

No. 25-1816

In the United States Court of Appeals  
for the Third Circuit

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NORMAN WANG,  
Appellant

v.

UNIVERSITY OF PITTSBURGH, ET AL.,  
Appellees

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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.)

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REPLY BRIEF FOR APPELLANT NORMAN WANG

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## I. INTRODUCTION

Wang’s opening brief (“Opening Br.”) demonstrates that the district court prematurely dismissed Wang’s claims without properly considering the facts Wang pled and the evidence he presented. Defendants’ opposition does the same. Defendants present facts on pleading motions that are nowhere in the pleadings. Thus, Wiley and AHA tell the Court about standards for retractions in academic publishing that they purportedly complied with (and that apparently do not involve an opportunity for the author to respond) (AHA Br. 2, 23-24, 35-36); that there were “deficiencies” in their review process (Wiley Br. 8); and point to documents produced in discovery after the claims against them were dismissed (Wiley Br. 28-29). This Court should reinstate Wang’s prematurely and improperly dismissed claims and should give no weight to Wiley and AHA’s improperly introduced facts.

As concerns summary judgment, Pitt and UPMC<sup>1</sup> submit statements of facts (Pitt Br. 5-12, UPMC Br. 4-22) that are inconsistent with the facts presented by Wang (Opening Br. 7-27) and that largely ignore his evidence. *Compare, e.g.*, Pitt Br. 9, 18, 29, 35-36 (Shekhar was not involved in the retaliation) *with* Opening Br. 17-21, 23, 51 (Shekhar was involved); UPMC Br. 15, 20-21, 39-40 (Gladwin was

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<sup>1</sup> Where context permits, Wang will use “UPMC” for the five defendants represented by the same counsel – UPMC, UPP, Gladwin, Saba, and Berlacher.

not involved in the retaliation) *with* Opening Br. 17-21, 23, 25, 52-54 (Gladwin was involved); UPMC Br. 9, 37-38 (Wang did not teach medical students) *with* Opening Br. 9 (Wang did teach medical students).

Avoiding facts pled and evidence presented may be defendants' best hope, but it is not the proper standard of review on the relevant motions.

## II. ARGUMENT

### A. Defendants fail to justify the district court's dismissal of Wang's defamation claims on a 12(b)(6) motion

Wang's opening brief demonstrated that the district court erred in dismissing his defamation claim on a motion to dismiss. Opening Br. 35-48. None of defendants' arguments refute that showing.

#### 1. Defendants ignore the "sting"

The issues relevant to this appeal depend to a substantial extent on the plausible interpretation of the defamatory words. *Milkovich v. Lorian Journal Co.*, 497 U.S. 1, 20 n.7 (1990) ("the issue of falsity relates to the *defamatory* facts implied by a statement"). Thus, Pennsylvania (and other) law emphasizes the "gist" or "sting" of the allegedly defamatory words in context. *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1072, 1084 (3d Cir. 1988); *St. Surin v. V.I. Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994).

Several corollaries flow. First, Pennsylvania law does not recognize an "innocent construction" defense. *E.g.*, *MacElree v. Phila. Newspapers*, 674 A.2d

1050, 1054 (Pa. 1996); *Mzamane v. Winfrey*, 693 F. Supp. 442, 470 (E.D. Pa. 2010) (“under Pennsylvania law, no . . . innocent construction rule exists”). The jury may consider not just the literal words, but the innuendo or implication created by those words. *Graboff v. Colleran Firm*, 744 F.3d 128, 136 (3d Cir. 2014) (“defamation may be established where a statement, viewed in context, creates a false implication”); *Manco v. St. Joseph’s Univ.*, 2024 U.S. Dist. LEXIS 13181, at \*24 (E.D. Pa. Jan. 25, 2024).

Thus, “the Court does not look to Defendant’s interpretation of his statement on a motion to dismiss. Plaintiffs’ interpretation is what steers the analysis.” *Salaam v. Trump*, 777 F. Supp. 3d 414, 426 (E.D. Pa. 2025). *See also Taylor v. Gural*, 2025 U.S. Dist. LEXIS 35837, at \*36 (E.D. Pa. Feb. 27, 2025) (as long as plaintiff’s interpretation is not unfair or forced, it must be accepted at the motion to dismiss stage).

Defendants agree that context is important (AHA Br. 2; Simon Br. 23), but they want their own twist on the statements to control. In even a neutral light, however, the defamatory “sting” of defendants’ statements was obvious. They suggested that Wang intentionally filled his article with numerous misquotes and misrepresentations of fact, motivated by his racism or virulent opposition to beneficial diversity policies. The AHA-Wiley retraction statement said that there were “*many* misconceptions and misquotes” (emphasis added) which “strip the

paper of its scientific validity.” Appx0237. The word “many,” in explaining a retraction, suggests that Wang was either grossly incompetent or malevolent. *Barrett v. Atl. Monthly Grp., LLC*, 2024 U.S. Dist. LEXIS 161266, at \*43 (D.D.C. Sept. 9, 2024) (denying motion to dismiss because “a reasonable juror could infer that the full cadre of statements paints a picture of a serial liar who maliciously set out to deceive editors and readers”).

AHA’s press statement stated that it was “reviewing the journal’s peer-review and publication processes to ensure future submissions containing *deliberate* misinformation or misrepresentation are *never* published.” Appx0167 (emphasis added). AHA now claims that this was not about Wang (AHA Br. 24), but Wang’s allegation to the contrary is more than plausible. The first four words of the press release title is “Wang paper is wrong.” The first paragraph states that Wang’s paper was filled with “misrepresentation of facts” and that the AHA “denounces” his views and regrets having enabled them. And if AHA’s statement were not about Wang’s article, and only about its review policies going forward, why use the word “deliberate”? *See* Restatement (Second) of Torts § 564, cmt. b (“It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended. Extrinsic facts may make it clear that a statement refers to a particular individual . . .”). Any dispute about

how a reasonable reader would understand this article should have gone to a trier of fact, or at least been the subject of discovery.

Simon, Wiley, and AHA published an “Editor’s Note.” Appx0195. In addition to explicitly accusing Wang of misrepresenting facts, it stated: “We also wish to reiterate that while we welcome independent viewpoints, it is with the goal of creating an open dialogue and not a misrepresentation of evidence.”<sup>2</sup> *See also* Wiley Br. 8. A reasonable reader would conclude from this sentence that Wang’s article did not qualify as a welcome “independent viewpoint” about race-based preferences because it was filled with purposeful misrepresentations of evidence.

**2. Defendants fail to justify the court’s dismissal of the defamation claim on the ground of “substantial truth”**

With the “sting” firmly in mind, defendants’ errors in discussing “substantial truth” are manifest.

**a. Burden**

Defendants wrongly assert that the burden is on plaintiffs to prove falsity. AHA Br. 20; Wiley Br. 10, 21; Simon Br. 19. Defendants cite *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) for this proposition, but *Hepps* only held that plaintiffs will have the burden of proving falsity at trial against a media

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<sup>2</sup> Simon notes that the district court dismissed the defamation claim based on this “misrepresentation of evidence” statement because it could not find it, Simon Br. 9, but makes no effort to defend this holding – perhaps because Simon himself quoted the entire passage at length in his brief in the district court. Dkt. 49 at 16.

defendant for statements of public concern. *Id.* at 777. In all other contexts, “substantial truth” is an affirmative defense under Pennsylvania law that a defendant must plead and prove. *LabMD Inc. v. Boback*, 47 F.4th 164, 182-83 (3d Cir. 2022) (“Under Pennsylvania law, . . . [t]he plaintiff does not have to affirmatively prove that the statement was false; rather, a defendant who disputes falsity has to prove the truth of the defamatory communication.”); *Graboff*, 744 F.3d at 136 (“A defendant may avoid liability for defamation if it shows that its statements were ‘substantially true.’”); *Assocs. in Med. Toxicology, P.C. v. Snyder*, 2022 U.S. Dist. LEXIS 58967, at \*29 (M.D. Pa. Mar. 30, 2022); *Parexel Int’l Corp. v. Feliciano*, 2008 U.S. Dist. LEXIS 52017, at \*10 (E.D. Pa June 30, 2008).

Thus, Wang may have to show falsity against a “media defendant” (a term *Hepps* did not define) at trial, perhaps Wiley. The First Amended Complaint (“FAC”) alleges only that AHA publishes JAHA; thus, it is like the defendant in *Graboff*, a professional organization for orthopaedic surgeons that published a newsletter.

Further, Simon did not raise the defense of “truth” in the district court. Simon Br. 10. Accordingly, he forfeited that affirmative defense for purposes of this appeal and cannot raise it here for the first time. Fed. R. Civ. P. 8(c)(1); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1171-72 (10th Cir. 1981); *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 896 N.W.2d 156,

188 (Neb. 2017) (“‘truth’ is an affirmative defense in a defamation action, and despite the fact that it is rooted in the First Amendment, it is waived if not pled.”).<sup>3</sup>

**b. Defendants cannot meet their burden**

Defendants cannot meet their burden of showing “substantial truth.”

First, defendants either rely on documents that were not referenced in the FAC (like source articles) or assume the truth of the defamatory statements in those that were. Opening Br. 44-46. Wiley is the only defendant to try to defend this position; it claims that the FAC “incorporated” *every* source article that Wang referred to in his article – literally scores of documents – simply because the FAC alleges that his article was accurate. Wiley Br. 26-27. It cites no authority in which such a huge number of documents outside the pleadings are “incorporated.” *Cf. Pete v. Cooper*, 2025 U.S. Dist. LEXIS 22713, at \*17 (S.D. Fla. Feb. 7, 2025) (rejecting defendant’s effort in a defamation action to bring additional material before the court because the “incorporation-by-reference” doctrine “applies only if the document is referred to in the complaint, central to the plaintiff’s claim, and undisputed”). Indeed, as a general rule, the defense of “substantial truth” requires significant factual development. *Salaam*, 777 F. Supp. 3d at 429 (unless apparent

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<sup>3</sup> Saba and Berlacher raise the “truth” defense only with respect to a different statement (that Shekhar called for the retraction of Wang’s article). UPMC Br. 52-53. Wang has not challenged the dismissal of his defamation claim with respect to that statement.

on the face of the complaint, “Third Circuit precedent requires development of the whole record” to establish “Defendant’s affirmative defense” of truth).

Second, even considering the outside materials, they do not go to the “sting” of the defendants’ defamation. None of the defendants explain how these articles show that Wang purposefully misquoted many sources in an effort to advance his allegedly nefarious agenda. Indeed, the defendants deny that they made any implication about Wang’s intent or even his competence. AHA Br. 24; Simon Br. 3. Wiley tries to dismiss the assertion that there were “many” misquotes by claiming that the number does not change the “sting” of the accusation. Wiley Br. 27-28. Perhaps the number of times a man sexually assaults his stepdaughter or a landlord has complaints filed against him might not change the “gist” of statements about those plaintiffs, as with the cases Wiley cites, but the number of misquotes in an academic paper, and whether they were intentional or not, changes the sting substantially. This is particularly so when the few so-called errors are identified as a “sample.” Appx0163. None of the defendants even mentions, much less tries to distinguish, the Second Circuit’s far more relevant opinion in *Buckley v. Littell*, 539 F.2d 882, 896 (2d Cir. 1975) (Opening Br. 47), where the distinction between the plaintiff having libeled one person and libeled “several” was deemed significant. Even assuming Wang had made two unintentional misquotes, a reasonable juror could still conclude that the attacks against him were not substantially true.

Indeed, a reasonable jury is more likely to conclude that Wang had not misquoted anyone. Merriam-Webster’s online dictionary gives the following example of a misquotation: “Play it again, Sam,” because the actual line from the movie *Casablanca* is “Play it Sam. Play As Time Goes By.” See *Misquotation*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/misquotation> (last visited Oct. 31, 2025). With this understanding of misquote – words between the quotation marks not being the ones from the original source – all agree that Wang did not misquote the Auseon article. Accordingly, the “misquote” accusation is both capable of defamatory meaning and false. (Whether five Justices of the Supreme Court in 1959 thought that selective quotation could be a misquotation in an entirely different context – whether Congress intended a summary of a witness’s interview to be produced in discovery – is irrelevant. Wiley Br. 25.)

But even if one uses defendants’ definition of “misquote” (so as to include a “misleading” quotation), a reasonable jury easily could conclude that defendants’ assertion is false even as to the “sample.” Wang has shown that the point of his quotation from Auseon was that Ohio State was potentially violating the law, not that any group was more or less qualified. Opening Br. 45. Oddly, defendants do not even try to dispute that. Indeed, the irony of the so-called Updated Retraction is that it engages in the very “misquotation” that it accuses Wang of. Here is a more complete quote from the part of Wang’s article that quotes Auseon:

However, it was also revealed that “. . . 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.” *Encouraging the explicit use of race and ethnicity for employment reveals a lack of knowledge regarding legal permissibility and fellow status.*

Appx0414 (emphasis added). The Updated Retraction (Appx0163) misleadingly omits the last sentence and thus omits the point for which Wang was quoting Auseon. The omitted sentence easily explains why Wang did not include the additional sentence from Auseon. It was irrelevant to his point.<sup>4</sup>

On a motion to dismiss, it is plaintiff’s reasonable interpretation of his own article that should prevail. *Taylor*, 2025 U.S. Dist. LEXIS 35837, at \*30 (“Because the Court is required to accept Plaintiffs’ allegations as true at the motion to dismiss stage, it will accept [plaintiff’s] interpretation of [the document] as another possible conclusion one could reach after viewing [it].”); *Manco*, 2024 U.S. Dist. LEXIS 13181, at \*36.

As to the Burnett article, defendants do not dispute that it was not a misquote because Wang was not quoting it. Opening Br. 46. Yet that is *exactly* how the misleading Updated Retraction presented it. Appx0163 (“*A quote from an article*

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<sup>4</sup> This excerpt was thus not making the point defendants attribute to it, *i.e.*, that certain minorities were “less qualified,” but in any event defendants do not really explain how the sentence omitted from the Auseon article – that there was no “significant difference” in scores on just one particular test among those “matched to the OSU program” (Appx0162) – would refute that attributed point.

mischaracterized . . .”) (emphasis added). Indeed, the excerpt provided from the Burnett article in the Updated Retraction looks exactly like the excerpt from the Auseon article (which *was* a quotation from the source). Appx0163-0164.

Finally, AHA claims that its statements are “undoubtedly true” because it “disclosed the investigation and report of UPMC.” AHA Br. 21; *see also* Wiley Br. 28-29. The FAC does not allege that UPMC conducted an investigation or issued a report; AHA and Wiley simply assume that an investigation was performed and a report issued because their retraction notice says so – a very convenient rule for a defamation defendant. Moreover, it is black letter law that one cannot avoid liability in a defamation claim by attributing the defamatory statement to someone else. Restatement (Second) of Torts § 578 (“one who repeats or republishes defamatory matter is subject to liability as if he had originally published it”); *Hoover v. Peerless Publ’ns, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978) (recognizing “black-letter rule”); *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 189-90 (3d Cir. 1998) (“The ‘has been reported’ phraseology does not shield Delta because republication of defamatory matter is actionable regardless of the republication’s accuracy.”); *cf.* AHA Br. 33 (quoting *Corabi v. Curtis Publ’g Co.*, 273 A.2d 899, 914 (Pa. 1971)). In any event, both JAHA and AHA “agreed completely with retraction” (Appx0170), which certainly suggests that they agreed with the reasons for it.

**3. Defendants fail to refute Wang’s showing that he pled fault**

Defendants err in their arguments defending the district court’s conclusion that the FAC was required, but failed, to plead “actual malice.”

**a. Limited purpose public figure**

Defendants do not dispute that courts generally defer the question of whether a plaintiff qualifies as a limited public figure to at least summary judgment.

*Taylor*, 2025 U.S. Dist. LEXIS 35837, at \*7, \*38 (denying motion to dismiss

where question of whether plaintiffs, “prominent figures in the world of harness racing,” were limited-purpose public figures was difficult and fact-specific);

*Monge v. Univ. of Pa.*, 2024 U.S. Dist. LEXIS 195124, at \*8-12 (E.D. Pa. Oct. 28,

2024) (deferring question of whether professor who taught an online course that involved a famous bombing was a limited public figure);<sup>5</sup> *Dac v. Booking*

*Holdings, Inc.*, 2023 U.S. Dist. LEXIS 62209, at \*21-22 (D. Del. Apr. 7, 2023)

(whether Booking.com is a limited public figure deferred to summary judgment).

A complaint may have so many allegations of public involvement that the question can be resolved on the pleadings, as in *McCafferty v. Newsweek Media Group, Ltd.*, 955 F.3d 352 (3d Cir. 2020). But the plaintiff there alleged facts

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<sup>5</sup> Several defendants cited an earlier decision in the *Monge* case without mentioning that the court subsequently changed its mind. Simon Br. 14; UPMC Br. 50. *Monge*, 2024 U.S. Dist. LEXIS 195124, at \*8 (noting its previous determination).

demonstrating that he had already become well-known, including that his videos supporting President Trump were seen by thousands (including one that went viral attracting more than 325,000 views on Facebook alone), and that many media outlets wanted interviews with him. But if every public online posting (including public postings on social media) on a controversial topic made someone a limited purpose public figure, there would be countless such figures. Monge’s course was available to anyone who enrolled online. *Monge v. Univ. of Pa.*, 2023 U.S. Dist. LEXIS 88270, at \*8 (E.D. Pa. May 19, 2023).<sup>6</sup>

**b. Actual malice**

Even if it were appropriate to determine Wang’s status on the pleadings, he pled sufficient facts to show that defendants either knew or recklessly disregarded the falsity of their claims. Defendants ignore Wang’s allegations.

At the pleading stage, “actual malice” is governed by the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure: “Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” *See also Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (“[A] rigid rule requiring the detailed pleading of

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<sup>6</sup> The court’s later *Monge* decision, concluding that it had erred in prematurely determining Monge’s status, tried to distinguish the district court’s decision here. *Monge*, 2024 U.S. Dist. LEXIS 195124, at \*12-13. But the distinction between an online course available to anyone on the internet who enrolls and an article in a professional publication available to anyone on the internet who finds it is one without a difference.

a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general ‘short and plain statement of the claim’ mandate in Rule 8(a) . . . should control the second sentence of Rule 9(b)’ (quoting 5A C. Wright & A. Miller, *Federal Practice and Procedure* §1301, p. 291 (3d ed. 2004)). *Cf. Hildebrand v. Allegheny Cnty.*, 757 F.3d 99, 112 (3d Cir. 2014) (“Neither *Iqbal* nor *Twombly* purport to alter Rule 9”). It is not an “onerous” (AHA Br. 13) standard.

Because defendants will rarely concede that they lied or purposefully avoided the truth, actual malice can be shown—and, at the pleading stage, can be alleged – by facts constituting circumstantial evidence. *LabMD*, 47 F.4th at 187; *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007) (“The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to”).

Wang alleged that (1) defendants read and reviewed his article, (2) the sources were clearly attributed and easy to verify, and (3) defendants “made their defamatory statements about it knowing they were false or with reckless disregard of whether they were true or false.” Appx0150 (¶ 73). The first two are not legal conclusions, but *facts* that must be accepted as true, and they readily support the allegation with respect to defendants’ state of mind. *Brown v. Am. Airlines, Inc.*,

2024 U.S. Dist. LEXIS 143124, at \*17 (E.D. Pa. Aug. 12, 2024) (plaintiffs plausibly allege actual malice regarding defendants' removal of plaintiffs from plane where complaint alleges that defendants were on the scene and knew plaintiffs had done nothing warranting removal); *Banonis v. Roney*, 2023 Pa. Super. Unpub. LEXIS 1060, at \*15 (Pa. Super. Ct. May 1, 2023) (where defendants stated plaintiffs had accepted "landfill PAC" donations, allegation that defendants could have accessed publicly-available Campaign Finance Reports that disproved their statement supported allegation of actual malice); *Palin v. N.Y. Times Co.*, 113 F.4th 245, 264-65 (2d Cir. 2024) (evidence that defamatory article hyperlinked to a different article demonstrating falsity of assertion in the first created issue of fact on actual malice even though editor testified that he did not read the second article); *Delgado v. Sonnen*, 2025 U.S. Dist. LEXIS 61579, at \*7 (S.D.N.Y. Mar. 31, 2025) (plaintiff plausibly alleged actual malice with respect to defendant's statement that she did not go to Harvard where plaintiff alleged she told defendant she had gone to Harvard); *Gunn v. JPMorgan Chase Bank, N.A.*, 2024 U.S. Dist. LEXIS 184245, at \*21 (D. Md. Oct. 9, 2024) (plaintiff adequately alleged actual malice for bank's report to credit agencies where complaint alleged bank failed to review plaintiff's dispute letter or reviewed it and ignored it).

Defendants argue that a mere failure to investigate is insufficient to support a finding of "actual malice." That is so, but the courts have distinguished between a

failure to investigate and “the purposeful avoidance of the truth.” *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 692 (1989). As cases like *Banonis*, *Palin*, and *Gunn* demonstrate, at the pleading stage, with the court’s obligation to interpret the allegations in plaintiff’s favor, Wang’s allegations are enough to conclude that defendants either purposefully avoided the truth or knew they were lying.

The FAC (and the documents referred to in the FAC) further demonstrate that defendants strongly opposed Wang’s position on race-based diversity efforts. Certainly, Saba’s and Berlacher’s invocation of racism show that, and AHA, Wiley, and Simon’s references to their “core values” and commitment to diversity do as well. Appx0144 (¶ 38); Appx0166; Appx0170; Appx0195 (“strong advocates of increasing equity, diversity, and inclusiveness”); AHA Br. 9 (DEI commitment). Defendants argue that such motivation is not sufficient by itself to support actual malice, but that does not render it irrelevant. *Weisenbach v. Project Veritas*, 2022 Pa. Dist. & Cnty. Dec. LEXIS 2963, at \*69 (Erie Cnty. Ct. Comm. Pleas July 15, 2022) (ulterior motive of eroding confidence in the security of mail-in voting relevant to actual malice on statements that postmaster backdated mail-in ballots to sway the outcome of a presidential election); *Palin*, 113 F.4th at 267 (defendant-editor’s relationship with his sibling, a Democratic U.S. Senator, could have established bias against prominent Republican to support actual malice);

*Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1259 (D.C. 2016) (“*Mann*”) (“bias providing a motive to defame by making a false statement may be a relevant consideration in evaluating other evidence to determine whether a statement was made with reckless disregard for its truth”); *Apelbaum v. Bloom*, 2025 U.S. Dist. LEXIS 128631, at \*11-12 (E.D. Va. July 7, 2025) (allegations of defendant’s bigotry and past anti-Semitic statements support actual malice for false statement that plaintiff is an Israeli spy); *X Corp. v. Media Matters for Am.*, 2024 U.S. Dist. LEXIS 157217, at \*20 (N.D. Tex. Aug. 29, 2024) (frequency and tenor of statements disparaging plaintiff’s social media platform support claim of actual malice); *Fairstein v. Netflix, Inc.*, 2023 U.S. Dist. LEXIS 166561, at \*53-54 (S.D.N.Y. Sept. 19, 2023) (writers’ notes for movie indicating that plaintiff should be depicted harshly and unsympathetically are evidence of actual malice).

**c. Wiley and AHA**

The district court did not address whether the FAC adequately alleged actual malice against Wiley and AHA. AHA Br. 31. Nonetheless, they argue that this Court can affirm the judgment of the court below on this ground. But the order dated December 21, 2021 dismissed the defamation claims against them *without leave to amend*. Appx0055. Neither explains why plaintiff should not be permitted to amend any purported pleading defect in the actual malice allegations against them. Indeed, the general rule in this Circuit is that amendment should be

allowed unless it would be futile. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 245-46 (3d Cir. 2008). Wiley and AHA do not argue that amendment would be futile; accordingly, their argument that this Court can affirm the district court's judgment on this ground is meritless.

Moreover, in addition to the allegations described in the last section, applicable to all defendants, the FAC alleges unique facts against Wiley and AHA. It alleges that the article went through the normal vetting process prior to publication. Appx0139 (¶ 21), 0143 (¶ 39). Interpreting this allegation in plaintiff's favor requires the conclusion that these defendants checked the cites and quotes before publishing in March 2020 and found them accurate.

It also alleges that Wiley and AHA did not respond to plaintiff's request that they identify the claimed flaws in the article. Appx0144 (¶ 42). This, too, is relevant circumstantial evidence. *Braig v. Field Commc'ns*, 456 A.2d 1366, 1376 (Pa. Super. Ct. 1982) ("actual malice" of TV station executive should be left to jury where executive sent tape to plaintiff by mail instead of hand, perhaps to avoid timely review); *Apelbaum*, 2025 U.S. Dist. LEXIS 128631, at \*11.

Finally, AHA states that it relied on UPMC and that this demonstrates it did not act with actual malice. AHA Br. 13. This is factually meritless because the FAC does not allege that AHA relied on UPMC, much less that it "would have no reason to believe that a reputable institution like UPMC would have fabricated

misrepresentations.” AHA Br. 36. It is legally meritless because republication of someone else’s statement is not a defense to a defamation claim when one either knows, or has strong reasons to suspect, the falsity of the statement. *Taj Mahal Travel*, 164 F.3d at 189-90; *Fairstein*, 2023 U.S. Dist. LEXIS 166561, at \*86-89; *Hoover*, 461 F. Supp. at 1209

#### 4. Defamatory statements

The district court rejected defendants’ arguments that their statements were not factual and accordingly could not be the basis for a defamation lawsuit.

Appx0025 (Saba), 0027-28 (Berlacher), 0029 (Simon), 0033 (holding that AHA and Wiley statements were true). Defendants nonetheless try to resurrect this defense on appeal, albeit not always coherently or consistently.<sup>7</sup>

Defendants seem to offer two different theories: first, that the statements cannot be proven true or false, or, second, that they disclosed the basis for their opinions. Neither is correct.

As the district court found, whether there were “misquotes” or misrepresentations of fact or evidence, or “specific scientific errors,” are statements that can be proven true or false, as can Wang’s intention in making

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<sup>7</sup> Saba and Berlacher misleadingly claim that the statements attributed to them “were properly held to be nondefamatory as a matter of law.” UPMC Br. 47. *See also* Simon Br. 1, 22. On the other hand, Wiley claims that all agree that the statements *were* defamatory. Wiley Br. 11 n.1.

those errors. AHA Br. 26 (distinguishing “misconception” from “misrepresentation” and “misquotation”). Whether research has been “thorough” or whether there were “problems” with data might be too vague, but that is not this case. *Robinson v. Williams*, 59 F.4th 113, 118-19 (4th Cir. 2023) (statement that plaintiff “misread” an echocardiogram before beginning surgery was defamatory even though plaintiff had not read it at all before surgery; “misread” goes to plaintiff’s professional competence in a unique way and implies that she was obligated to read it); *Mann*, 150 A.3d at 1224, 1243 (affirming the denial of a motion to dismiss defamation claim under D.C.’s anti-SLAPP law; article that asserted that climate scientist was “the Jerry Sandusky of climate science,” who “molested and tortured data in service of politicized science” could convey a defamatory meaning because “[a] jury could find that the article accuses [plaintiff climate scientist] of engaging in specific acts of academic and scientific misconduct in the manipulation of data”); *Project Veritas v. N.Y. Times Co.*, 2021 N.Y. Misc. LEXIS 2264, at \*7-11 (N.Y. Sup. Ct. Mar. 18, 2021) (holding that articles which described plaintiff’s video as “deceptive,” “false,” and “without evidence” were defamatory; “a reasonable reader could very well believe that the challenged statements were conveying facts about Veritas”).

Nor can defendants properly claim the mantle of “pure opinions” on the ground that they disclosed the bases for their opinions. First, they were making

factual assertions, not expressing opinions. Moreover, only Wiley and AHA said anything about the bases for their assertions, and this was only in the Updated Retraction. Even assuming that document is properly considered on a motion to dismiss, it said that there were *many* misconceptions and misquotes in Wang’s article, and gave a “sample.” Appx0163. This plainly implied many undisclosed facts behind the “sample.” Moreover, for the reasons previously stated, the “sample” was itself misleading and defamatory. *Milkovich*, 497 U.S. at 18-19 (“Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”); *Mann*, 150 A.3d at 1246 (“to claim this form of protection from liability, the facts on which the purported opinion is based must be accurate and complete.”).

Wiley tries to circumvent this flaw by erroneously asserting that it “linked” to Wang’s article, and, in turn, Wang’s article had sources for his statements. Thus, according to Wiley, its statements were “pure opinions” because readers could go to the library, review each quote and endnote in Wang’s article and determine for themselves whether or not it contains “many misconceptions and misquotes” or factual misstatements or specific scientific errors. Wiley Br. 15-17; AHA Br. 28. But to be a “pure opinion,” it is the *defendants* who must disclose the facts on which their opinions are based, not the readers of the article who must find them.

Defendants can cite no case where any court has absolved a defamation defendant on the basis of a hypothetical research project *by readers* covering more than 100 endnotes. One could similarly argue that, in *Milkovich v. Lorain Journal Co.*, the readers could go read the transcript of the hearing in which the newspaper article claimed that school officials had lied and ascertain for themselves whether they agreed, *Milkovich*, 497 U.S. at 21-22; or that, in *Mann*, the readers of the publications could review Dr. Mann’s climate science work for themselves and determine whether he “tortured data” in the service of “politicized science.”

#### **5. Pitt and vicarious liability**

Pitt argues that it cannot be held responsible for others’ defamation because the allegations that employees of Pitt were acting on its behalf were conclusory. Pitt Br. 53. But, in addition to alleging that Saba, Berlacher, Simon, and John Doe Defendants 6-10 were employees or agents of Pitt (Appx0138), the FAC alleges that (1) Gladwin sent an email on August 7, 2000 to School of Medicine faculty explaining how Wang’s article was “was antithetical to our values and deeply hurtful to many of our URM faculty” (Appx0142 (¶ 31), Appx2764), and (2) Shekhar sought the retraction of the article (Appx0027, citing Appx0145 (¶ 46)); UPMC Br. 52-53. Reasonably interpreting these allegations in plaintiff’s favor, the individual Pitt employees would have understood that they were pursuing Pitt’s stated interests in defaming Wang. *Kass-Hout v. Cmty. Care*

*Network, Inc.*, 2021 U.S. Dist. LEXIS 157787, at \*32 (N.D. Ind. Aug. 20, 2021) (allegations that agent’s defamatory statements “disparaging Plaintiff’s performance were intended to distance the hospital from Plaintiff’s allegedly poor work” sufficed to allege vicarious liability).

## **6. Pennsylvania Constitution**

The right to protect one’s reputation is enshrined in Article 1, Section 1 of the Pennsylvania Constitution as one of the “inherent rights of mankind.” While the rights of free speech are no doubt important, Pennsylvania always has emphasized the need to balance the two rights. *Norton v. Glenn*, 860 A.2d 48, 58 (Pa. 2004):

[I]n the quest to strike a balance between these two competing protections, our court cautioned that the freedom of expression should not be seen as dominant and the protection of reputation as inferior. We [have] stressed that the right to protect one’s reputation is not a second-class right, amenable to being pressed into oblivion by other constitutional provisions.

*See also Milkovich*, 497 U.S. at 22-23. By dismissing before any discovery, the district court failed to strike this balance. It should be reversed.

### **B. The First Amendment**

Wang asserted a First Amendment retaliation claim against six defendants – Pitt, UPMC, UPP, Gladwin, Saba, and Berlacher. The district court dismissed Pitt, UPMC, and UPP under Rule 12(b)(6), and later granted summary judgment to

Gladwin, Saba, and Berlacher. Opening Br. 30-32. All of these rulings are subject to *de novo* review. Opening Br. 34-35.

**1. Pitt and UPMC fail to address the facts concerning their relationship**

Neither Pitt nor UPMC truly address the strikingly conflicting facts in the summary judgment record concerning their relationship – facts that should have been weighed by a jury. This failure impacts multiple claims on appeal, but most notably the district court’s grant of summary judgment to Gladwin, Saba, and Berlacher on Wang’s First Amendment claim (*see infra* Section II.B.2.), and the district court’s grant of summary judgment to Pitt on Wang’s Title VII and PHRA claims (*see infra* Section II.C.2.).

First, neither Pitt nor UPMC meaningfully address the Relationship Agreements. *See* Opening Br. 7-8, 50-51. UPMC only alludes to the Affiliation Agreement to acknowledge that it exists and to state that it is “confidential” (UPMC Br. 5); while Pitt only mentions the Affiliation Agreement in two short passages (Pitt Br. 29-30). And what Pitt says is wrong. In his opening brief, Wang explained that the Affiliation Agreement places responsibility for “publications, research, and research integrity policies” on Pitt, not UPMC. Opening Br. 8 (quoting §3.4 of the Affiliation Agreement, Appx1901); *see also* Appx2863 (Reorganization Agreement §3.3). Pitt points to a different section of the agreement as purportedly limiting Pitt’s oversight to “NIH and federally funded

peer reviewed health related research.” Pitt Br. 30 (quoting §5.2 of the Affiliation Agreement, Appx1904). But this section concerns Pitt’s identification as the sponsoring institution and “Institutional Review Board” approval as to this category of research; it does not negate the more general provisions of Section 3.4.

UPMC emphasizes that the Relationship Agreements have traditionally been treated as confidential. Appx1954-1956 (Shekhar Dep.). So confidential, in fact, that most of the witnesses in this case had never seen the Relationship Agreements. Appx1182 (Gladwin Dep.); Appx1410-1411 (Saba Dep.); Appx1650-1651 (Berlacher Dep.); Appx2297-2299 (Bump Dep.). The only exception was Shekhar, a new hire at the time the events in this case arose, and who still often seemed unclear about how the Pitt-UPMC relationship was intended to work. Appx1926-1927, 1954-1955, 2006 (Shekhar Dep.). Indeed, the record is full of indicia that the participants in the retaliation against Wang either didn’t know or didn’t care what the distinction was between Pitt and UPMC, and simply treated them as a single institution. *See, e.g.*, Appx2679 (ambiguous reference to “our institution” in Saba’s Aug. 1 email); Appx2706 (ambiguous reference to “the institution” in Berlacher’s Aug. 4 email).

Second, neither Pitt nor UPMC meaningfully address Pitt’s Research Integrity Policy. *See* Opening Br. 8, 25-26, 50-51; Univ. of Pittsburgh, RI 07 Research Integrity (formerly 11-01-01) (Feb. 20, 2017),

<https://www.policy.pitt.edu/research-integrity>. UPMC makes no reference to this subject, while Pitt boldly asserts that Wang was owed no process at all before his colleagues requested that JAHA retract his article. Pitt Br. 38. That was certainly not the opinion of Pitt's Tenure and Academic Freedom Committee ("TAFC"), which demanded, "A letter of acknowledgment and apology to Dr. Wang for the institution's failure to follow due process in connection with the accusations regarding his published article." Appx3238 (TAFC memorandum). Pitt mischaracterizes the TAFC's memorandum as being limited to a request for reinstatement of Wang's "authority over students." Pitt Br. 12. It was not. The AAUP, similarly, called attention to Pitt's obligation to provide due process before taking retaliatory action based on Wang's research or publication. Appx3189-3190 (citing the 1940 *Statement of Principles on Academic Freedom and Tenure*).

**2. Gladwin, Saba, and Berlacher fail to justify the district court's grant of summary judgment**

Gladwin, Saba, and Berlacher attempt to defend the district court's grant of summary judgment on Wang's First Amendment claim on the single ground that there was no state action as to these defendants. UPMC Br. 31-40. In his opening brief, Wang clearly set forth five instances of retaliation: (1) his removal as fellowship director; (2) the bar on his contact with medical students, residents, or fellows; (3) the campaign of attack against his article, including the attempt to have it retracted without affording him traditional academic due process; (4) that he was

subject to denigration on social media, including the use of the @PittCardiology twitter account; and (5) that he was subject to attempts to ostracize him in the hopes he would resign. Opening Br. 49-50. The defendants only address the first two, perhaps because the existence of state action is undeniable as to the others. Shekhar, for example, clearly played a leading role in obtaining the retraction of Wang's article. Opening Br. 18-22; Appx2657, Appx2662, Appx2708-2717 (emails).

As to the two instances of retaliation that UPMC does address, the parties largely seem to agree about the law. The leading case on state action in the context of dual employment is *Borrell v. Bloomsburg University*, 870 F.3d 154 (3d Cir. 2017), which holds:

the pertinent question is whether Richer was wearing his Geisinger hat or his Bloomsburg hat when he decided to terminate Borrell. Actions taken "in the ambit of [non-state motivated] pursuits" are excluded from state action. *Screws v. United States*, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L.Ed. 1495 (1945). The record shows that Richer's actions were authorized by Geisinger to enforce its drug and alcohol policy, and not pursued under any authority granted him by the state. Simply put, Richer did not need permission from Bloomsburg to fire a Geisinger worker who violated a hospital policy.

*Id.* at 160-61. Accordingly, the court in *Borrell* analyzed the collaboration agreement between Geisinger and Bloomsburg to determine which entity was responsible for the action at issue, concluding that Geisinger was responsible. *Id.*

at 157-58, 161-62. Here, the defendants and the lower court never address the Relationship Agreements.

Gladwin, Saba, and Berlacher do mention several other cases touching on dual employment, *Untracht v. Fikri*, 454 F. Supp. 2d 289 (W.D. Pa. 2006), *Schwartz v. Univ. of Cincinnati Coll. of Med.*, 436 F. Supp. 3d 1030 (S.D. Ohio 2020), *Langston v. Hershey Med. Ctr.*, 2016 U.S. Dist. LEXIS 158792 (M.D. Pa. Nov. 16, 2016), and *Thompson v. Robert Wood Johnson Univ. Hosp.*, 2011 U.S. Dist. LEXIS 63980 (D.N.J. June 15, 2011). UPMC Br. 30-31, 34-35, 38. None of these cases are on point, as they all concern either (1) clinical care or (2) the termination of trainees for violating hospital rules. Here, in contrast, we are concerned with the academic side of the medical school–hospital relationship.

Defendants argue that there is no dispute of fact concerning Gladwin’s non-involvement because he testified that way during his deposition. UPMC Br. 21, 39-40. But his deposition testimony was inconsistent, as is his brief. Appx1325 (Gladwin Dep.); UPMC Br. 4 (Saba and Berlacher made the decisions at issue “along with Mark Gladwin, MD”). Gladwin later claims that his testimony shows that he was not involved “in the challenged *decisions*.” UPMC Br. 40 (emphasis added). But his testimony was that his August 7 email – in which he said that “we have taken immediate action” (Appx2764, emphasis added) – was a “leadership communication” using the “royal we,” that he was “communicating solidarity of a

leadership *decision*,” even though he did not “personally take that *action*” (Appx1325 (emphasis added)). A reasonable juror could conclude that Gladwin made the decision but let others implement it.

And even if Gladwin (and his lawyers) were perfectly consistent in denying involvement *after he was sued*, that would hardly preclude a jury from considering the various *contemporaneous* statements he (and others) made in 2020 showing otherwise. *See* Opening Br. 52-54. Here is another example:

- ... we had few leadership options: ....
- He is a training program director who picks candidates to interview and we firmly ascribe to and believe in holistic chart review and progressive and affirmative recruitment of a diverse workforce[.]
  - He showed no insight or remorse during meetings ....
  - To be honest, this places Samir Saba’s job on the line and threatens all that Joon Lee has built ....
  - *This threatens my leadership agenda ....*
  - *WE have HR clearance and are prepared for legal challenge that might be taken up by conservative news and think tanks- we -and I personally - are ok being on this side of the debate on affirmative action.*

Appx3013 (emphasis added) (Gladwin email dated Aug. 5, 2020). Thus, there is ample evidence that Saba and Berlacher were not acting on their own.

Defendants do not dispute that joint action between private actors and state actors is state action and agree that Gladwin had no role with HVI or GME.

UPMC Br. 6, 11; Pitt Br. 5-6 (Saba reported to Gladwin with respect to his academic work for Pitt); *see also McNeally v. Hometown Bank*, 2025 U.S. App. LEXIS 27183, at \*15-16 (8th Cir. Oct. 20, 2025) (jury could find joint action

sufficient to render bank liable under § 1983 where bank had coordinated with public school district to retaliate against bank employee for protected speech). Thus, any involvement Gladwin had with the Wang retaliation could only have been in his Pitt role, and it would demonstrate joint action even if the others were all private actors.

Further, defendants do not dispute that “[m]edical students at UPSOM are not part of the UPMC GME Program” (UPMC Br. 7), that Saba, as the Chief of the Division of Cardiology, was Wang’s superior at Pitt (Opening Br. 9), and that Saba and Berlacher precluded Wang from having contact with medical students (Opening Br. 21-22). Thus, Saba and Berlacher simply had to be wearing their “Pitt hats” in imposing this restriction.<sup>8</sup> Indeed, defendants do not argue that they were wearing their “UPMC hats,” but rather that they had no authorization to impose the restriction in their “Pitt hats.” UPMC Br. 20; Pitt Br. 11, 18 (“restriction was *ultra vires*”), 34-35 (same). Defendants also assert that Shekhar “promptly” (UPMC Br. 37) reversed this prohibition when he figured it out,

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<sup>8</sup> In responding to Wang’s point (Opening Br. 57) that, had Saba and Berlacher been wearing their “UPMC hats” in imposing the no-contact-with-medical-students restriction, it would have been Shapiro, and not Shekhar, who would have modified it, UPMC oddly states that it is a “red herring” and “completely unsupported by the record.” UPMC Br. 37 n.1. Yes, it is unsupported by the record: it was a counterfactual. The premise (that Saba and Berlacher were wearing their UPMC hats) is false.

although Pitt apparently claims he is a slow learner. Pitt Br. 12 (“Over the next couple of months, Dean Shekhar came to understand . . .”).

Whether Saba, as Wang’s superior at Pitt, had actual authority to impose a prohibition on contact with medical students is irrelevant. *Bennis v. Gable*, 823 F.2d 723, 733-34 n.11 (3d Cir. 1987) (police chief acted under color of state law regardless of whether he had actual authority); *Basista v. Weir*, 340 F.2d 74, 80 (3d Cir. 1965) (“statutory words ‘under color of [law]’ do not exclude from the purview of the Civil Rights statutes acts of an official who can show no authority for what he does”).

Nor would a jury be obligated to believe that Shekhar was slow. As pointed out in the Opening Brief, he learned of the prohibition against Wang’s participation in *all* medical education (*including* medical students) in August but only acted after multiple investigations (by the TAFC, the Department of Education, and the AAUP) were underway. Opening Br. 17-21, 23, 51. Moreover, the fact that Shekhar could reverse the decision to bar Wang from contact with medical students well after that decision had originally been made suggests that Shekhar could similarly have reversed other aspects of the decisions that had been made, had he chosen to assert his authority as Senior Vice Chancellor. *See* Appx1901 (Affiliation Agreement §3.4); Appx2832-2842 (article by Dr. Arthur Levine [Shekhar’s predecessor] et al. explaining Pitt-UPMC relationship and role of

Senior Vice Chancellor). The Relationship Agreements give Pitt authority over all of the decisions that were made concerning the response to Dr. Wang's article.

And if Pitt had authority, then Shekhar had authority, since it is undisputed that he has ultimate authority over the School of Medicine. Pitt Br. 18, 35; *see* Univ. of Pittsburgh Sch. of Med., Plan of Organization (Aug. 2014), <https://www.medfaculty.pitt.edu/sites/default/files/UPSOMPlanofOrg2014.pdf>. This is true even if Shekhar did not understand the extent of his own authority.

To summarize: Gladwin, Saba, and Berlacher argue that there was no state action, but fail to address all of the instances of retaliation that were pled, and never address either the Relationship Agreements or Pitt's Research Integrity policy. By his own admissions, Gladwin was involved in the retaliation, even though he had no role in HVI and thus could only have been acting for Pitt. Shekhar too was involved from the outset (Opening Br. 17-21, 23, 51), and in any event had the power to reverse decisions after they had been made. Saba and Berlacher, for their part, took multiple adverse actions impacting Wang's role in medical education, and their colleagues joined them in defaming and attacking Wang.

**3. Wang plausibly alleged final policymaker approval for purposes of *Monell***

A single decision from a final policymaker is sufficient to establish official policy for purposes of municipal liability under Section 1983. *Pembaur v. City of*

*Cincinnati*, 475 U.S. 469, 480-84 (1986); *Hill v. Borough of Kutztown*, 455 F.3d 225, 240-41 (3d Cir. 2006). Pitt does not dispute that Shekhar qualifies as a final policymaker. Indeed, Pitt argues that he exercised that authority in reversing the “no-contact-with-medical-students” prohibition. Pitt Br. 18, 35. Here, the Third Amended Complaint adequately alleged that Shekhar (1) approved of his subordinates’ decisions (Appx0324-0325 (¶¶ 34-37)) and (2) was himself involved in seeking a retraction of Wang’s article (Appx0145 (¶ 46), 0327 (¶ 46)). Further, by pleading Gladwin’s “Dear Colleague” email (Appx0326 (¶¶ 40-42)), Wang alleged that the decisions were “cast in the form of a policy statement.” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988).

**4. UPMC and UPP fail to justify their dismissal on a 12(b)(6) motion**

UPMC attempts to defend the district court’s dismissal of Wang’s First Amendment claim against UPMC and UPP for failure to plead state action. UPMC Br. 27-31. The FAC identified Pitt as a state actor (Appx0137 (¶ 6)); identified UPMC and its affiliation with Pitt (Appx0137 (¶7)); identified UPP and its affiliation with Pitt (Appx0138 (¶9)); identified the roles of Gladwin, Saba, and Berlacher and alleged that they were acting on behalf of Pitt (Appx0138 (¶¶ 12-14)); described Wang’s employment contract with UPP, including the contract’s many references to Pitt (Appx0139 (¶¶ 17-18)); and described the retaliation that

was undertaken by Gladwin, Saba, and Berlacher on behalf of Pitt, UPMC, and UPP (Appx0140-0143, 0146-0147 (¶¶ 22-38, 48-58)).

Detailed pleading is not required to satisfy Rule 12(b)(6), nor need a complaint establish a *prima facie* case to survive a motion to dismiss. *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786, 788-89 (3d Cir. 2016). Rather, “the post-*Twombly* pleading standard “simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of” the necessary element[s].” *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556).” *Id.* at 789.

As UPMC acknowledges (UPMC Br. 28), one of the tests used to determine whether state action exists is “whether the private party has acted with the help of or in concert with state officials.” *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009). Assuming *arguendo* that UPMC and UPP normally have the status of private parties, the FAC plainly alleges that, on the facts of this case, they acted in concert with the state and state officials – Gladwin, Saba, and Berlacher. If so, then UPMC and UPP may themselves be treated as having acted under color of state law. Wang was entitled to proceed to discovery on this theory, and it was error to dismiss UPMC and UPP without leave to amend.

Alternatively, as again UPMC acknowledges (UPMC Br. 28), another test to determine whether state action exists is whether “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 (cleaned up). Wang alleged enough about the Pitt-UPMC relationship that UPMC and UPP should not have been dismissed. *See, e.g.*, Appx0139 (¶¶17-18) (describing delegations to Pitt department head in Wang’s employment contract).

### **C. Retaliation in violation of civil rights statutes**

Wang asserted retaliation claims under Title VI, Title VII, the PHRA, and Section 1981. The district court either dismissed these claims or granted summary judgment against them.

#### **1. The district court erred in concluding that there was no “protected activity” for purposes of Title VII, the PHRA, and Section 1981**

Pitt and UPMC attempt to defend the district court’s grant of summary judgment to UPMC, UPP, and Pitt on Wang’s Title VII, PHRA, and Section 1981 claims on the ground that there was no “protected activity,” as the district court determined at the summary-judgment stage and at the earlier motion-to-dismiss stage (the court made essentially the same ruling on two occasions). UPMC Br. 41-46; Pitt Br. 40-49.

*Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, 450 F.3d 130 (3d Cir. 2006), distinguished between “public manifestations of disagreement with illegal employment practices,” which are protected so long as

they are at least implicitly connected to a specific employer, and mere expressions of opinion that are not linked to any illegal employment practice, which are not protected. *Id.* at 136. Thus, the pro-choice newspaper advertisement at issue in *Curay-Cramer* was not protected because it “did not mention employment, employers, pregnancy discrimination, or even gender discrimination.” *Id.* at 134; *see also id.* at 136 (the advertisement was not “directed at employers generally or at Ursuline specifically”).

Pitt asserts that the statements from *Curay-Cramer* are merely “dicta ... quoting unsupported dicta.” Pitt Br. 44. This ignores, *inter alia*, the case of *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. Unit A Sept. 1981), which is among the authorities discussed in *Curay-Cramer*. *Payne* held that a plaintiff’s participation in boycotting and picketing was protected activity where that boycotting and picketing was organized as a protest against discriminatory practices by local businesses in general, and the defendant understood that its stores were included among those targeted. *Id.* at 1133-37 and n.7.

Both Pitt and UPMC, moreover, ignore the EEOC guidelines, entitled to deference (Opening Brief at 62-63), which state that “protesting against discrimination by industry or society in general” is protected activity. EEOC, *Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016) at 15; *Doe v. C.A.R.S. Prot. Plus*, 527 F.3d 358, 364 (3d Cir. 2008).

Wang’s article addresses employment discrimination in GME programs on a nationwide basis. Appx2634. The article begins, “Affirmative action *as national policy* ....” Appx2629 (emphasis added). As shown in Wang’s Opening Brief, and as *they themselves concede*, the individual defendants all understood Wang’s article to criticize *every* GME program. Opening Br. 63-64; UPMC Br. 16 (“Saba and Berlacher understood Wang to be expressing a desire for ACGME and *all graduate medical programs in the nation* to follow the law.”) (emphasis added). The Pitt-UPMC graduate medical program is “in the nation.” The fact that there are others as well does not render Wang’s article unprotected.

This point is particularly clear in the context of ACGME’s diversity directive, since all GME programs in the nation were required to comply or risk losing accreditation.<sup>9</sup> Appx2629-2930, 2633-2634. The article’s concerns about race discrimination necessarily applied to the Pitt-UPMC GME program, the defendants understood this, and the connection was clearly expressed in the remarks that were made during the July 31 meeting. Opening Br. 17-24. It is not true that Wang’s article merely stated views “antithetical to UPMC’s values” (Pitt Br. 48; *accord*, UPMC Br. 45); rather, the defendants knew that Pitt and UPMC were engaged in the very employment discrimination that Wang criticized.

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<sup>9</sup> The ACGME’s diversity directive appears to have been formally withdrawn on September 5, 2025. *See* Email from ACGME dated September 5, 2025, <https://donoharmmedicine.org/wp-content/uploads/2025/09/ACGME-DEI.pdf>.

Wang’s article identifies two other entities by name as engaging in employment discrimination, the American College of Cardiology (“ACC”) (Appx2629, 2634, 2639) and Ohio State (Appx2633). These are not mere “fleeting references.” Pitt Br. 45. And it is no coincidence that two of the seven signatories to the email requesting retraction of Wang’s article were members of ACC’s diversity task force, and one (Capers) was a vice dean at Ohio State and a co-author of the article Wang addressed. Appx1741-1742, 1809 (Berlacher Dep.); Appx2014 (Shekhar Dep.). Capers was particularly vehement in his public denunciations of Wang.<sup>10</sup> Appx2084-2085 (Shekhar Dep.). “There is nothing in Title VII that limits retaliation claims to situations where an individual is engaging in protected activity against his or her own employer; rather, the plain language of Title VII clearly prohibits retaliation by an employer against an employee who is taking any action to protest or oppose statutorily prohibited employment discrimination by any employer . . . .” *Abreu v. Suffolk Cnty. Police Dep’t*, 2007 U.S. Dist. LEXIS 12695, at \*31-32 (E.D.N.Y. Feb. 23, 2007).

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<sup>10</sup> Capers: “The bar for retraction is high. It must be shown that the author falsified data/findings. That is the bar. That bar was met. Let me say again, that bar was met... This is not cancel culture, this is an example of editors being made aware of deliberate falsification and taking appropriate steps.” Appx2084.

**2. Pitt fails to justify the district court’s grant of summary judgment in the face of evidence that Pitt was involved in actionable violations of Title VII and the PHRA**

Pitt attempts to defend the district court’s summary judgment ruling on several alternative grounds. First, Pitt argues that it was not involved in Wang’s removal as program director or the bar on his contact with students, residents, and fellows. Pitt Br. 27-38. The facts here are the same as they are in the context of the state-action issue, and have already been fully addressed (*see supra* Section II.B.1. & 2.). Pitt, moreover, applies the wrong legal test, asserting that *Borrell* applies. Pitt Br. 28, 30, 35, 37. Two entities, however, may be “co-employers” or “joint employers” of one employee for purposes of Title VII or the PHRA. *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 215 (3d Cir. 2015); *Graves v. Lowery*, 117 F.3d 723, 727 (3d Cir. 1997); *Noma v. Cap. Bluecross*, 2025 U.S. Dist. LEXIS 113760, at \*7 (M.D. Pa. June 16, 2025). Even if Pitt were not wholly in control of what took place, as a joint employer it will be liable if it participates in the discrimination, or if it knows or should have known of the discrimination but fails to take corrective measures within its control. *EEOC v. Global Horizons, Inc.*, 915 F.3d 631, 641 (9th Cir. 2019) (endorsing rule expressed in EEOC guidelines and adopted by fifth and seventh circuits); *see also Graves*, 117 F.3d at 729 n.12 (co-employer has duty under Title VII to protect employee from other co-employer’s discriminatory conduct). Here, there were many disputed issues of material fact as

to whether Pitt was liable either as a direct participant or because it failed to take corrective measures within its control.<sup>11</sup>

Second, Pitt argues that the “remaining actions” that were taken against Wang, including the denigration he was subjected to on social media, the request that his article be retracted without complying with Pitt’s Research Integrity policy, and the attempts to ostracize him at work, either were not “materially adverse” or were themselves protected by the First Amendment. Pitt Br. 38-39. Actions are “materially adverse” if they “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Moore v. City of Phila.*, 461 F.3d 331, 348 (3d Cir. 2006) (quoting *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53, 68 (2006)). This is not a demanding standard, and easily met here. *Moore*, 461 F.3d at 348 (pattern of harassment suffices); *Szeinbach v. Ohio State Univ.*, 493 Fed. Appx. 690, 694-96 (6th Cir. 2012) (accusing faculty member of research misconduct suffices); *Morrison v. City of Reading*, 2007 U.S. Dist. LEXIS 16942, at \*26-27 (E.D. Pa. Mar. 9, 2007) (disparaging comments coupled

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<sup>11</sup> In a footnote, UPMC argues that the Title VII and PHRA claims against it fail because Wang was employed by UPP, not UPMC. UPMC Br. 41 n.2. This is wrong because UPMC and UPP would be considered a “single employer” under these statutes. See *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 85-86 (3d Cir. 2003) (parent company may be liable under Title VII where it directs subsidiary to perform the discrimination); *Hollinghead v. City of York*, 11 F. Supp. 3d 450, 464-65 (M.D. Pa. 2014) (PHRA has even broader scope than Title VII as to the entities that may be held liable), *aff’d*, 592 Fed. Appx. 110 (3d Cir. 2015).

with threats of other adverse action suffices); *Lewis v. Ind. Wesleyan Univ.*, 2022 U.S. Dist. LEXIS 119681, at \*23 (N.D. Ind. July 7, 2022) (adverse changes to work conditions suffices).

The First Amendment, moreover, will not be a defense to retaliatory speech by a public official if “there was ‘a threat, coercion, or intimidation, intimating that punishment would follow.’” *Conrad v. Pa. State Police*, 902 F.3d 178, 183 (3d Cir. 2018) (quoting *Mirabella v. Villard*, 853 F.3d 641, 651 (3d Cir. 2017)); cf. *Greisen v. Hanken*, 925 F.3d 1097, 1113-14 (9th Cir. 2019) (retaliatory speech not protected if it is part of a campaign of harassment or if it intimates that some form of punishment will follow); *Echols v. Lawton*, 913 F.3d 1313, 1322-23 (11th Cir. 2019) (retaliatory speech not protected where it constitutes defamation).<sup>12</sup> Here, not only was Wang subject to immediate, tangible punishments, but he was led to believe that he could be fired at any moment. Appx2492, 2579 (Wang Dep.).

Third, Pitt argues that Wang failed to establish causation, but it concedes that all of the retaliatory actions were causally linked to Wang’s article. Pitt Br. 49-52. As shown above, the article was protected activity.<sup>13</sup>

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<sup>12</sup> All of these cases were decided in the context of First Amendment retaliation claims, rather than Title VII or PHRA retaliation claims, but the principle nevertheless applies.

<sup>13</sup> UPMC seems to be making its own causation argument in reciting that Berlacher wanted Wang removed because his article jeopardized the “safety” of the trainees. UPMC Br. 14, 17-19. Indeed, Berlacher did testify that Wang’s views represented a threat to the “safety” of the trainees and “are counter to being a physician.”

**3. Pitt fails to justify the district court’s dismissal of Wang’s Title VI and Section 1981 claims against it on a 12(b)(6) motion**

Pitt attempts to defend the district court’s dismissal of Wang’s Title VI and Section 1981 claims from the FAC by arguing, once again, that Wang did not adequately plead that it was involved in the retaliation.<sup>14</sup> Pitt Br. 20-24. Wang disagrees. The FAC identified Pitt (Appx0137 (¶ 6)); identified UPMC and UPP as being affiliated with Pitt (Appx0137-0138 (¶¶7, 9)); identified the roles of Gladwin, Saba, and Berlacher, alleging that they were acting on behalf of Pitt (Appx0138 (¶¶ 12-14)); described the many references to Pitt in Wang’s employment contract with UPP (Appx0139 (¶ 17)); and described the retaliation that was undertaken by Gladwin, Saba, and Berlacher on behalf of Pitt (Appx0140-0143, 0148 (¶¶ 22-38, 59-67)).

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Appx0598 (email); Appx0631 (interrogatory response); Appx1744-1746, 1856-1863 (Berlacher Dep.). Such statements reveal a troubling hostility to the enforcement of our civil rights laws. The purported fact that people felt uncomfortable because of Wang’s protected activity is not a defense. *E.g.*, *Alvarez v. Royal Atl. Dev., Inc.*, 610 F.3d 1253, 1269 (11th Cir. 2010) (discomfort with discrimination claim not legitimate reason for retaliation).

<sup>14</sup> Pitt argues that Wang forfeited this argument by making only a “passing reference” to the issue in his opening brief. Pitt Br. 22. Wang forthrightly addressed this argument in a separate section of his opening brief under a separate heading. Opening Br. 66-67. The issue, moreover, was relatively simple, overlapped substantially with other issues already addressed earlier in Wang’s opening brief (*e.g.*, state action, *Monell*) and simply did not need much space to address.

Again, Pitt refers to the wrong legal standard, citing *Borrell* (Pitt Br. 22), a state-action case, rather than the law applicable to civil rights statutes. Indeed, Title VI and Section 1981 are, if anything, even broader in their scope of coverage than Title VII and the PHRA, since they do not require an employment relationship. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 452-55 (2008) (retaliation under §1981); *Reddy v. Univ. of Pa.*, 2024 U.S. Dist. LEXIS 150254, at \*8-9 (E.D. Pa. Aug. 22, 2024) (retaliation under Title VI). Pitt’s citation to *Connelly* (Pitt Br. 21) does not help; *Connelly* only requires that Wang plead enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements of his claim. *Connelly*, 809 F.3d at 789. Wang did that. And Wang’s allegations were confirmed rather than “contradicted by the summary judgment record,” as Pitt alleges. Pitt Br. 24; *see* Opening Br. 7-27.

Although Pitt denies that the district court’s ruling on the Second Amended Complaint was inconsistent with its ruling on the FAC (Pitt Br. 23-24), the differences between the two pleadings on this point were minimal and simply do not explain the different outcomes. *Compare* Appx0020-0022 (first ruling) *with* Appx0309-0312 (second ruling). Conspicuously, Gladwin, Saba, and Berlacher did *not* move to dismiss the First Amendment claim against them in the FAC, but did so move with respect to the Second Amended Complaint.

**4. Wang adequately pled his Title VI claim against UPMC**

UPMC argues Wang failed to plead facts sufficient to establish that the GME funding UPMC receives from the federal government has “a primary objective” of providing employment. UPMC Br. 53-57. The FAC alleged that UPMC “employs” residents and fellows in its GME program and “specifically receives federal funds to employ residents and fellows in its residency, GME, and fellowship programs” Appx0137 (¶ 8); *see also* 0148 (¶ 60).

Residents in GME programs are employees. *Mayo Found. v. United States*, 562 U.S. 44, 51 (2011). Medical residency is “a supervised clinical training period, which is generally considered to be an intensive, *full-time job* that provides residents (also called trainees) with hands-on experience and increasing autonomy in delivering health care under the guidance of experienced attending physicians.” Cong. Rsch. Serv., R48636, Federal Support for Graduate Medical Education 1 (2025) (“CRS Report”) (emphasis added).

UPMC cites cases dismissing Title VI claims for failure to allege that the federal funding was primarily directed to employment, but none of these cases dealt with GME programs, or any other comparable category of employment. *See Jasim v. Port Auth. of Allegheny Cnty.*, 2018 U.S. Dist. LEXIS 33019, at \*4 (W.D. Pa. Mar. 1, 2018) (funding Port Authority); *Johnson v. Cmty. Coll. of Allegheny Cnty.*, 566 F. Supp. 2d 405, 457-59 (W.D. Pa. 2008) (funding general education);

*Johnson v. Cnty. of Nassau*, 411 F. Supp. 2d 171, 176 (E.D.N.Y. 2006) (funding diversity initiatives); *Thornton v. Amtrak*, 16 F. Supp. 2d 5, 7-8 (D.D.C. 1998) (funding Amtrak); *Reynolds v. Sch. Dist. No. 1*, 69 F.3d 1523, 1531 (10th Cir. 1995) (funding public school district).

UPMC identifies Medicare as the source of federal GME funding. UPMC Br. 57 n.4. Congress expressly authorized the Medicare program to subsidize the costs of GME, including residency and fellowship programs, through “direct graduate medical education costs” payments. 42 U.S.C. § 1395ww(h). The regulations specify that GME reimbursement covers “residents’ salaries and fringe benefits” as well as portions of teaching physicians’ salaries and benefits. 42 C.F.R. §413.75(b)(1).

These payments are not general subsidies that can be spent on just anything; they reimburse the direct cost of employing the residents who work in hospitals. Medicare’s share of GME funding was estimated to be \$21.2 billion in Fiscal Year 2023, supporting an estimated 116,000-124,000 employees. CRS Report, *supra*, at 2, 13.

### III. CONCLUSION

This Court should reverse the district court's orders granting summary judgment and dismissing claims in Wang's complaint.

Dated: November 3, 2025

Respectfully submitted,

/s/ J. Robert Renner

J. Robert Renner

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and this Court's Order of October 27, 2025 (Dkt. 78) because this brief contains 10,942 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

Dated: November 3, 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: November 3, 2025

/s/ J. Robert Renner  
J. Robert Renner

**CERTIFICATE OF ELECTRONIC FILING  
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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: November 3, 2025

/s/ J. Robert Renner

J. Robert Renner

**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 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: November 3, 2025

/s/ J. Robert Renner  
J. Robert Renner