Case No. 23-10072

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHERYL BUTLER,

Plaintiff-Appellant,

v.

JENNIFER M. COLLINS; STEVEN C. CURRALL; ROY P. ANDERSON; JULIE P. FORRESTER; HAROLD STANLEY; PAUL WARD; SOUTHERN METHODIST UNIVERSITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

OPENNING BRIEF OF PLAINTIFF-APPELLANT CHERYL BUTLER

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.1, I hereby certify as follows:

(1) This case is *Cheryl Butler v. Jennifer Collins et al.*, No. 23-10072 (5th Cir.).

(2) The undersigned counsel of record hereby certifies that the following persons and entities, including those described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case:

Plaintiff-Appellant
Cheryl Butler

Counsel for Plaintiff-Appellant
Ezra Ishmael Young of the Law Office of Ezra Young

Defendants-Appellees
Jennifer Collins
Steven Currall
Roy Anderson
Julie Forrester
Harold Stanley
Paul Ward
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/s/ Ezra Young
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STATEMENT REGARDING ORAL ARGUMENT

Professor Butler respectfully requests oral argument. Oral argument in this case will illuminate the positions of the parties and aid the Court in reaching a decision.

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JURISDICTIONAL STATEMENT

Professor Butler was mistreated, her reputation and good name impugned, and ultimately denied tenure at SMU Law. After exhausting administrative remedies, Professor Butler filed suit against SMU and the Individual Defendants to redress violations of the THRCA, FMLA, ADA, §1981, Title VII, and Title IX in addition to separate violations of her rights under Texas contract and tort common law.

This suit was initially filed in a Texas state trial court, in August 2017. Approximately six months later, Defendants-Appellees removed this case to the Northern District of Texas citing entitlement pursuant to 28 USC § 1446. The Northern District effectuated removal and thereafter exercised jurisdiction over the federal and state law claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367 respectively.

The Northern District entered final judgment on January 19, 2023. Later that same day, Professor Butler filed a Notice of Appeal pursuant to Fed. R. App. P. Rule 4 seeking relief from final orders resolving all claims. This Court has jurisdiction of Professor Butler's appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Texas Supreme Court precedent holds that the TCHRA preempts state law tort claims against employers but not against their employees. Did the Northern District error in finding as a matter of law that the THCRA preempts state tort claims against Individual Defendants?
2. A client has a right to choose her counsel. Butler terminated Attorney Dunlap, who subsequently moved to withdraw. The Northern District summarily denied that motion providing no rationales for its decision, making it impossible to review its reasoning on appeal. Did the Northern District abuse its discretion?
3. A professor's tenure box is indispensable evidence in every tenure denial case. When Butler went up for tenure at SMU Law she submitted her tenure box, but it was never returned. Nor was the tenure box produced during discovery, and SMU's counsel otherwise refused to produce the tenure box out of time. Butler filed a Rule 56(d) motion, which was summarily denied. Nine months later, the Northern District issued a merits opinion that turned on facts not in the record. Close in time at a hearing, the Northern

District found as fact the tenure box had been produced claiming to have reviewed it at summary judgment. The tenure box was not proffered at summary judgment. Did the Northern District abuse its discretion?

4. The same day Butler terminated Attorney Dunlap for failing to prepare filings opposing summary judgment, she retained new counsel who appeared in this case and immediately docketed a request for scheduling relief pursuant to Rule 6(b)(1)(A) explaining what had happened and why relief was necessary. The Northern District summarily denied that motion. Later, Butler moved under Rule 6(b)(1)(B) seeking relief from the deadline that had been missed. That motion and subsequent ones seeking reconsideration pointed to evidence of excusable neglect, good faith, and no untoward prejudice to the nonmovants, nonetheless they were denied. Did the Northern District abuse its discretion in denying motions under either rule?

5. While Butler waited for the Northern District to consider her motion for scheduling relief, she docketed filings opposing summary judgment so as not to miss the deadline she requested in her

motion. In March 2022, the Northern District denied Butler's motion and struck her opposition filings. In April 2022, summary judgment was summarily granted against all of Butler's claims. In January 2023, a merits opinion was finally issued. Should summary judgment have been treated as unopposed? If yes, what burdens if any did Defendants-Appellants bear on that posture?

6. Upon remand and in light of the scope of errors below as well as Judge Brown's many statements evidencing bias, is reassignment necessary?

STATEMENT OF THE CASE

Professor Cheryl Butler worked hard her entire life to earn a seat at the table. This case, at its core, concerns whether SMU and the Individual Defendants must be held to account for depriving Butler of the tenured law professorship she earned as well as a litany of violations of federal and Texas law. On appeal this case concerns this Circuit's commitment to ensuring the integrity of civil rights proceedings at the trial court level.

Respectfully, Professor Butler requests that this Court vacate the orders appealed and remand this case to the Northern District with instruction for it to be reassigned.

A. History of Lockout in the Legal Academy

Our nation's law schools are critical incubators for our learned profession. When they are sick, our communities suffer. Every single person deserves to be treated fairly. Her fortunes should rise and fall on her qualifications and work ethic, not who she is. And yet, to this very day many American law school faculties are demographically homogenous.

There are disproportionately few Black women on law faculties in the United States. Despite a modest uptick in the number of Black women hired for tenure-track law professorships, pushout remains all too common.

Women of color law professors rarely enjoy the status, authority, and opportunity equal to that of white men working in the legal academy. Meera E. Deo, *The Ugly Truth About Legal* Academia, 80 BROOKLYN L. REV. 943, 975 (2015) (cleaned up). "After securing faculty appointments, candidates from underrepresented groups have continued to wage tenure wars for decades, just for their survival in the academy. They confront many obstacles, including inconsistent application of rules and requirements, micro-aggressions, and overt hostilities to their successes." Angela Mae Kupenda & Tamara F. Lawson, *Truth and Reconciliation: A Critical Step Toward Eliminating Race and Gender Violations in Tenure Wars*, 31 COLUM. J. GEN. & L. 87, 88 (2015).

SMU Law was founded in 1925. Despite producing many skilled and well-respected minority women lawyers, it did not during Butler's employ have a reputation for being hospitable towards minority faculty, especially women. In fact, it did not tenure its first Black woman,

Professor Jessica Weaver, until 2015. That ninety-year streak was no accident.

Making change is a treacherous but necessary endeavor. As Professor Angela P. Harris explains, "To be a Woman of Color in academia is, too often, to be presumed incompetent." It takes a special kind of courage to tell one's truth "[i]n the face of academia's unspoken norm to be silent about one's vulnerability." *Presumed Incompetent in the Era of Diversity*, in PRESUMED INCOMPETENT II: RACE, CLASS, POWER, AND RESISTANCE OF WOMEN IN ACADEMIA x (eds., Yolanda Flores Nieman, Gabriella Gutiérrez y Muhs, & Carmen G. Gonzalez, 2020).

B. Professor Cheryl Butler

Cheryl Butler has been an academic star her whole life. She earned a merit scholarship to Phillips Academy Andover, graduated *cum laude* from Harvard College, and was a Ruth Tilden Kern Scholar at NYU Law (ROA.1991). After law school, she clerked for the Honorable Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia (ROA.1991). Thereafter, Butler worked at Debevoise & Plimpton for three years, and then went in house as senior counsel at Enron Corporation (ROA.1991). Butler then went on to serve as General

Counsel and Executive Director of Top Teens America, Inc., a national youth service and humanitarian organization (ROA.1991).

Eventually, Butler transitioned into law teaching. She spent several years working at University of Houston Law Center, first as an assistant clinical professor and later as a visiting fellow (ROA.1991). In 2012, Butler joined the SMU Law faculty as a tenure-track assistant professor of law (ROA.1991). That tenure-track professorship was a promise to Butler that if she worked hard and followed the rules, she would earn life tenure and a seat at the table.

Butler was an all-star at SMU, the kind of young scholar that senior colleagues predicted would become a leader in her field. She published articles in flagship law review articles that "clearly contributed to the growth and understanding of the law" (ROA.1992). She gave lectures around the nation on issues within her expertise (ROA.1993–94). Butler's colleagues also recognized her sustained engagement and service to SMU Law and the university as well as service at the national level promoting law teaching and supporting non-profits within her areas of expertise (ROA.1995–96).

Butler excelled at teaching higher level courses in Critical Race Theory and employment discrimination (ROA.1996–97). Some of Butler's colleagues rated her an outstanding teacher in the Torts as well. *See, e.g.*, ROA.2042 (October 2015 teaching evaluation from law professor Joshua Tate); ROA.2046 (November 2015 teaching evaluation from Ann Batenburg, SMU Center for Teaching Excellence); ROA.2036 (October 2015 teaching evaluation from law professor Anthony Colangelo).

C. Hostilities, Disparate Treatment, and Illness

As a scholar of race and employment discrimination, Professor Butler was well aware of the inordinate challenge it would be to secure tenure at SMU Law as a Black woman. Early on, Butler spoke candidly with her colleagues and administrators about how many minority women professors are locked out of tenured law professorships (ROA.3017). She presented statistics and scholarly articles dissecting the problem and asked for support in ensuring that when she went up for tenure, she would be treated fairly. That was not to be.

In Spring 2015 Butler's husband fell seriously ill. The stress of her husband deteriorating health took a toll on Butler. Her asthma and other conditions became harder to manage, and she was diagnosed with

depression and anxiety (ROA.3016). Throughout the late Spring and Summer 2015, Butler reached out to administrators including Dean Jennifer Collins at SMU Law seeking accommodations to help her navigate these challenges. Rather than step in to help Butler, administrators including Collins started to sabotage her. Rumors also began to swirl around the law school that Butler was faking illness or simply not committed to SMU Law when nothing could be further from the truth. Butler reached out to SMU in June 2015 seeking assistance filing for FMLA leave (ROA.2127). She also shared her health problems directly with Dean Collins (ROA.2104–05).

Around this same time, Butler raised serious concerns about bias at SMU Law directly to Dean Jennifer Collins. In one August 2015 email, Butler expresses concern that SMU Law failed to expediently intervene when she reported students harassed her, voiced concern that the same student damaged her reputation and spread falsities, and also indicated she had faced harassment and discrimination from SMU Law colleagues. *See generally* ROA.2215–20. Butler's email also attested that student harassment in the classroom and in evaluations "continue to cause great anxiety" (ROA.2217). She was alarmed that efforts to discipline

harassing students were "repeatedly discouraged" (ROA.2217). She goes on to report an incident where a student "yelled" at her in the classroom in front of other students, threatened to get Butler fired, and bragged that she could poison Butler's reputation amongst other faculty at SMU Law (ROA.2218).

Butler's lengthy email complaint to Collins goes beyond individual incidents of mistreatment, bias, and hostilities. Butler describes being harassed by several students in the past and the cumulative effect was "starting to wear on me physically and emotionally" (ROA.2217). She claims that there is a pattern and practice of law students "harassing the only Black Female professor" teaching 1L courses (ROA.2218) (cleaned up). She reasons students targeted her because she was "vulnerable not only because I am not tenure. But permanently vulnerable because zi am Black and female" (ROA.2219). She complained that some colleagues responded negatively to her concerns: "My colleague's response, one that has been repeated in other incidents, was to presume my guilt and try to punish me" (ROA.2219). She worried that her "colleagues seek to punish the professor for the complaint by students" (ROA.2219).

Butler closes by directly asking Collins to affirmatively take responsibility for the hostilities Butler was enduring at SMU Law. To wit, Butler asks Collins to do more than just offer to talk with her as friend. "I need more than someone to talk to. I need someone to protect me. I need someone at the university to decide what can be done" (ROA.2220).

D. Tenure Rules and Tenure Boxes

SMU's university wide rules for tenure are set forth in the Guidelines and that the Law School's rules are in the Bylaws. The Guidelines identify two factors for tenure—teaching and research—and state that tenure is awarded where the candidate is deemed "outstanding" in either area and at least "of high quality" in the other (ROA.2079). The Bylaws also identify two factors for tenure—teaching and "contributing to the growth and understanding of the law," and state that these factors are to be "given equal weight in the determination whether to award tenure" (ROA.2074–75).

The Bylaws set forth the Law School internal process for tenure: (a) the Dean appoints a three-member tenure committee, (b) the tenure committee visits the candidate's classes, reviews her writings, and

provides counsel on teaching and research throughout her probationary period, (c) the Dean calls a special meeting for the faculty to consider the tenure application, (d) the faculty vote via unsigned secret ballots, and (e) if the Dean agrees with the faculty, that recommendation is made to the Provost (ROA.2072–73).

The Guidelines set forth the tenure process beyond the law school: (f) the Dean submits their recommendations to the Provost no later than February 1, (g) the Provost submits the Dean's recommendations to the Provost's Advisory Committee, and (h) the Provost makes their recommendations to the President and ultimately, to the Board of Trustees (R.2080). The Guidelines permit appeal of negative recommendations made by the Dean (appealed to the Provost) and the Provost (appealed to the President) (ROA.2072–73). The Bylaws separately vest tenure candidates considered in their fifth year or later with the right to appeal the decision of the Faculty during their terminal year (ROA.2073–74).

Qualifications for tenure are assessed by reviewing the applicant's "tenure box." ROA.2016 ("And all we – all we look at is what's in the

dossier. The dossier covers research, teaching, in-service. We don't look at anything else. It's a pure merit-based system.").

A "tenure box" (sometimes also called a tenure dossier or tenure binder) is the application package submitted by professors seeking tenure at American universities. Tenure boxes collect the professional life's work of a professor. Tenure boxes contain all positive, negative, and neutral "evidence" of the applicant's aptitude at teaching and research.

At the first stage of the process, the tenure candidate assembles her contributions to the tenure box. She labels a box as her own, creates a table of contents and dividers for the different sections of the box including empty spots for decisionmakers to add materials in, and otherwise fills the box with the required elements that are in her possession. Professor Butler's tenure box also included other unique items, including but not limited to: several hand-labeled dividers that are colored, a table of contents affixed to the first divider in the box, two pages affixed to the outside of the box including a special table of contents (or index) and another labeling the box as Professor Butler's. *See* R.2975–77 (describing contents); R.2997 (listing contents); ROA.2998–99 (Promotion & Tenure Checklist).

By design, the tenure box facilitates fair consideration by each decisionmaker in the multi-step tenure process—it contains all the permissible and pertinent records speaking to the candidate's qualifications for tenure. Without the tenure box, decisionmakers cannot possibly make a fair, substantive assessment of the candidate's qualifications. At each stage of consideration within the formal tenure process, the decisionmaker renders a vote on tenure and adds in materials memorializing the decision. The box is then handed off to the next decisionmaker in the chain until the tenure review is complete.

There is no requirement under the Guidelines or Bylaws that a professor go up for tenure in her fifth year. The Guidelines provide that one goes up for tenure at "an appropriate time" defined as a "probationary period not to exceed seven years" (ROA.2080–81), whereas the Bylaws state that a candidate is not ordinarily considered until at least "her fifth year of teaching" (ROA.2072).

E. Professor Butler's Doomed Bid for Tenure

Beaten down by her and her husband's poor health and deeply concerned that student and colleague bias would negatively infect her

tenure review, Butler cautiously began to initiate the tenure application process.

In late September 2015, Butler raised concerns to her Tenure Committee. In one late September 2015 email, Butler asks for assistance to contextualize student evaluations she believed in her expert eye were infected with bias. Unfortunately, Butler's concerns about bias in the tenure process were construed by the Tenure Committee as being complaints against them as individuals, which Collins turned around and used a pretext to totally reconstitute Butler's committee anew. *See, e.g.*, ROA.2222–24 (Sept. 2015 correspondence between Butler, Collins and Thomas); ROA.2088 (Sept. 2015 correspondence between Collins and original tenure committee).

It was procedurally irregular for Butler's tenure committee to be reconstituted in late September 2015 given that she was applying for tenure that same cycle. ROA.1949 (noting it was "not typical," generally "you'd have the same committee for the full five years prior"); ROA.1957 (characterizing it as "an extraordinary situation").

This new tenure committee also operated in an unusual manner. Despite others having continuously and closely evaluated Butler's

progress towards tenure since she arrived at SMU Law, the new committee put "very little" reliance on their evaluations of Butler (ROA.1949). Indeed, they appear to have ignored for the most part Butler's strong Contract Renewal Report (ROA.2083–87) from 2014. The time crunch coupled with Butler's declining health made one member of the new committee opine "I cannot give an opinion on her teaching (and on her career) based on what I've observed and experienced over the last few months" (ROA.2041).

There were other irregularities with Butler's tenure process—both Butler and SMU Law colleagues thought it was peculiar for her to go up for tenure at a time when she was seriously ill and had sought leave and secured FMLA leave. Multiple members of Butler's tenure committee thought it inappropriate for Butler to be considered for tenure when she was so obviously ill. *See, e.g.*, ROA.2041 (Spector: "As Cheryl began to complain about her health, the [teaching reviews] got worse. I'm not sure which came first, the bad reviews or the bad health."); ROA.1958 (Anderson: "[The Committee] also agreed that we were going to slowly encourage [Butler] to get a tenure extension because we believed she had the ability to do the job").

Despite Butler's obvious poor health, SMU Provost Stanely denied Butler's request for a tenure clock extension. *See* ROA.2033–34 (November 10, 2015 letter denying tenure clock extension). The denial is itself odd because the extension was denied on the pretense that because Butler was healthy enough to teach full time in the 2015–16 school year, the extension was deemed unnecessary.

Stanley's letter denying Butler's a tenure clock extension cannot be reconciled with records evidencing that Butler was in fact deemed by SMU to be too ill to teach in both the Fall 2015 and Spring 2016 terms. For instance, emails from SMU's benefits department evidence that Butler was on FMLA for from roughly November 2015 through April 2016. *See, e.g.*, ROA.2146 (December 2015 email memorializing approval of FMLA leave in November and December 2015, and intermittent leave through June 15, 2016); ROA.2147 (January 2016 email memorializing FMLA leave for "first part of Spring 2016 semester).

After Butler's request for tenure clock extension was denied but during her FMLA leave, SMU continued to push forward with Butler's tenure application.

Butler's tenure committee finalized Butler's Tenure Report in January 2016. The lengthy report (ROA.1991–2011) purports to evaluate Butler in the areas of research, service, and teaching. The Committee agrees Butler is qualified in the areas of research and service (R.1992–96). But the lion's share of the Report—13 of its 21 pages—hyper-scrutinizes Butler's teaching.

The Tenure Report totally discounts the previous Committee's assurance that Butler was on track to "be at least at a high quality level in her large Torts class" (ROA.1998). The Tenure Report goes on to quote purported student reviews and peer evaluations without attribution. It paints positive peer evaluations of Butler's teaching skills as unbalanced (ROA.2002). Oddly, the chair of the Committee, Anderson, critiques Butler for using class notes and a casebook in the classroom while she lectures (ROA.2006–07), which is common practice at every American law school including the undersigned's institution.

There are other aspects of the Tenure Report that stand out as unusual. The Report makes serious allegations against Butler without any corroboration. For example, an entire subsection insists that Butler "Lack[s] Commitment to Teaching" (ROA.2007). Other very serious

accusations are made without reference to corroborating materials and more often than not without attribution. For example, the Report asserts Butler never turned her Torts grades in on time (ROA.2007) and that Butler's exams are "problematic" despite the Committee never having reviewed them (ROA.2008).

The Tenure Report concludes by attacking Butler's character and bringing up issues that are not supposed to be considered when a professor goes up for tenure. For instance, the Report divulges that Butler was presently on FMLA leave (ROA.2009). It accuses Butler of being "untruthful in her dealings with her colleagues and the law school administration" without references or corroboration (ROA.2010). And it also takes the position that Butler "made accusations against colleagues, including our Dean and our Provost, that are demonstrably not true" (ROA.2010).

The record reflects that the Tenure Committee's process was infected with bias and other improprieties. For example, Butler's race, gender, and supposed mental health status were considered by the tenure committee as it authored its Tenure Report of Butler. *See, e.g.*, ROA.1964 (Anderson characterizing Butler as "hysterical"); ROA.2229

(Anderson reporting that Spector characterized Butler's conduct as "so bizarre, it was not fair to vote"); ROA.2238 (Spector reporting that there was "some discussion generally about race and gender being a factor in student evaluations"). The Tenure Committee also directly corresponded with Dean Collins throughout their evaluation taking her input despite the fact that under both the Guidelines and Bylaws the Dean cannot be involved in earlier stages of the multi-step tenure review process. *See, e.g.*, ROA.2038 (October 2015 email in which Collins serves as conduit for peer teaching evaluation with the Tenure Committee); ROA.2037 (January 2015 email from Collins to Anderson sharing purported student complaints, without corroboration).

Thereafter, Butler's tenure application moved through the next steps of the tenure review process. Once again, there were procedural irregularities and evidence that Butler's race and gender were points of discussion as part of the tenure process in the next stages of review. Among other things, Butler was told by one of her colleagues that parts of her tenure box were "removed" during the faculty's "inspection period" and placed in "Dean Collins' office or some other remote location" (ROA.3020).

The SMU Law faculty did not vote to award Butler tenure. Under the Bylaws, a candidate for tenure must garner favorable votes from 60% of the faculty present and eligible to vote (ROA.1985). Butler received 9 votes in favor, 12 votes against, with 6 members of the faculty abstaining (ROA.2229). SMU Law faculty members attest that Butler's race, gender, and supposed mental health status was discussed openly while her tenure application was considered by the full faculty. *See, e.g.*, ROA.1966 ("I'm sure the discussion of race came up" during the faculty vote on tenure).

Butler appealed the negative tenure vote to Law faculty. Contrary to the rules, Dean Collins adjudicated the appeal herself (R.2096) despite the Bylaws requiring the Dean to "promptly convoke a special meeting of those members of the Faculty eligible to vote on the candidate's tenure" to consider the petition (ROA.2074).

Collins broke other rules, too. She violated the Guidelines' requirement that her vote on tenure as dean must be transmitted to the provost by February 1 (ROA.2080). Collins did not send her review of Butler's tenure application to the Provost until May 4, 2016 (ROA.2097),

93 days past the deadline. Collin's recommendation is negative (ROA.2097–102).

Evidence suggests that Provost Currall also failed to independently review Butler's tenure application as is required by the Guidelines. On May 5, 2016, Provost Currall notified Butler that "after thoroughly reviewing your case for promotion and tenure" he too did not recommend her for tenure (ROA.2103). It is not believable that Currall reviewed Butler's voluminous tenure box and all of the tenure documentation in one day's time. *See* ROA.2023 (Currall deposition: "I read [Dean Collins' review] multiple times" and going on to claim he corroborated its findings against Butler's tenure box asserting he reviewed "faculty evaluations and student evaluations as well").

Amidst these procedural irregularities, some of Butler's colleagues at SMU Law reached out to her, sharing their views that "SMU was treating me to a highly unusual tenure process that was strikingly different from other candidates" (ROA.3018). A Latino man advised that SMU systematically applied different tenure standards to different faculty candidates and reserved the right to do so (ROA.3018). The only Black woman then tenured on the faculty advised that "SMU applied

more stringent tenure standards based on race and gender in her tenure case and mine" (ROA.3018). Later, that same professor shared bluntly with Butler a difficult truth: "It's like they lynched you" (ROA.3021).

At the end of the 2015–16 tenure cycle, Butler asked Collins to return her tenure box, a request that was refused. This was odd given that other professors at SMU Law reported that it was "routine" for the tenure box to be returned (ROA.3020).

F. Butler's Remaining Time at SMU

Butler spent the 2016–17 school year outside the classroom. And struggling to find alternative employment. While she continued to attempt to redress what happened through internal complaints, they all proved futile. More disturbingly still, Butler learned from faculty at another Texas law school that SMU giving negative references for her despite a promise from Provost Currall before she filed suit that he would personally assist Butler in seeking a professorship elsewhere (ROA.3022).

G. Prior Proceedings

This case was initially filed in a Texas state trial court in August 2017. In January 2018, Defendants-Appellees removed it to the Northern

District (ROA.30–31). Butler's complaint was amended (ROA.594), and Defendants-Appellees' later filed a motion to dismiss pursuant to Rule 12(b)(6) (ROA.15).

In quick succession federal judges and magistrates were assigned and removed from this case and both sides transitioned out attorneys.

While Judge Lindsey was assigned, one motion to dismiss was partially granted (ROA.1151). Butler later moved to reconsider dismissal of state law tort claims brought against the Individual Defendants arguing those claims were not preempted by the THCRA (ROA.1239).

Judge Brown was reassigned this case in September 2019. Thereafter, this litigation became increasingly hostile between Defendants-Appellees' aggressive motion practice and Judge Brown's near reflexive denial of Butler's merit motions.

In quick succession, Butler's motion for reconsideration of the dismissal of her tort claims was summarily denied (ROA.1474), and a series of hearings were held in which Judge Brown repeatedly maligned Butler's character and threatened to sanction her for errors made by her by that time former, terminated counsel. Butler was represented in two of those hearings by new counsel, one Andrew Dunlap. *See* ROA.3190

(Nov. 14, 2019 hearing trans.); ROA.3206 (Nov. 25, 2019 hearing trans.); ROA.3378 (Nov. 29, 2019 hearing trans.).

In Judge Brown's first few months presiding over this case, it became immediately apparent that Butler's fortunes had turned. Special solicitude was afforded Defendants-Appellees' counsel at hearings and in motion practice. And Judge Brown was quick to threaten Butler with sanctions for mundane discovery matters that were mishandled by former counsel.

In early 2020, Butler and her husband filed for bankruptcy as a consequence of her lost income and inability to find an equivalent source of income to the job she held at SMU (ROA.1750; ROA.3022). As required by bankruptcy law, this case was administratively closed in February 2020 (ROA.1753). The case was reopened once Butler's financial fortunate improved and her bankruptcy case was closed out (ROA.1771).

In late October 2021, Defendants-Appellees cycled through additional counsel immediately before summary judgment motions were due (ROA.1840). Simultaneously, Defendants-Appellees sought to compel Butler to mediate her case with them, demanding a mediator who

was a current employee of SMU Law and sought sanctions against her for refusing that mediator (ROA.1829).

In late November 2021, Defendants-Appellees moved for summary judgment. ROA.1868 (motion); ROA.1876 (brief in support); ROA.1937 (appendix in support). Shortly thereafter, Butler's relationship with Dunlap deteriorated as he began to make bizarre demands for money not due him and otherwise refused to do work on her case including preparing her opposition to summary judgment.

As the deadline for docketing Butler's opposition filings approached, Dunlap insisted on moving for a few days of extensions at a time, including filing one motion asking for a new deadline of January 7, 2022, without seeking Butler's authorization requested on the pretense that she (not Dunlap) was too busy to complete the filings (ROA.2274).

On January 6, 2022, Butler reached a breaking point and retained the undersigned, a law professor who had experience litigating tenure denial cases. The undersigned swiftly moved to appear pro hac vice (ROA.2281). He also filed another motion to extend the deadline for summary judgment opposition filings under Rule 6(b)(1)(A) which candidly explained to the Northern District that there were no draft

filings in existence and there was no way they could possibly be completed by January 7 (ROA.2291).

On January 7, Dunlap moved in Butler's name to strike her Rule 6(b) motion insisting that he would timely docket her summary judgment opposition filings that same day (ROA.2301). Butler then moved to strike Dunlap's unauthorized motion to strike (ROA.2303). Hours later, Dunlap accepted he had been terminated and moved to withdraw as counsel (R.2306). In the days that followed the Northern District issued a series of electronic orders denying Dunlap's motion to withdraw and Butler's Rule 6(b) motion summarily (ROA.22).

Later that same January, a motion for reconsideration of Dunlap's withdrawal (ROA.2311) and a Rule 6(b)(1)(B) motion seeking leave to docket summary judgment opposition out of time seeking a deadline in February 2022 (ROA.2321) were filed. The Northern District did not rule on those motions, and with the requested deadline for docketing summary judgment out of time approaching, the undersigned prepared and docketed full opposition papers on February 19, 2022. *See* ROA.24 (reflecting docketing of a response motion as ECF No. 159, brief in support as ECF No. 160, and appendix as ECF No. 161).

On February 25, 2022, the Northern District denied Butler's Rule 6(b)(1)(B) motion, variously accusing Butler of engaging in "bad faith" litigation tactics not evidenced by the record and concluding that Defendants-Appellees would be unduly prejudiced if they were made to respond to Butler's opposition filings because the April 2022 trial setting was approaching (ROA.2444).

As the trial setting approached, activity in the case picked up. Defendants-Appellees' requested a status hearing in early March (ROA.2443). At that March 8 hearing, Judge Brown converted the status hearing into oral arguments on outstanding motions including reconsideration of Dunlap's withdrawal.

The March 8 hearing was deeply unsettling. During the hearing, Judge Brown repeatedly insisted that Butler was not entitled to rationales for denials of her motions. *See, e.g.*, ROA.3477–78 ("I don't owe you an answer other than denied or granted."); ROA.3490 ("I read all your paperwork, you seem to think you are entitled to some reasoned opinion on my – denial. And you, in fact, are not. So I just want to disabuse you of that so that – so that, you know, we understand what the law really is."); ROA.3492 ("You know, there are some things that you absolutely

are entitled to a reasoned opinion on. Something within my discretion, like 'yes' or 'no', no, you're not."); ROA.3493 ("I do not owe you a reasoned opinion on denying your motion. Any of them.").

Judge Brown went on to make logically infirm orders at the hearing. For instance, Dunlap's withdrawal was once against denied, this time on the premise that keeping him on was necessary so as not to delay the April 2022 trial setting (ROA.3532). And yet, Judge Brown also determined that "Defendants having to prove a case at all, at this point is prejudicial" (ROA.3517). Without providing any rationales, the Northern District simply insisted the trial would go ahead under these bizarre conditions.

Thereafter, attempts to correct the Northern District via motions for reconsideration of Butlers Rule 6(b) proved futile. Time and again, the Northern District made factual findings without support in the record. It also wildly misconstrued binding Circuit precedent. *See* ROA.2592 (motion for reconsideration); ROA.2878 (notice apprising of binding Circuit precedent); ROA.2879 (denying reconsideration).

A few weeks before the trial was to begin, the Northern District *sua sponte* stayed the proceedings, cancelling the pretrial conference, trial

setting, and requisite settlement conference until it could decide summary judgment (ROA.2948). Close in time, an attempt to move under Rule 56(d) to seek production of Butler's tenure box, which had not been produced in discovery or adduced in support of Defendants-Appellees' motion for summary judgment was also filed (ROA.2968). In mid-April 2022, the Northern District summarily granted summary judgment in full to Defendants-Appellees (ROA.3069) and also denied Butler Rule 56(d) motion (ROA.3068).

In early December 2022, the Northern District issued a merits opinion both denying Butler's Rule 56(d) motion and *sua sponte* threatened the undersigned with sanctions for having filed the motion (ROA.3070). Once again, that order made factual findings that were unsupported by the record. More curiously still, the Northern District concocted the rationales for denial from whole cloth as Defendants-Appellees did not docket any opposition to it before it was summarily granted in April 2022 (ROA.27). The undersigned responded to that Order in advance of the show cause hearing (ROA.3087).

On January 19, 2023, the Northern District conducted a day long in person show cause hearing (ROA.3537). As with previous hearings in this

case, Judge Brown personally attacked and repeatedly threatened both Butler and the undersigned with sanctions. *See, e.g.*, ROA.3541–42; ROA.3640–41; ROA.3656–58; ROA.3663–67). Immediately after the hearing, the Northern District issued a merits summary judgment opinion (ROA.3121), an order finding the undersigned sanctionable but declining to sanction him (ROA.3172), and final judgment (ROA.3176).

SUMMARY OF THE ARGUMENT

The Northern District should not have dismissed Butler's state law tort claims against the Individual Defendants. The TCHRA is a comprehensive statutory scheme for adjudicating claims against one's employer, not coworkers. Moreover, binding Texas Supreme Court precedent recognizes such claims are not preempted.

The Northern District abused its discretion in denying Attorney Dunlap's motion to withdraw. Federal trial courts are required to provide stated rationales on motions so that they are properly reviewable on appeal. The Northern District's failure to provide rationales at the time it denied the motion is an abuse.

The Northern District also abused its discretion in denying Butler's Rule 6(b) motions. The initial motion sought relied under Rule 6(b)(1)(A) prior to the deadline for docketing her summary judgment opposition and was denied summarily, and thus is an abuse of discretion. Alternatively, denial of Butler's subsequent Rule 6(b)(1)(B) motion after the deadline had passed was improper because the stated reasons for its denial are unsupported by the record and contrary to law.

The Northern District also abused its discretion in denying Butler's Rule 56(d) motion. In this tenure denial case, Butler's tenure box is indispensable evidence for both parties and should have been produced in discovery by Defendants-Appellees because it was last in their possession. Moreover, Northern District's rationales for denying relief both in its written order and expressed in hearings after the fact evidence that factual findings unsupported by the record.

It was also error to grant Defendants-Appellees' motion for summary judgment under these circumstances. The Northern District should not have treated summary judgment as unopposed because Butler did in fact docket opposition filings, albeit out of time. Even if unopposed, the Northern District erred in failing to properly assess whether Defendants-Appellees carried their burdens as movants.

The record below is replete with statements made by Judge Brown throughout these proceedings which evidence prejudice against Butler, her chosen counsel, and overt favoritism of Defendants-Appellees and their counsel. Coupled with the considerable legal errors and factual findings made totally without support in the record, strong medicine is necessary. If remanded, an instruction to reassign should be made.

ARGUMENT

I. Standard of Review

The Northern District's grant of Defendants-Appellees' Rule 12(b)(6) motion to dismiss state law tort claims against the Individual Defendants is reviewed *de novo*. *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018).

The Northern District's denial of Professor Butler's Rule 56(d) motion is reviewed for abuse of discretion. *Dominick v. Mayorkas*, 52 F.4th 992, 995 (5th Cir. 2022) (Higginbotham, J.).

The Northern District's decision to deny Professor Butler's Rule 6(b)(1)(A) and 6(b)(1)(B) motions seeking scheduling relief to docket her opposition to summary judgment is reviewed for abuse of discretion. *L.A. Pub. Ins. Adjusters, Inc. v. Nelson*, 17 F.4th 521 (5th Cir. 2021) (citing *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990)).

The Northern District's grant of Defendants-Appellees' motion for summary judgment is reviewed *de novo*. *Hagen v. Aetna Ins. Co.*, 808 F.3d 1022, 1026 (5th Cir. 2015).

II. Butler's tort claims against the Individual Defendants should not have been dismissed because they are not preempted.

Professor Butler was not simply denied tenure at SMU Law. Her good name and reputation as a teacher and scholar were defamed by the Individual Defendants who made derogatory statements about Butler as well as spread untruths about her in and outside of SMU Law. To remedy those violations, Butler brought common law tort claims of defamation and conspiracy to defame against the Individual Defendants.

At the motion to dismiss stage, the Northern District interpreted the TCHRA to preempt tort claims against one's coworkers and on that basis dismissed Butler's defamation and conspiracy to defame claims on that basis. This is error. Texas common law torts committed by coworkers are not preempted by the TCHRA.

Federal courts exercising jurisdiction over state law claims do not write on a clean slate. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, federal courts must defer to the highest state court's interpretation of substantive legal questions like state law preemption. For civil claims, the highest state court is the Texas Supreme Court and its precedents must be followed.

The Texas Supreme Court has twice spoken on tort preemption in the context of the TCHRA. In both cases, the Texas Supreme Court recognizes that the TCHRA preempts some tort claims against one's employer, but not tort claims against one's coworkers.

In *BC v. Steak N Shake*, the Texas Supreme Court expressly holds tort claims against individual coworker assailants (as opposed to the employer itself) are not preempted by the THCRA. The Texas Supreme Court did not mince words:

> The TCHRA is a statutory scheme created to provide a claim for individuals against their *employers* for tolerating or fostering a workplace that subjects their employees to discrimination in the form of harassment [and that] the public policy [the TCHRA] advances is wholly inapposite to claims against individual assailants.

512 S.W.3d 276, 282 (Tex. 2017) (cleaned up). The Court also goes on to clarify the holding of another case, *Waffle House v. Williams*, 313 S.W.3d 796 (Tex. 2010), which dismissed as preempted tort claims against the worker's employer. Construing its own precedent, the Court points out that *Waffle House* did not speak to preemption of tort claims against coworkers. Quite the contrary. *Waffle House* states unequivocally recognizes a distinction between tort claims against one's employer and coworkers, the former being preempted by the TCHRA and the latter not

preempted. *Waffle House*, 313 S.W.3d at 803 ("[t]he issue before us, however, is not whether [the plaintiff] has a viable tort claim against a coworker"). Further clarifying its precedent, the Texas Supreme Court construes. *Waffle House* as a decision that was "was "mindful to note that assault claims against individual assailants do not fall within the scope of the TCHRA." 512 SW3d at 283.

Because the TCHRA does not preempt tort claims against Butler's coworkers as established by binding Texas Supreme Court precedent, the decision dismissing these claims should be reversed.

III. The Northern District abused its discretion in denying Attorney Dunlap's motion to withdraw.

Professor Butler's exercised her right to terminate Andrew Dunlap as counsel after their attorney-client relationship irreconcilably deteriorated. The Northern District should not have denied Dunlap's withdrawal.

It is the most basic right of a client to choose who she does and does not work with. As this Circuit recognized in *Sanders v. Russell*, 401 F.2d 241, 246 (5th Cir. 1968), it is inappropriate for a judge to substitute its judgment for that of a litigant in her choice of counsel except to prevent

unethical conduct. As the Third Circuit has held, keeping terminated counsel on the case "serves no meaningful purpose," consequently, withholding withdrawal is an abuse of discretion because "withdrawal would be required at that point." *Ohntrup v. Makina Ve Kimya Endustrisi Kurumu*, 760 F.3d 290, 295 (3d Cir. 2014).

The Northern District's summary denial of Dunlap's withdrawal motion (R.2306) is an abuse of discretion. No rationales for denying the motion are provided. *See* R.22 (docket at ECF No. 144). This Circuit has repeatedly and unequivocally held that district courts cannot summarily deny motions. Failure to provide rationales for denying a motion is an abuse of discretion because it deprives this Circuit of the benefit of the trial court's reasoning and precludes meaningful appellate review. *CenterPoint Energy Houston Elec. LLC v. Harris Toll Road Auth.*,436 F.3d 541, 550 (5th Cir. 2006); *Schwartz v. Follander*, 767 F.2d 125, 133 (5th Cir. 1985).

IV. The Northern District abused its discretion denying Professor Butler's Rule 56(d) motion seeking production and identification of her tenure box.

The Northern District should not have denied Professor Butler's Rule 56(d) motion. Her motion was timely filed, sought indispensable

evidence as to the tenure denial claims, and she otherwise diligently attempted to get the tenure box before and during this litigation and prior to seeking relief under Rule 56(d).

Rule 56(d) affords the nonmovant the opportunity to seek additional discovery after a motion for summary judgment is filed and before it is decided. Rule 56(d) motions are "broadly favored and should be liberally granted." *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010). A Rule 56(d) movant "must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id.* If the requesting party "has not diligently pursued discovery, however, she is not entitled to relief" under Rule 56(d). *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 606 (5th Cir. 2001).

The Northern District denied Butler's Rule 56(d) motion in part on the pretense that she was not diligent in seeking her tenure box in discovery. But that finding is unsupportable on this record. Butler adduced evidence establishing her diligent efforts prior to and during litigation to seek her tenure box. Among other things, Butler's Rule 56(d)

motion and supporting exhibits point to email requests she sent Dean Collins in 2016 requesting return of her tenure box and correspondence between her current and past counsel memorializing that the tenure box was sought in discovery in this case. Butler also points to hearing transcripts evidencing that SMU's counsel disclaimed knowledge of what a "tenure box" is that conflicts with a later position she took insisting that the tenure box had been produced prior to that hearing Additionally, Butler pointed to email communications between her counsel and SMU's lawyer requesting production of the tenure box before filing her Rule 56(d) motion.

The Northern District also erred in determining that Butler did not move in good faith seeking production of the tenure box. By the time of the January 2023 hearing, the record reflects that the purported absence of "good faith" here was premised on findings of fact unsupported by the record. *See, e.g.*, ROA.3593–94 ("I think [Askew] gave you the tenure box. I believe that to be true. I'm finding that fact on the record. . . . So I find it not credible so far that you had a good-faith basis to accuse [Askew] of misconduct."); ROA.3599 (asserting that Butler's tenure box was "attached to summary judgment"); ROA.3655 ("You are not going to bring

up this raggedly tenure-box argument, that's been shot down in a 100 pages of writing by me, several motions. It was turned over. It was attached. . . . Summary judgment—it was attached. This thing exists. The tenure box file was tendered multiple times. I saw it. I read it. It's a thing."). This evidence warrants disturbing the factual findings made by the Northern District in its initial order denying relief.

V. The Northern District abused its discretion denying Butler's Rule 6(b) motions seeking relief to docket her opposition to summary judgment.

Professor Butler should not have been denied scheduling relief to extend the deadline to docket her summary judgment opposition let alone her later motion, after the deadline passed, to docket her opposition out of time.

Federal Rule of Civil Procedure 6(b) commits to the discretion of the district court the power to extend deadlines before they are missed, FRCP 6(b)(1)(A), as well as to excuse late filings docketed after the deadline has passed, FRCP 6(b)(1)(B). "If done prior to the expiration of the time limit at issue, a court may extend the period for any reason, upon a party's motion, or even on its own initiative. However, once a time limit has run, it may be extended only upon a party's motion and only if the court finds

that the party failed to act because of excusable neglect." *L.A. Public Insur. Adjusters, Inc. v. Nelson*, 17 F.4th 521, 524 (5th Cir. 2021) (Dennis, J.) (cleaned up).

A. It was an abuse to summarily deny without explanation Butler's Rule 6(b)(1)(A) motion.

The Northern District abused its discretion in denying Professor Butler's motion seeking extension of time to docket her summary judgment opposition filings. Butler's motion was summarily denied without explanation via an electronic order 24 hours after the motion was filed and late in the day her filings were due if relief was not granted. Once again, federal trial courts must provide rationales for denying a motion or else they are effectively unreviewable on appeal. *CenterPoint*, 436 F.3d at 550; *Schwartz*, 767 F.2d 133.

The Northern District's statements to Butler months later further evidence that this was an abuse of discretion. At the March 2022 hearing, the Northern District repeatedly insisted that it need not provide any rationales for its decisions, in particular Butler's motions seeking scheduling relief to docket her opposition to summary judgment. The statements evidence not just a dereliction of duty, but also concerning distain for its heavy responsibilities as a federal trial court. *See, e.g.*,

ROA.3477–78 ("I don't owe you an answer other than denied or granted."); ROA.3490 ("I read all your paperwork, you seem to think you are entitled to some reasoned opinion on my – denial. And you, in fact, are not. So I just want to disabuse you of that so that – so that, you know, we understand what the law really is."); ROA.3492 ("You know, there are some things that you absolutely are entitled to a reasoned opinion on. Something within my discretion, like 'yes' or 'no', no, you're not."); ROA.3493 ("I do not owe you a reasoned opinion on denying your motion. Any of them.").

B. It was also an abuse of discretion to deny Butler's Rule 6(b)(1)(B) motion on this record.

The Northern District abused its discretion in denying Professor Butler's motion seeking leave to docket her opposition to summary judgment out of time. Rule 6(b)(1)(B) empowers district courts to grant scheduling relief after a deadline is missed where there is excusable neglect, the moving party is acting in good faith, and grant of the request does not unduly prejudice the nonmovant.

The Northern District erred in finding that there was no excusable neglect. Excusable neglect is an elastic concept. *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 392 (1993). It exists both where there

are events beyond the movant's control as well as where there are delays caused by inadvertence and even mistake or carelessness so long as the delay is not long, there is neither bad faith nor prejudice to opposing party, and the movant's excuse has some merit. *Pioneer*, 507 U.S. at 388.

The determination of what is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the movant's omission. *McCarty v. Thaler*, 376 Fed.Appx. 442 (5th Cir. 2010) (quoting *Pioneer*, 507 U.S. at 395). The key here is that there is a reasonable basis for not complying with the missed deadline. *In re Four Seasons Securities Laws Litigation* 493 F.2d 1288, 1290 (10th Cir. 1974). In reaching its final determination, this Court may also consider the "danger of prejudice to the opposing party, the length and impact of the delay, the reason for delay, and the moving party's good faith." *DeSilva v. U.S. Citizenship & Imm. Servs.*, 599 Fed.Appx. 535, 544 (5th Cir. 2014) (Wiener, J.).

Butler's initial motion and her subsequent motions for reconsideration point to strong evidence of excusable neglect insofar as her former counsel, Dunlap, failed to prepare opposition filings in time to meet a deadline he requested without her authorization. The Northern

District's insistence that the deadline could have been met, despite evidence reflecting that Dunlap had not prepared any such filings is untenable.

For similar reasons, the Northern District erred in deeming Butler to have not moved in good faith. Professor Butler did not seek scheduling relief to secure a tactical advantage, she was fighting for her case to survive a transition from former counsel she terminated to new counsel. *In re Four Seasons*, 493 F.2d at 1290–91.

The Northern District also erred in treating Defendants-Appellees' self-serving conclusory assertion—that they would be prejudiced if *any scheduling relief* were granted—cut against granting Butler relief. While delay is regrettable, it is not always prejudicial. *Cf. Akers v. State Marine Lines, Inc.*, 344 F.2d 217, 220 (5th Cir. 1965) (cleaned up) ("harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense.").

Moreover, the Northern District failed to balance Defendants-Appellees' claim of prejudice against the prejudice Butler would face if her request was denied. The precise concern Butler elevated in her

motion—that if denied she would be subjected to summary judgment by default—is precisely what happened below. The Northern District granted summary judgment on all claims without any rationales in April 2022. That is a severe penalty unmatched by any supposed prejudice to Defendants-Appellees. It is an outcome that also contravenes "the judicial preference for adjudication on the merits, which goes to the fundamental fairness of the adjudicatory process." *Chorosevic v. MetLife Choices*, 600 F.3d 934, 947 (8th Cir. 2010) (cleaned up).

To the extent the Northern District tried to later cure its failure to consider evidence proffered in support of Butler's motions with "credibility" determinations of Butler and the undersigned, that was also error. The discretion afforded district courts to grant or deny relief cannot and should not be deemed to permit judges to engage in character attacks against litigants and their counsel as a means to cover for record evidence not supporting their decisions.

The Northern District's many statements attacking the character of Butler and the undersigned at the March 2022 and January 2023 hearings paint a disturbing picture of bias that infected not just denials of these particular motions, but the proceedings as a whole. *See, e.g.*,

ROA.3657 ("And so she has not behaved credibly, ethically, appropriately; and has been vexatious in her litigation."); ROA.3578 ("You have to know at this point, and you had to know at that hearing, that your client does not always tell the truth. And that is just a fact. And if you have reviewed everything in this case, that's just a fact."); ROA.3605 ("You are either ignorant or blind, I do not know which."); ROA.3608 ("I don't know any ethical lawyer who behaves the way you do."); ROA.3612 ("You have behaved disastrously and, this Court believes, unethically and – and recklessly."); ROA.3657 ("I also find you not credible, Professor Young.").

VI. Defendants-Appellees' motion for summary judgment should not have been granted.

The Northern District should not have granted Defendants-Appellees' motion for summary judgment on all claims. Even if that motion is treated as unopposed, Defendants-Appellees were not relieved of their burdens to establish that they were entitled to the relief that they sought.

A. It was error to deem some claims legally uncognizable.

The Northern District granted summary judgment on several of Butler's claims on the pretense that they are not legally cognizable. But some of those decisions are contrary to law.

The Northern District erred deeming Butler's disability claim grieving segregation in the workplace (Count 18) uncognizable. This claim articulates a specific form of discrete act disability discrimination that is expressly recognized as cognizable by the ADA. *See* 42 U.S.C. § 12112(b)(1) (defining as discrimination "limiting or classifying a job applicant in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant and employee.").

It was also error to grant summary judgment on Butler's associational disability discrimination claim (Count 19). This claim is also cognizable. The Northern District overlooked a recently decided but unpublished opinion of this Circuit precisely on point. *Besser v. Texas Gen. Land Off.*, recognizes that the ADA prohibits associational discrimination and bases that holding on a reference to regulations

promulgated under that statute. 834 Fed.Appx. 876, 887 (5th Cir. 2020) (unpublished) (citing 29 C.F.R. § 1630.8).

B. Defendants-Appellees' assertions of material facts should not have been deemed undisputed.

A district court is not required to treat assertions of material facts as undisputed on this posture. Rule 56(e) states that if a party fails to "properly address another party's assertion of fact as required by Rule 56(c), the court *may* . . . consider the fact undisputed for the purposes of the motion." The "may" language indicates that this is a matter properly within the district court's discretion.

The Northern District's opinion relies entirely on one case in which this Circuit approved deeming movants' assertions of material fact as undisputed as grounds to do the same in Butler's case, *Eversley v. MBank Dallas*, 834 F.2d 172 (5th Cir. 1988). But *Eversely* is distinguishable.

In *Eversely* the nonmovant never offered an explanation for missing the summary judgment deadline, sought leave to docket opposition papers out of time, complained that he was denied necessary discovery, and "did not attempt in the court below to either cause it to change its ruling or in anyway oppose the motion for summary judgment." 834 F.2d at 173–74.

Butler was in no way similarly situated. She explained candidly to the Northern District that former counsel, whom she terminated, failed to prepare summary judgment opposition filings, she sought scheduling relief before the deadline passed, and after it passed. Butler also sought reconsideration of denial of scheduling relief repeatedly. She also went the extra step, while her Rule 6(b)(1)(B) motion was still pending to docket full summary judgment opposition filings.

Critically, the Northern District also failed to account for why it was appropriate to refuse to consider Butler's belated opposition filings which were docketed 11 months prior to its issuance of the merits summary judgment opinion. The undersigned can find no precedent in this Circuit or any other where a district court has acted in that way let alone been affirmed on appeal.

As a matter of policy, this Circuit should not condone what the Northern District did here. This is not a situation where the trial judge would have been forced to dig through a record to drum up facts in support of a delinquent litigant. Rather, the Northern District simply struck filings docketed 11 months before it got around to issuing a merits

opinion, at which point it pretended the stuck opposition filings never existed.

C. Defendants-Appellees did not carry their evidentiary burden on the tenure denial claims.

Summary judgment on Butler's tenure denial claims should not have been granted because Defendants-Appellees bore the burden of proving that Butler was unqualified for tenure but nonetheless failed to adduce indispensable evidence to prove that point, Butler's tenure box.

The centrality of a tenure box in tenure denial cases is well established. The Supreme Court has gone to bat on this precise issue—universities do not have a right to withhold documents pertinent to the tenure decision-making process. In ordering the University of Pennsylvania to produce a component of the tenure box, the Supreme Court underscored the importance of tenure materials: "Indeed, if there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files." *Univ. Penn. v. EEOC*, 493 U.S. 182, 193 (1990).

This Circuit has long recognized that wrongful tenure denial is proved by reference to the applicant's tenure box. As one example, a direct comparison of candidates who were granted and not granted

tenure is one means to prove discrimination. To do this one must compare the candidates' respective qualifications against those of successful and unsuccessful candidates. *See Yul Chu v. Miss. State Univ.*, 592 Fed.Appx. 260, 261–62 (5th Cir. 2014) (unpublished) (directly comparing qualifications of tenure applicants as a means of determining whether plaintiff was illicitly denied tenure).

Wrongful tenure denial can also be proved by pointing out that the applicants' qualifications as evidenced by their tenure box does not comport with decisionmaker's state rationales for denying tenure. *Nikolova v. Univ. Tex. at Austin*, 2022 WL 466988 at *11 (W.D. Tex. Feb. 15, 2022) (quoting and citing *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) and *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147–48 (2000) ("Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive because once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation.") (cleaned up)).

SMU did not proffer Butler's tenure box as evidence at summary judgment. Even a cursory review of the table of contents of SMU's appendix makes that abundantly clear (ROA.1937–41). It is thus not possible that SMU *proved* Butler was unqualified for tenure, as was its burden.

The Northern District's purported findings of fact at the January 2023 hearing should not save SMU because those findings are clearly erroneous on this record. *See, e.g.*, ROA.3593–94 ("I think [Askew] gave you the tenure box. I believe that to be true. I'm finding that fact on the record. . . . So I find it not credible so far that you had a good-faith basis to accuse [Askew] of misconduct."); ROA.3599 (asserting that Butler's tenure box was "attached to summary judgment"); ROA.3655 ("You are not going to bring up this raggedly tenure-box argument, that's been shot down in a 100 pages of writing by me, several motions. It was turned over. It was attached. . . . Summary judgment—it was attached. This thing exists. The tenure box file was tendered multiple times. I saw it. I read it. It's a thing.").

D. Defendants-Appellees failed to carry their evidentiary burdens on other claims.

Rather than assess whether the Defendants-Appellees as movants carried *their* evidentiary burdens, the Northern District simply defaulted to finding that Butler failed to carry her burdens as nonmovant. This is error.

At summary judgment when the nonmovant is the plaintiff, "the inquiry must be whether the facts presented by the defendants create an appropriate basis to enter summary judgment." *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). The movant thus still carries "the burden to establish the absence of a genuine issue of material fact and, unless it has done so, the court may not grant the motion, regardless of whether any response was filed. *Hibernia Nat'l Bank v. Administración Cent. Sociedad Anónima*, 776 F.2d 1277, 1279 (5th Cir. 1985).

As is always the situation at summary judgment, evidence must be construed in the light most favorable to the nonmovant. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 150 (2000). Further, the district court "may not make credibility determinations or weigh evidence." *Id.* at 254–55. At summary judgment, it is inappropriate for the judge to "weigh the

evidence and determine the truth of the matter, [she must instead] determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).

In broad strokes, the Northern District did not even attempt to meaningfully review the record to ensure that Defendants-Appellees carried their evidentiary burdens. While a district court is not necessarily required to scourer the record on this posture, it is still obliged to at least assess whether the movants' own evidence supports the findings they claim it supports. And, to the extent that it is possible to construe evidence in the light most favorable to Butler, that must be done.

A few illustrative examples, in addition to Butler's tenure denial claims, drive home the Northern District's errors. For instance, the Northern District held that there was no genuine issue of material of fact precluding summary judgment of Butler's breach of contract claim. That ruling was premised on the finding of fact that Butler's tenure evaluation comported with SMU's Guidelines and SMU Law's Bylaws (ROA.3135). But evidence proffered in support of the motion cuts against that finding. Among other things, Dean Collins adjudicated Butler's appeal contrary to the rules' requirement that it be brought to the faculty. Additionally,

Collins' letter to Currall recommending against Butler's tenure is dated May 4, 2016, 93 days past the February 1 deadline required by the rules.

Evaluation of Butler's several race discrimination claims is similarly infirm. Those rulings are premised on a finding that there was "no evidence" that Butler was subjected to harassment on account of her "group membership as a black woman" (ROA.3139). And yet, Butler's lengthy email to Collins in Summer 2015 evidences with excruciating detail that she experienced and complained about hostilities and discrimination on account of her being a Black woman. No deep dive into the record was required to find that evidence—Defendants-Appellees proffered it in their summary judgment appendix.

Assessment of Butler's failure to accommodate claim which grieved SMU's refusal to stop her tenure clock and go up another year is also fatally flawed. SMU argued below that applying for tenure at a certain time was not required of Butler. The Northern District credited that finding purportedly on evidence in the record. But that finding is not reconcilable with Provost Stanley's November 2015 letter to Butler directing her that she must apply for tenure that cycle and the only reason an accommodation was not being granted was because Butler was

well enough to teach fulltime in both Fall 2015 and Spring 2016 (ROA.2033–34). SMU's own internal records approving Butler's FMLA leave because of illness for substantial portions of both of those terms at the very least casts doubt on Provost Stanley's true reasons for denying the accommodation.

Outside of the four corners of the summary judgment merits opinion, Judge Brown's litany of attacks on Butler's credibility suggest the Court was not capable of not making credibility determinations as is required at summary judgment. *See, e.g.*, ROA.3657 ("And so she has not behaved credibly, ethically, appropriately; and has been vexatious in her litigation."); ROA.3578 ("You have to know at this point, and you had to know at that hearing, that your client does not always tell the truth. And that is just a fact. And if you have reviewed everything in this case, that's just a fact.").

Additionally, Judge Brown's repeated insistence that Butler's case does not matter and no one cares about it, if nothing else, suggests that it was a foregone conclusion that Butler would lose summary judgment irrespective of what the evidence actually showed happened at SMU Law. *See, e.g.*, ROA.3648–49 ("This case turned out—turned out to be

nonsense."); ROA.3649 ("This case turned out to be trash."); ROA.3649 ("No one is watching this case. . . . So the notion that there is somehow this public interest . . . is not a thing."); ROA.3649 ("From everything I have seen in this case; and I have been on this rodeo longer than you, sir, there was nothing to send to a jury had it gone.").

VII. This case should be reassigned.

In the event that this Circuit reverses and remands this case, Butler respectfully requests that it do so with a direction that it be reassigned. There is considerable evidence that Judge Brown acted inappropriately and was otherwise incapable of acting neutrally in these proceedings. It it is not reasonable to expect that she could set aside her preconceptions of Butler and the undersigned let alone cast aside prejudicial favoritism of SMU Law.

This Circuit is empowered to reassign this case to another judge on remand. The power to reassign "is an extraordinary one and is rarely invoked." *Miller v. Sam Houston State Univ.*, 986 F.3d 88, 892 (5th Cir. 2021) (cleaned up). Nonetheless, reassignment is necessary where a litigant has been deprived of a "full and fair opportunity to make her case

in a fair and impartial forum." *Id.* (quoting *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)).

This Circuit has applied two tests, one more lenient than the other. The stringent test considers:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Miller, 986 F.3d at 892–93 (quoting *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700–01 (5th Cir. 2022) (cleaned up)). The more lenient test "looks at whether the judge's role might reasonably cause an objective observer to question the judge's impartiality." *Miller*, 986 F.3d at 893 (quoting *DaimlerChrysler*, 294 F.3d at 701).

Reassignment is necessary in light of the improprieties evidenced by this record once Judge Brown was assigned to this case. As pointed out exhaustively in the Statement of the Case, Judge Brown did not conduct herself or these proceedings in a manner expected of federal judges in any matter, let alone a civil rights case.

At bottom, it is incumbent upon this Circuit to signal to the broader public as well as to trial judges below it that each and every litigant is entitled to fair and equitable treatment in our nation's federal courts. This Circuit should not hesitate to exercise its powers. Though extraordinary some cases like this one call for strong medicine.

CONCLUSION

For all of the foregoing reasons, Professor Butler urges that reversal of the orders appealed and respectfully ask that this case be remanded to the Northern District with direction that it be reassigned.

Dated: May 2, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 2, 2023, I electronically filed the foregoing Brief for Plaintiff-Appellant Professor Cheryl Butler using the Court's CM/ECF systems, which constitutes service under the Court's rules.

/s/ Ezra Young
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Counsel for Professor Cheryl Butler

FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this Brief has been prepared in Microsoft Word using 14-point, proportionally spaced font, and that based on word processing software, the brief contains 11,266 words, excluding items that do not count towards the word limit pursuant to Fed. R. App. P. 32(f).

Date: May 2, 2023

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