Gladwin, Saba, and Berlacher (Appx0496) and Pitt (Appx1105) filed motions for summary judgment. The court heard oral argument on December 4, 2024. Appx3627. On March 26, 2025, the court granted the motions in full. Appx0087. Judgment was entered the same day. Appx0109.

Wang filed a notice of appeal on April 24, 2025. Appx0111.

C. Rulings Presented For Review

There are four sets of rulings presented for review:

1. Memorandum Opinion and Order of December 21, 2021

On December 21, 2021, the District Court dismissed certain claims from Wang's First Amended Complaint pursuant to Rule 12(b)(6). Appx0001; Appx0054. Among these dismissals, Wang appeals:

1) from the court's dismissal of his First Amendment claim against UPMC and UPP. The dismissal was without leave to amend. The court held that UPMC and UPP are not state actors and there was no set of facts that Wang could plead that would convert them into state actors. Appx0016.

2) from the court's dismissal of his Title VI claim against UPMC. The court held that Wang failed to plead that UPMC receives federal funds for the primary purpose of funding employment. Appx0019.

3) from the court's dismissal of his Title VI and §1981 claims against Pitt. The court held that the pleading did not support that Pitt, as opposed to UPMC, had taken any adverse action against Wang. Appx0020-0022.

4) from the court's dismissal of his defamation claims against Pitt, UPMC, UPP, Saba, Berlacher, AHA, Wiley, and Simon. As to the majority of these parties, the court held that Wang was required to allege that the defendants had acted with actual malice and had failed to do so. As to AHA and Wiley, the court held that it could address the defense of truth, and the statements at issue were true. Appx0022-0038.

2. Memorandum Opinion and Order of August 31, 2022

On August 31, 2022, the District Court dismissed Wang's First Amendment claim against Pitt from the TAC pursuant to Rule 12(b)(6). Appx0059; Appx0071. The dismissal was without leave to amend. The court's reasoning was that Wang had failed to plead that Pitt officials with policymaking authority had taken action. Appx0067-0069.

3. Memorandum Opinion and Order of August 22, 2023

On August 22, 2023, the District Court dismissed in part Wang's Title VII and PHRA claims against Pitt from Wang's Fourth Amended Complaint pursuant to Rule 12(b)(6). Appx0072; Appx0085. The dismissal was without leave to amend. The court's reasoning was that Wang's published article did not constitute

protected opposition activity within the meaning of Title VII and the PHRA. Appx0080-0083.

4. Memorandum Opinion and Order of March 26, 2025

On March 26, 2025, the District Court granted summary judgment to Pitt, UPMC, UPP, Gladwin, Saba, and Berlacher on all claims in Wang's Fourth Amended Complaint. Appx0087; Appx0109. The court concluded that there were no genuine issues of material fact:

- 1) that Gladwin (who was clearly a state actor in the context of this case) was not personally involved in the retaliation against Wang (Appx0095-0096);
- 2) that Saba and Berlacher had been acting solely on behalf of UPMC and not Pitt, and that Shekhar had not participated (Appx0097-0100);
- 3) that Pitt was not involved in the retaliation against Wang (Appx0102); and
- 4) that Wang's published article, either alone or in combination with his statements to Saba and Berlacher, did not constitute protected opposition activity within the meaning of Title VII, the PHRA, and §1981 (Appx0101-0107).

VI. SUMMARY OF ARGUMENT

The District Court committed reversible error in failing to give proper weight and deference to the facts Wang raised, either as those facts were pled, or as they were presented in opposition to the motions for summary judgment.

The District Court made three errors in dismissing Wang's defamation claims. First, it prematurely concluded that Wang was a public figure. Second, it erroneously concluded that Wang had failed to plead actual malice. Third, contrary to the court's ruling that the defamatory statements at issue were true, the truth or falsity of the statements could not be determined on the face of the complaint, or from any matter subject to judicial notice.

On Wang's First Amendment claim, there were genuine issues of material fact as to the existence of state action by Saba and Berlacher, and as to whether Gladwin or Shekhar were involved in the retaliation. Likewise, Wang had adequately pled that Pitt was involved in the retaliation at the level of Pitt officials with policymaking authority, and that UPMC and UPP acted under color of state authority because they acted in concert with state actors.

On Wang's civil rights claims, there were, at worst, genuine issues of material fact as to whether Wang's published article, either alone or in combination with his statements to Saba and Berlacher, constituted protected opposition activity. And more likely, Wang should prevail on this point as a matter of law.

Likewise, there were genuine issues of material fact as to whether Pitt was involved in the retaliation. The same two legal issues had previously been addressed (and resolved wrongly by the court) on earlier motions to dismiss. In addition, contrary to the court's ruling in dismissing Wang's Title VI claim against UPMC, Wang had adequately pled that UPMC receives federal funding for the primary purpose of providing employment.

VII. ARGUMENT

A. Standard of Review

All issues raised in this appeal should be reviewed under a *de novo* standard. *Levy v. Sterling Holding Co.*, 544 F.3d 493, 501 (3d Cir. 2008) (grant of summary judgment); *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008) (dismissal under Rule 12(b)(6)).

In the context of a motion for summary judgment motion under Fed. R. Civ. P. 56(a), all “[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true.” *Big Apple BMW v. BMW of N. Am.*, 974 F.2d 1358, 1363 (3d Cir. 1992). The court's function is not to make credibility determinations, weigh evidence, or draw inferences from the facts; rather, the court must simply “determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). “The evidence of the non-

movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255.

In the context of a motion to dismiss under Rule 12(b)(6), the Court must “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips*, 515 F.3d at 233. A motion to dismiss should be denied if the plaintiff has pled “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

B. The District Court Erred In Dismissing Wang’s Defamation Claims

Wang alleged the following defamatory statements in his First Amended Complaint:

- 1) On August 2, Berlacher posted her original tweet asserting that Wang’s article “misinterprets data and misquotes people” and is “scientifically invalid and racist.” Appx0145; Appx0231.
- 2) On August 2, Saba re-tweeted a copy of the tweet that had been posted to the official @PittCardiology Twitter account asserting that Wang’s article “uses misquotes, false interpretations, and racist thinking.” Appx0145; Appx0233.

3) On August 5 or 6, AHA and Wiley published a “Retraction Notice” in JAHA announcing the retraction of Wang’s article. It asserts Wang’s article “contains many misconceptions and misquotes and that together those inaccuracies, misstatements, and selective misreading of source materials strip the paper of its scientific validity.” Appx0143-0144; Appx0237.

4) On August 5 or 6, AHA issued a Press Statement on its website about the decision to retract Wang’s article. It asserts that the views expressed in Wang’s article “are a misrepresentation of the facts and are contrary to our organization’s core values and historic commitment to promoting diversity and inclusion in medicine and science.” Further, it states that AHA “take[s] our responsibility to ensure factual accuracy seriously,” that “[t]he journal can and will do better,” and that JAHA and AHA “are reviewing the journal’s peer-review and publication processes to ensure future submissions containing deliberate misinformation or misrepresentation are never published.” Appx0144; Appx0166-0167.

5) On August 6, AHA and Wiley published an article in JAHA titled, “A Path Forward.” It states the author’s institution had requested the retraction of the article “on the basis of specific scientific errors as well as misleading and incomplete quotations,” and that “JAHA and the AHA agreed completely with retraction.” Appx0144; Appx0170-0171.

6) Sometime in August, Simon published an article in JAHA titled, “Equity, Diversity, and Inclusiveness in Cardiovascular Medicine and Health Care.” Simon asserts Wang’s article “misrepresented facts to argue against affirmative action in the field of cardiology.” It further asserts the article included a “misrepresentation of evidence.” Appx0145; Appx0195.

7) Doe Defendants 6-10, acting on behalf of Pitt, UPMC, and UPP, told Wiley and AHA that the article contained “many miscitations and misquotations” as part of a “systematic attack campaign” against his article. Appx0143-0144.

Wang’s defamation claim is governed by Pennsylvania law. A claim for defamation under Pennsylvania law includes: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; and (5) the understanding by the recipient of it as intended to be applied to the plaintiff. *Graboff v. Colleran Firm*, 744 F.3d 128, 135 (3d Cir. 2014). “A statement is defamatory ‘if it tends so to harm the reputation of another as to lower him in the estimation in the community or to deter third persons from associating or dealing with him.’” *Tucker v. Fischbein*, 237 F.3d 275, 282 (3d Cir. 2001) (quoting *Corabi v. Curtis Publ’g Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (Pa. 1971)). A court should not dismiss a complaint unless it is clear the publication is incapable of a defamatory meaning. *Id.* If it is capable of a defamatory meaning, the jury

should determine whether the recipient understood the publication to have that meaning. *Corabi*, 441 Pa. at 442. Under Pennsylvania law, “[m]ixed opinions, which ‘imply the allegation of undisclosed facts as the basis for the opinion,’ are actionable.” *Monge v. Univ. of Pa.*, 674 F. Supp. 3d 195, 206-207 (E.D. Pa. 2023) (quoting *Braig v. Field Commc’ns*, 456 A.2d 1366, 1372 (Pa. Super. 1983)); accord, *Meyers v. Certified Guar. Co.*, 221 A.3d 662, 671 (Pa. Super. 2019) (“An opinion can be defamatory if it is misleading or based on undisclosed facts which are not true.”).

Here, the District Court correctly determined that all of the defamatory communications at issue were either actionable statements of fact or defamatory opinions based on undisclosed facts. Appx0024-0035. Unfortunately, it also made a number of serious errors.

1. The District Court Prematurely Concluded Wang Was a Public Figure

First, the court prematurely determined that Wang was a limited purpose public figure. Appx0025. The Third Circuit applies a two-part test for determining whether a plaintiff is a limited purpose public figure: “(1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of the plaintiff’s involvement in that controversy.” *McDowell v. Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985). Trial courts in this circuit repeatedly hold that whether a plaintiff is a limited-purpose public figure is a difficult and fact-specific

question not suitable for resolution on a Rule 12(b)(6) motion. *E.g., LifeMD, Inc. v. Lamarco*, 607 F. Supp. 3d 576, 591 (W.D. Pa. 2022); *Goldfarb v. Kalodimos*, 539 F. Supp. 3d 435, 455-56 (E.D. Pa. 2021).

There is nothing in the Amended Complaint to suggest that, before his article was published, Wang was anything but a relatively obscure academic doctor. While race-conscious practices in medical education are undoubtedly a matter of public controversy, that Wang's article was out in the academic literature for four months before anyone noticed it speaks to the non-public nature of Wang's career. The record is also silent as to the extent of the journal's readership.

Appx0139-0140.

Indeed, Wang was seemingly unknown to the general public until appellees made him a better known figure by their campaign of cancellation. Appx0140, 0143. The Third Circuit has cautioned against creating a public figure by "bootstrapping." *McDowell*, 769 F.2d at 949. "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (holding that a scientist did not become a public figure merely by publishing academic research). Like the plaintiff in *Hutchinson*, Wang did not have "the regular and continuing access to the media that is one of the accouterments of having become a public figure." *Id.* at 136.

2. Wang Adequately Alleged Actual Malice

Second, aside from prematurely determining that Wang was a limited purpose public figure, the court erred in determining that Wang had failed to adequately plead actual malice as to Saba, Berlacher, and Simon. Appx0023-0030. It did so even though Saba and Berlacher did not even *argue* that the amended complaint lacked allegations of actual malice. Appx0025 (“Saba did not address actual malice in his Brief or Reply Brief”); Dkt. 53, 65.

The actual malice standard requires that the defendant make the defamatory remarks with “knowledge that [the statement] was false or with a reckless disregard of whether it was false or not.” *McDowell*, 769 F.2d at 951 (alteration in original) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). “[R]eckless disregard for the truth means that the defendant in fact entertained serious doubts as to the truth of the statement ... or that the defendant had a subjective awareness of probable falsity.” *Id.* (internal quotations omitted). Since actual malice is based on the defendant’s state of mind, it can normally only be proven through circumstantial evidence. *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1089-90 (3d Cir. 1988). A court will “infer actual malice from objective facts.” *Id.* at 1090 n.35. A plaintiff need only plead facts that raise a reasonable inference that the defendant acted with actual malice. *Monge v. Univ.*

of Pa., 2024 U.S. Dist. LEXIS 87312, *25, 2024 WL 2188473 (E.D. Pa. May 14, 2024) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Here, in addition to the descriptions of the defamatory statements themselves, Wang pled the following objective circumstances from which it can be inferred that Saba, Berlacher, and Simon acted with actual malice:

1) Defendants “had reviewed and read Plaintiff’s article, and made their defamatory statements about it knowing they were false or with reckless disregard of whether they were true or false. The citations and quotations in Plaintiff’s article were clearly attributed, easily verified, and correct.” Appx0150,¶73.

2) Wang published on a highly-sensitive topic, asserting that medical schools and GME programs nationwide were engaging in illegal race discrimination in favor of certain candidates. Appx0139,¶20; Appx0178.

3) Wang was acting as a whistleblower, and within the protection of federal civil rights statutes. Appx0148-0149, 0153-0155.

4) Wang’s article was subject to peer-review prior to publication. Appx0139-0140,¶21, 0143,¶39.

5) Defendants, acting in coordination, launched “a systematic attack campaign against Plaintiff’s article,” including a deliberate effort to obtain the retraction of the article by falsely asserting it contained “many miscitations and misquotations,” bypassing the normal process for review. Appx0143,¶¶38-39.

The District Court did not acknowledge *any* of the foregoing allegations before concluding that Wang had failed to plead actual malice. In the case of Saba, who had not even raised the point, the court’s analysis was limited to two cursory sentences: “The Amended Complaint contains no factual allegations to support that Dr. Saba retweeted these statements with actual malice beyond mere conclusory allegations. There are no allegations that Dr. Saba knew that these statements were false or that he published these statements with reckless disregard for their truthfulness.” Appx0025-0026. The court’s treatment of Berlacher and Simon was similarly terse. Appx0028-0030. This was error. Wang’s pleading was more than sufficient to raise a “reasonable inference” that appellants had acted with actual malice. *Iqbal*, 556 U.S. at 678. Indeed, the fact that defendants acted in coordination to bypass the normal process for the review of faculty research constitutes a particularly strong indicator of actual malice. *Monge*, 2024 U.S. Dist. LEXIS 87312 at *28-*29 (fact that university did not use its internal mechanism for the investigation of claims against faculty before denouncing faculty member’s research was strong indicator of actual malice).

The District Court also refused to consider the allegation that Simon had said that Wang’s article included a “misrepresentation of evidence” because it “could not find” the statement in the JAHA article Simon co-authored. Appx0028.

The phrase is in the first sentence of the third paragraph of the article and, in context, is plainly referring to Wang's article. Appx0195.

The District Court also dismissed the defamation claim against UPP, UPMC, and Pitt on the ground that they were derivative of the claims against Saba, Berlacher, and Simon; and further supported dismissal of the claim against Pitt on the ground that the First Amended Complaint did not allege that the John Doe defendants acted on behalf of Pitt (Appx0036-0038). Since the claims against Saba, Berlacher, and Simon were improperly dismissed, the claims against the entities should not have been dismissed. The First Amended Complaint adequately alleged, moreover, that those three and the John Doe defendants were acting on behalf of the entities, including Pitt. Appx0138, 0140, 0143, 0149.

3. The Truth Or Falsity of the Defamatory Statements Could Not Be Determined On the Face of the Complaint

Third, the District Court erroneously determined that the statements by AHA and Wiley were true (Appx0031-0036), and that the statements by Saba, Berlacher, and Simon could be held to be true as an alternative ground for the court's ruling (Appx0026-0030). Although truth is a defense to defamation, the resolution of the truth of a defendant's statement is not normally appropriate on a motion to dismiss because it will take the court beyond the pleadings. *Fanelle v. LoJack Corp.*, 79 F. Supp. 2d 558, 562 (E.D. Pa. 2000).

In deciding a motion to dismiss, courts generally consider only the allegations of the complaint, exhibits attached to the complaint, and matters of public record. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir 1993). In addition, a court may consider a “document integral to or explicitly relied upon in the complaint.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). Here, this means the District Court could consider Wang’s article (Appx0178) and the full versions of the defamatory statements alleged in the Amended Complaint (meaning Appx0235, Appx0233, Appx0237, Appx0166, Appx0170, Appx0195).

The first problem, then, is that the complaint never referred to the Retraction Notice submitted by Wiley and AHA on their motion to dismiss, Appx0163, and Wang disputed that it did. Rather, the complaint referred to an earlier Retraction Notice that gave no “examples.” Appx0143; Appx0237. The District Court, strangely, appears to have looked at the defamatory statements but never looked at Wang’s article. Appx0032-0036. What the court focused on, almost exclusively, was the long version of the Retraction Notice published by AHA and Wiley (Appx0163).

Even that version of the Notice was defamatory. It asserts that Wang’s article “contains *many* misconceptions and misquotes and that together those inaccuracies, misstatements, and selective misreading of source materials void the

paper of its scientific validity” (emphasis added). It then presents two alleged errors from the article as “[a] *sample* of the misconceptions and misquotes” (emphasis added). Appx0163.

The first alleged “misquote” concerns a quotation appearing on page 5 of Wang’s article taken from an article published by Auseon, Kolibash, and Capers of Ohio State. Wang’s quotation reads: “... we simply made it a priority to rank [underrepresented in medicine] applicants more aggressively than in previous years, thus achieving success in matching them regardless of recruiting efforts, with the implication being that we accepted less competitive applicants in an effort to increase diversity.” Appx0182. The Wiley/AHA Retraction Notice does not dispute that precisely these words appear in the source article, but claims this quotation was “taken out of context” because Wang did not also include the sentence that immediately followed his quoted passage: “Although the measure of an applicant’s achievement reflected in his or her application and, by extrapolation, the applicant’s potential for being a successful fellow, cannot be fairly quantified, USMLE score comparison shows no significant difference between URM and non-URM fellows matched to the OSU program.” Appx0163.

One clearcut error is that the court simply assumed the defamatory assertion in the Retraction Notice (that the article omitted an important sentence) was true, a conclusion that could only be made by going outside the complaint, the article, and

even the improperly-considered Retraction Notice. But even if Wang’s alleged omission of a sentence from a source article could be considered on a motion to dismiss, the determination that the *omission* was a *misquotation* required the court to decide a crucial jury question: how a “reasonable reader,” in the context of a retraction notice, would understand “misquote.” Wang’s article was about race discrimination, and the quotation he did use (we ranked certain candidates more “aggressively”) related to that issue. The omitted sentence (that there were no “significant” difference in scores on a single examination *that the authors believed did not accurately gauge potential for success*) did not.

The second alleged error in Wang’s article concerns a passage appearing at page 11. Here, Wang cites to a 1995 study as having “demonstrated primary care physicians who were not board certified were 1.6 times more likely to work in rural underserved areas when compared with board certified counterparts.” Appx0148. The Retraction Notice claims that Wang’s “quote” is “mischaracterized” because the original source is making a comparison between non-board-certified family and general care physicians and other non-board-certified physicians, rather than between non-board-certified primary care physicians and board-certified primary care physicians. Appx0163-0164.

This alleged error, like the first, cannot be ascertained from the allegations of the complaint, the article, or even the improperly-considered Retraction Notice.

Moreover, it does not involve a quotation and obviously cannot be a *misquotation*. Even if Wang made a mistake in citing the passage at issue, a single, isolated, and seemingly inconsequential error does not support the Retraction Notice's broad claim.

Indeed, the District Court simply ignored the defamatory thrust of the statement: that there were *many* misquotes and miscitations (plural for both) that *void the paper of its scientific validity*. The two purported errors in the Retraction Notice were just a *sample*. This clearly implied many others, especially given that the article is 17-pages of double-column text with 108 endnotes. Appx0178-0194. *Buckley v. Littell*, 539 F.2d 882, 895-96 (2d Cir. 1975) (affirming judgment of defamation based on statement that journalist had libeled "several people"; statement was false even though journalist had been sued for libel and one such suit was successful by way of settlement).

The District Court identified no other evidence to support the truthfulness of any of the alleged defamatory statements, all of which made similar claims about "misquotes," "false interpretations," "scientific errors," "misrepresentation," and "racist thinking," said to be grave enough to require the retraction of the article. AHA went even further in its Press Statement, wherein it plainly implied that Wang's article contained "deliberate misinformation," Appx0167, a particularly

pernicious defamatory statement that accused Wang of knowing lies. The District Court never bothered to address it.

The District Court erred in addressing the defense of truth in the context of a Rule 12(b)(6) motion.

C. Wang Has a Valid Claim for Retaliation In Violation of the First Amendment

1. A Jury Should Have Been Permitted to Determine Whether Gladwin, Saba, and Berlacher Violated the First Amendment

To establish a claim under §1983, a plaintiff must demonstrate that (1) the conduct at issue was committed by a person acting under the color of state law (i.e., that there was “state action”) and (2) the conduct deprived the plaintiff of rights secured under the Constitution or laws of the United States. *Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 753 n.6 (3d Cir. 2019).

The District Court granted summary judgment to Gladwin, Saba, and Berlacher on Wang’s First Amendment claim, holding that Wang had failed to raise a genuine issue of material fact as to the existence of state action. Appx0092-0100. This was error.

The test for whether state action exists is fact-dependent. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295-96 (2001). Here, the District Court overlooked a number of facts common to all three of the individual defendants. First, it is acknowledged that Gladwin, Saba, and Berlacher were

employees of the state, because Pitt, their co-employer, is a state actor. *See Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 101-102 (3d Cir. 1984) (Pitt is an instrumentality of the state by virtue of Pennsylvania statute). “State employment is generally sufficient to render the defendant a state actor.” *West v. Akins*, 487 U.S. 42, 49 (1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 n. 18 (1982)). “[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.” *Id.* at 50. Gladwin, Saba, and Berlacher were, of course, dual employees, being employees of both Pitt and UPP.⁴

Second, in the context of First Amendment retaliation, the District Court only addressed two of the instances of retaliation against Wang—his removal as fellowship director and the bar on his contact with medical students, residents, or fellows. Appx0092-0101. The court failed to address the other instances of retaliation that had been pled: that Wang was subject to a campaign of attack against his article, including attempts to have it retracted without affording him traditional academic due process (Appx0391-0392, Appx2708-2709); that he was subject to denigration on social media, including the use of the @PittCardiology

⁴ Although UPMC and UPP themselves acted under color of state authority in the context of this case, *see* Section VII.C.3, it is not necessary to accept this to find state action by Gladwin, Saba, and Berlacher, given, *inter alia*, their dual employment by Pitt, and their having acted in concert with state officials.

twitter account (Appx0391-0392, Appx2682); and that he was subject to attempts to ostracize him in the hopes he would resign (Appx0392, Appx0597, Appx3051-3052). In this regard, a First Amendment retaliation claim may be predicated on any “retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights.” *Baloga*, 927 F.3d at 752 (quoting *Palardy v. Twp. of Millburn*, 906 F.3d 76, 80-81 (3d Cir. 2018)).

Third, the District Court never addressed the structure of the relationship between Pitt and UPMC, including the Relationship Agreements. Appx0092-0101. That structure establishes (or at least opens an issue of fact that should have been decided by a jury) that Pitt was responsible for *all* of the retaliation in this case. Wang, a Pitt Medical School professor, was retaliated against because he published a peer-reviewed academic article in a medical journal. The Relationship Agreements state that, as between Pitt and UPMC, Pitt reserved to itself the responsibility for “publications, research, and research integrity.” Appx1901. Wang’s employment agreements provide that “Research” is done for Pitt. Appx1123; Appx2591; Appx1987-1988 (Shekar Dep.). Wang is subject to Pitt’s Research Integrity policy, which broadly defines “Research” as: “a systematic study, experiment, evaluation, demonstration or survey designed to contribute to generalizable knowledge and includes all basic, applied, and demonstration research in all fields.” Appx1972 (Shekhar Dep.). And the TAFC (a Pitt faculty

organization) believed the retaliation that was imposed on Wang was Pitt's responsibility. Appx3237-3238. Thus, any actions taken against Wang in retaliation for his research article must be laid at Pitt's feet and those acting on behalf of Pitt, whatever other roles those individuals may have had.

Fourth, the District Court ignored the involvement of Shekhar, who worked solely for Pitt as Senior Vice Chancellor and Dean of the Medical School; he was not a dual employee. Appx1929-1930 (Shekhar Dep.). Shekhar (acting with Saba) played a lead role in pressing JAHA to retract Wang's article; Shekhar was a co-signatory to the email requesting retraction. Appx2662; Appx2708-2709.

Moreover, Shekhar knew that Wang had been prohibited from having contact with medical students no later than the emails Shekhar received on August 6 (Appx2761) and August 27 (Appx3177-3179; Appx3181), but Shekhar did nothing to reverse this decision until months later, when he was under pressure from the TAFC and the federal government. *Cf. A.M. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004) (supervisor may be liable for constitutional violations when "as the person in charge, [he] had knowledge of and acquiesced in his subordinates' violations").

Finally, the District Court never addressed the evidence of Pitt's *de facto* responsibility for the GME programs. The residents and fellows are taught by Pitt faculty. Appx1990 (Shekhar Dep.). The programs are advertised on Pitt's

website, and are represented on Pitt's website as being Pitt programs. Appx2312-2318 (Bump Dep.); Appx2888-2896; Appx2899-2904; Appx2906-2913. Pitt has an Associate Dean of Graduate Medical Education who supervises these programs. Appx1993-1994 (Shekhar Dep.); Appx2213-2214 (Bump Dep.). And the programs could not be certified without their Pitt affiliation. Appx1994 (Shekhar Dep.). Thus, even if this case were solely about the GME programs, there would still have been a question for a jury about Pitt's culpability.

a. There Were Genuine Issues of Material Fact as to Whether Gladwin Was Involved in the Retaliation

Gladwin, as Chair of the Department of Medicine, was the Pitt official above Saba and Berlacher in the Pitt chain of command. Appx1173-1174, 1236 (Gladwin Dep.); Appx1643-1644 (Berlacher Dep.). Although Gladwin was a dual employee, because HVI had been carved out of his area of responsibility, his sole authority over Saba, Berlacher, and Wang was in his Pitt capacity. Appx1171-1174, 1236, 1246, 1249-1250, 1263-1266, 1279-1281, 1348 (Gladwin Dep.). Accordingly, if Gladwin was involved in the retaliation, he acted under color of state authority. And he was involved. Appx1234-1237 (Gladwin Dep.)

Gladwin *said so*, for example, in an email he sent to a Medical School faculty listserv on August 7: "*We* have taken immediate action and removed the person from their [sic] leadership position." Appx2764 (emphasis added). When asked at deposition why he used "we" he said he was using the "royal we."

Appx1325. Since the “royal we” is used to mean “I,” a reasonable jury could conclude that Gladwin was, in fact, the moving force behind any decision to remove Wang from his directorship. At the very least, a reasonable juror could conclude that Gladwin was a joint decisionmaker.

The District Court’s reasoning here is baffling. The court held that the August 7 email did not demonstrate any involvement with the adverse personnel decisions related to Wang because it was sent “after Drs. Berlacher and Saba had taken actions against Dr. Wang,” and “merely expresse[d] knowledge and agreement with the removal and restriction decisions.” Appx0096. Of *course* it came after the decisions; almost all admissions come after the fact they are admitting. And the “royal ‘we’” (to use Gladwin’s own term)—as in “we have taken immediate action”—can obviously be understood as something more than mere agreement and approval. Saba and Berlacher reported to Gladwin on the Pitt side, and a reasonable juror could conclude that Gladwin used that position to instruct, induce, or encourage them to take adverse action against Wang. *Brentwood Acad.*, 531 U.S. at 296 (private individuals act under color of state authority “when the State provides ‘significant encouragement, either overt or covert.’”) (citation omitted).

When writing to Shekhar (who was *only* an employee of Pitt) on September 3, Gladwin doubled-down on his use of the first person plural: “[Wang’s] writings

directly conflict with our institutional priorities to educate, recruit, and retain a diverse workforce and thus *we cannot allow him to teach medical students and fellows*, and to select residents for EP fellowship.” Appx3184 (emphasis added). Further, he refers again to “medical students,” which Gladwin had authority over only in his Pitt (state) capacity.

Finally, Shekhar consistently treated Gladwin (Chair of Pitt’s Department of Medicine) as one of the decisionmakers regarding Wang, and directed his memorandum of October 27 to Gladwin, along with Saba and Berlacher. Appx2150-2151 (Shekhar Dep.); Appx2721 (memorandum); Appx3243, ¶b (letter asserting that recipients of October 27 memorandum were those involved with the “personnel decisions regarding Dr. Wang”).

Gladwin’s involvement is important not only for his own liability, but Saba’s and Berlacher’s as well. Even if (contrary to the evidence) Saba and Berlacher were acting solely on behalf of UPMC, they acted jointly with a state actor, Gladwin, and thus were themselves acting under color of state authority. *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009).

b. There Were Genuine Issues of Material Fact as to the Existence of State Action by Saba and Berlacher

As to Saba and Berlacher, the District Court erroneously concluded “[t]here is no record evidence that [they] acted under the *authority* of the University.” Appx0098 (emphasis added). This conclusion is not only contradicted by

substantial evidence—including the background facts discussed above (e.g., the scope of the retaliation, the structure of the relationship between Pitt and UPMC, and Pitt’s *de facto* responsibility for the GME programs)—it is *insufficient and no defense* if Saba or Berlacher acted jointly with an undisputed state actor such as Gladwin or Shekhar. In addition, the court’s conclusion is wrong for additional reasons specific to Saba and Berlacher.

Saba and Berlacher were dual employees. The leading case on state action in the context of dual state-private employment is *Borrell v. Bloomsburg University*, 870 F.3d 154 (3d Cir. 2017). *Borrell* concerned a nurse anesthetist program jointly operated by a public university (Bloomsburg) and a private hospital (Geisinger) pursuant to a written collaboration agreement. The program director, Richer, a dual employee, managed the program’s clinical component. The plaintiff, Borrell, a program student, was terminated from the program by Richer because she violated a Geisinger drug policy applicable to all Geisinger employees, including clinical students. Borrell claimed a due process violation. *Id.* at 159-60. The Court determined Richer had not been acting for the state when he terminated Borrell.

What matters “is not whether the private actor and the state have a close relationship generally, but whether there is ‘such a close nexus between the State and *the challenged action* that seemingly private behavior may fairly be treated as

that of the State itself.” *Id.* at 160 (emphasis in original) (quoting *Leshko v. Servis*, 423 F.3d 337, 339 (3d Cir. 2005)). Ultimately, “the pertinent question is whether Richer was wearing his Geisinger hat or his Bloomsburg hat when he decided to terminate Borrell.” *Id.* The Court concluded that Borrell had been terminated for her violation of a Geisinger policy, and that, pursuant to the terms of the collaboration agreement, Geisinger retained sole authority to terminate students for noncompliance with Geisinger policies. *Id.* at 160-62.

The facts here are profoundly different. The District Court did not address the crucial facts about the relationship among the parties (including the Relationship Agreements), in spite of *Borrell*’s clear command to look to the terms of any relationship agreement to determine which entity was responsible. *Borrell*, 870 F.3d at 161-62. In *Borrell*, this Court relied on the fact that the agreement gave Geisinger *exclusive* authority to remove participants from the program for failure to comply with Geisinger’s preexisting policies. *Id.* at 158, 161-62. No analogous provision gives UPMC the exclusive right to address purported research misconduct.

Indeed, the District Court never addressed the majority of Wang’s facts at all. He presented the court with 108 Additional Materials Facts in opposition to the motions for summary judgment. Appx3347-3423; Appx3572-3625. The court never mentioned any of these facts in its Opinion, and only included the moving

parties' facts (and not the evidence Wang cited to rebut those facts) in its Statement of Facts. Appx0088-0091.

Further, Saba admitted he had no role in GME. Appx1421-1424 (Saba Dep.). Accordingly, he could not have used his UPMC authority to remove Wang from his role as program director, or to cut off his contact with residents and fellows. The District Court's conclusion that Saba did have authority over GME programs (Appx0098) improperly discounts the importance of Saba's admission.

A reasonable jury could conclude that Saba had used his authority as a state actor to prohibit Wang from having contact with medical students. Medical students are not part of GME, and Saba had no responsibility for them in his Institute role, only his Pitt role. Appx1664 (Berlacher Dep.); Appx2322 (Bump Dep.). The District Court tried to get around this by observing that, months later, Shekhar overruled Saba and Berlacher as to Wang's contact with medical students, and this "supports the notion that Drs. Saba and Berlacher did not operate within their University capacity when they made the challenged decisions." Appx0098. Just the opposite is true. It is *precisely because* they were wearing their "Pitt hats" in precluding Wang from contact with medical students that a state actor, Shekhar, had to overrule them (albeit only when the Department of Education began to investigate Pitt). If Saba and Berlacher had mistakenly used their UPMC authority, then Saba's UPMC superior (Shapiro) should have reversed the decision.

Cf. Borrell, 870 F.3d at 162 (“no evidence ... to suggest that [University’s Chair of Nursing] could have done anything to stop ... decision to deny additional process ...”).

Whether Saba and Berlacher exceeded their authority as state actors in precluding Wang from having contact with medical students is no defense. “[T]he actions of a state officer who exceeds the limits of his authority constitute state action.” *Lugar*, 457 U.S. at 929. The issue is how a reasonable observer would understand the source of the authority.

The court also overlooked the fact that Bump, a Pitt Associate Dean, had given pre-approval to the contact bar. Appx1540 (Saba Dep.).

Finally, the tweets Berlacher posted about Wang went to an official “@PittCardiology” account. The evidence about who controlled that account—Pitt or UPMC—was contradictory. Appx1751-1763 (Berlacher Dep.). In the context of an earlier discovery dispute, UPMC’s counsel expressly denied that the @PittCardiology account was in the control of either UPMC or Berlacher. Appx3298. The court should not have resolved a disputed issue of fact on summary judgment. Appx0100. All of these questions should have gone to a jury.

2. Wang Adequately Pled that Pitt Officials with Policymaking Authority Were Involved In the Retaliation

The District Court dismissed Wang’s First Amendment claim against Pitt on the ground Wang failed to plead that Pitt officials with policymaking authority were involved, thus making Pitt involved. Appx0067-0069. This was error.

Municipal liability under §1983 can be established in three different ways:

First, the municipality will be liable if its employee acted pursuant to a formal government policy or a standard operating procedure long accepted within the government entity; second, liability will attach when the individual has policy making authority rendering his or her behavior an act of official government policy; third, the municipality will be liable if an official with authority has ratified the unconstitutional actions of a subordinate, rendering such behavior official for liability purposes.

McGreevy v. Stroup, 413 F.3d 359, 367 (3d Cir. 2005) (internal citations omitted).

Here, in addition to pleading that Gladwin and Saba had final policymaking authority (Appx0323-0324), Wang pled: “In the alternative ... that the adverse action received authorization from the decision-maker (upon information and belief, Dean Shekhar) who possessed final decision-making authority to establish policy for Pitt” (Appx0324)—specifically identifying this allegation as one requiring further discovery. *See* Fed. R. Civ. P. 8(d)(2), 8(d)(3), 11(b)(3). The question of who approved the adverse action and what authority that person possessed was not an appropriate matter for resolution on a motion to dismiss, particularly when it is recognized that policymaking authority may be delegated on

an informal or *de facto* basis. *Galicki v. New Jersey*, 2016 U.S. Dist. LEXIS 126076, *31-34, 2016 WL 4950995 (D.N.J. Sept. 15, 2016). Relevant policymaking authority may have been delegated to Shekhar, to Gladwin, or to Saba, and only targeted discovery could determine the answer. For that reason, it was error to prevent Wang's First Amendment claim against Pitt from proceeding.

3. Wang Adequately Pled that UPMC and UPP Acted Under Color of State Authority Because They Were Acting In Concert with State Actors

The District Court dismissed the First Amendment claim against UPMC and UPP without leave to amend on the grounds they are not state actors and no set of facts could be pled that would convert them into state actors. Appx0016. This was error. It is true that some cases to date have held that UPMC is not a state actor. *Untract v. Fikri*, 454 F. Supp. 2d 289, 317-20 (W.D. Pa. 2006). These cases, however, have arisen in the context of clinical care, rather than in the context of retaliation imposed on a dually-employed member of the medical school faculty for academic research.

A nominally private party has acted under color of state authority when “the private party has acted with the help of or in concert with state officials” or when “the state has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity.” *Kach*, 589 F.3d at 646 (internal quotations omitted). The First Amended

Complaint adequately pled that UPMC and UPP acted under color of state authority under these tests. Appx0137-0143 (describing the extent to which the actions of Pitt, UPMC, and UPP were intermingled).

D. Wang Has Valid Claims for Retaliation Under Multiple Civil Rights Statutes

1. Genuine Issues of Material Fact Exist as to Whether Wang’s Published Article, Either Alone Or In Combination with His Statements to Saba and Berlacher, Constituted Protected Opposition Activity

In granting summary judgment, the District Court determined that Wang’s published article, whether viewed alone or in combination with his statements to Saba and Berlacher, did not constitute protected opposition activity within the meaning of Title VII, the PHRA, or §1981, and for that reason UPMC and UPP should be granted summary judgment on Wang’s Title VII and PHRA retaliation claims, and UPMC should be granted summary judgment on Wang’s §1981 retaliation claim. Appx0102-0104, 0107. This was error.

As a remedial statute, Title VII is to be interpreted liberally. *Slagle v. County of Clarion*, 435 F.3d 262, 267 (3d Cir. 2006). Title VII makes it unlawful for an employer to retaliate against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter.” 42 U.S.C. §2000e-3(a). The pertinent language of the PHRA is substantially identical. *Fogleman v. Mercy Hosp.*, 283 F.3d 561, 567 (3d Cir. 2002).

To establish a prima facie case of retaliation, a plaintiff must tender evidence that: (1) he engaged in activity protected by Title VII; (2) the employer took an adverse employment action against him; and (3) there was a causal connection between his participation in the protected activity and the adverse employment action. *Moore v. City of Philadelphia*, 461 F.3d 331, 340-41 (3d Cir. 2006).

The first step is to identify the protected opposition activity. The Third Circuit recognized in *Curay-Cramer v. Ursuline Academy of Wilmington*, 450 F.3d 130 (3d Cir. 2006), that the opposition clause of Title VII should be given an expansive definition:

Title VII's opposition clause is triggered by formal EEOC proceedings "as well [as] informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, *protesting against discrimination by industry or society in general*, and expressing support for co-workers who have filed formal charges." (citations omitted). When deciding whether a plaintiff has engaged in opposition conduct, we look to the message being conveyed rather than the means of conveyance.

Curay-Cramer, 450 F.3d at 135 (emphasis added) (quoting *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990)); accord, *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3d Cir. 1995). The only limitation is that the opposition "must identify the employer and the practice—if not specifically, at least by context." *Curay-Cramer*, 450 F.3d at 135. The U.S. Equal Employment Opportunity Commission has adopted the same broad understanding of opposition activity.

EEOC, *Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016) at 14-16 (opposition clause is given expansive definition and includes complaints raised publicly, such as protesting against discrimination by industry or society in general, providing manner of raising complaint is reasonable). The statutory text, moreover, prohibits retaliation for opposition to *any* practice, and is not limited to practices by the plaintiff's employer. 42 U.S.C. §2000e-3(a); *Patterson v. Georgia Pac.*, 38 F.4th 1336, 1348-49 (11th Cir. 2022) ("Opposition is opposition, and *any* unlawful employment practice is *any* unlawful employment practice.").

Here, Wang's article was written in the context of his concern about what he believed was illegal race discrimination being introduced into the GME programs at Pitt and UPMC. Appx2449-2454, 2465-2467, 2470-2476 (Wang Dep.). Indeed, appellees themselves understood Wang's article to have been written as a protest against race discrimination at these institutions. Gladwin testified:

Q. So you -- good. You understood his article -- Dr. Wang's article to be a criticism of affirmative action programs?

A. Yes.

Q. Including in graduate medical education?

A. Yes.

Q. Okay.

A. The selection of fellows in cardiology.

Q. Including at UPP?

A. Yes.

Appx1339-1340. Gladwin was not alone. Responding to Wang's article, Lee sent the following email to Shekhar on August 2: "Diversity in the training program has been at the soul of the culture of HVI for many years and the training program has been breaking the mold with nearly 50% women and URM numbers several fold over the average cardiology training program in the country." Appx3017-3018. And then there is Wang's July 31 meeting with Saba and Berlacher, where it was Saba who first drew the connection between Wang's article and what was taking place at UPMC: "You know what we are trying to do here, Norm." Appx2490-2491 (Wang Dep.); Appx2796 (Wang Dec.).

Wang's article was more than "sufficiently specific to put the employer on notice of the specific kind of unlawful discrimination being alleged and complained of." *Laymon v. Honeywell Int'l*, 645 F. Supp. 3d 443, 459 (W.D. Pa. 2022). The article clearly describes how racial preferences were being introduced into GME programs, starting with ACC's Diversity and Inclusion Initiative in 2018, and ACGME's diversity directive in 2019. Appx2629-2630, 2634, 2643. And the article twice references Wang's affiliation with UPMC. Appx2629, 2643. Bump, for one, obviously saw the connection between Wang's article and UPMC's compliance with ACGME's diversity metric, since he took care to edit Wang's annual program update on this very subject. Appx2236-2244, 2368 (Bump Dep.); Appx3083 (update); Appx3144-3145 (update).

Moreover, Wang’s article mentioned specific practices by other employers: it refers to the cardiology fellowship program at Ohio State University, points out that it ranked certain races more aggressively than it had in the past, and states that the practice revealed “a lack of knowledge regarding legal permissibility.”

Appx2633. It further noted that ACC was a labor organization under Title VII and that it was promoting quotas in its membership in violation of that statute.

Appx2639. The District Court failed even to mention these specific references.

As to Wang’s July 31 meeting with Saba and Berlacher, the court ruled that Wang had made no statements challenging UPMC’s GME hiring practices.

Appx0103-0104. This was error—the court failed to address what was said during that meeting in the context of Wang’s article, which provided the detail needed to understand what was in dispute during the meeting.

Although the District Court addressed Wang’s §1981 retaliation claim against UPMC under a separate heading, the elements of a §1981 claim are the same as those of a Title VII claim. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181-82 (3d Cir. 2009).

The District Court erred in adopting a restrictive view of protected opposition activity. The court correctly concluded, however, that, if Wang’s comments at the July 31 meeting had constituted protected activity, genuine issues of material fact would exist as to whether the alleged adverse actions were

material, and were causally connected to the protected activity. Appx0104-0106.

Wang's statutory retaliation claims should have gone to a jury.⁵

2. There Were Genuine Issues of Material Fact as to Whether Pitt Was Involved In the Retaliation

The District Court determined that Pitt was not involved in the retaliation against Wang, and for that reason should be granted summary judgment on Wang's Title VII and PHRA retaliation claims. Appx0102. The court did not separately analyze the facts, but merely referenced its earlier analysis from the First Amendment claim. The court erred here for the same reasons it erred in its earlier analysis. In addition, unlike Section 1983, there is no "policymaker" requirement under Title VII or PHRA, so that *respondeat superior* liability applies. There were many disputed facts concerning the involvement of Pitt's agents, and these questions should have gone to a jury.

3. Wang Adequately Pled that Pitt Was Involved

The District Court dismissed Wang's Title VI and §1981 claims against Pitt pursuant to Rule 12(b)(6). Appx0020-0022. The court's reasoning was that the pleading did not support that Pitt, as opposed to UPMC, had taken any adverse

⁵ Earlier in the action, the District Court had dismissed (in part) Wang's Title VII and PHRA claims against Pitt pursuant to Rule 12(b)(6). Appx0072; Appx0085. The court's ruling under 12(b)(6) was essentially the same as the ruling it later made on summary judgment—the court held that Wang's published article did not (and could not on any set of facts) constitute protected opposition activity.

action against Wang.⁶ This was error. Wang's First Amended Complaint more than adequately alleged that Pitt's agents, acting in that capacity, were responsible for the actions taken against Wang. Appx0137-0138, 0140-0143.

4. Wang Adequately Pled that UPMC Receives Federal Funding for the Primary Purpose of Providing Employment

The District Court dismissed Wang's Title VI claim against UPMC pursuant to Rule 12(b)(6), holding that Wang failed to plead that UPMC receives federal funds for the primary purpose of providing employment. Appx0018-0020. This was error.

The First Amended Complaint alleges: "UPMC receives federal funds. It specifically receives federal funds to employ residents and fellows in its residency, GME, and fellowship programs." Appx0137,¶8; *see also* 0148,¶60 ("UPMC receives federal funds for the purpose of funding residents and fellows."). In addition, Wang's article, which was incorporated into his complaint, states: "Cardiovascular disease training programs are custodians for some of the \$16 billion per year in federal funding that supports graduate medical education." Appx0192.

These allegations were sufficient.

⁶ This ruling was inconsistent with the court's later ruling (on the Second Amended Complaint) in which the court held it had been sufficiently alleged that Gladwin, Saba, and Berlacher had been acting on behalf of Pitt. Appx0311-0312.

VIII. CONCLUSION

For the foregoing reasons, this Court should reverse those parts of the District Court's orders granting summary judgment and dismissing Wang's complaint challenged here.

Dated: July 21, 2025

Respectfully submitted,

/s/ J. Robert Renner

J. Robert Renner

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,999 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: July 21, 2025

/s/ J. Robert Renner
J. Robert Renner

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: July 21, 2025

/s/ J. Robert Renner
J. Robert Renner

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Counsel hereby certifies that the electronic copy of this Brief for Appellant is identical to the paper copies filed with the Court.

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Dated: July 21, 2025

/s/ J. Robert Renner

J. Robert Renner

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 21, 2025

/s/ J. Robert Renner
J. Robert Renner