Superior Court of New Jersey

Appellate Division

Docket No. A-000895-20-T1

A. DAWN TAWWATER, *Plaintiff-Appellant,* vs. ROWAN COLLEGE AT GLOUCESTER COUNTY; ROWAN COLLEGE AT GLOUCESTER COUNTY BOARD OF TRUSTEES; GENE J. CONCORDIA, Chairperson; YOLETTE C. ROSS, Vice Chairperson; DOUGLAS J. WILLS, ESQUIRE, Treasurer; JEAN L. DUBOIS, Secretary; LEN DAWS; *(For Continuation of Caption See Next Page)*	CIVIL ACTION ON APPEAL FROM ORDERS GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND TO RETURN MATTER TO ACTIVE TRIAL CALENDAR DOCKET NO. BELOW GLO-L-130-15 Sat Below: HON. DAVID W. MORGAN, J.S.C. HON. SAMUEL J. RAGONESE, J.S.C.

CORRECTED BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Defendants-Respondents.	:

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE defends these rights at both public and private institutions through public advocacy, litigation, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court. *See, e.g.*, Brief for FIRE as *Amicus Curiae* Supporting Neither Affirmance Nor Reversal, *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (No. 20-3289); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant, *Kashdan v. George Mason Univ.*, No. 20-1509 (4th Cir. Aug. 19, 2020); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant-Petitioner, *McAdams v. Marquette Univ.*, 2018 WI 88 (2018) (No. 2017AP1240); Brief for FIRE et al. as *Amici Curiae* Supporting Plaintiff-Appellant, *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (No. 10-1413).

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

FIRE has a significant interest in the appeal before this Court because the trial court decision, if allowed to stand, will deny Plaintiff-Appellant Dawn Tawwater the opportunity to vindicate her expressive rights, which the arbitrator determined Rowan College likely violated in contravention of the New Jersey Civil Rights Act. Because FIRE defends faculty nationwide from threats to their expressive and academic freedom rights on a daily basis, we know that allowing college administrators to escape responsibility for violating the First Amendment and corresponding provisions of state constitutions will engender further retaliation and censorship, and erode professors' ability to teach their students in New Jersey and across the nation.

PRELIMINARY STATEMENT

Plaintiff-Appellant Dawn Tawwater taught college students about female objectification as part of her Sociology 101 course, which Rowan College assigned her to teach after hiring her as a full time, tenure track professor in 2014. During a September 2014 class on the topic of female objectification, she screened "Defined Lines"—a timely parody of Robin Thicke's music video "Blurred Lines." Three female Australian law students created "Defined Lines" to highlight female objectification and misogyny in "Blurred Lines" and in pop culture as a whole. "Blurred Lines" prompted conversations both in classrooms and in

the media about sexism, sexual assault, and female objectification.

Some of Tawwater's students, however, took offense to the video because it objectified men by depicting them in their underwear—much like the original "Blurred Lines," which included images of topless women—as a way to highlight how *women* are objectified in popular culture. Their offense left Tawwater unemployed. Rowan College administrators first directed Tawwater to sign a "Last Chance Agreement" that would have sharply restricted her speech and academic freedom in the classroom in the future. When she refused, Rowan College terminated her for using "indecent language." Tawwater's ability to challenge this unconstitutional decision was limited because she was not yet tenured, and therefore lacked the procedural protections tenure affords.

The "Defined Lines" video, and Professor Tawwater's pedagogical decision to show it during class, are both squarely protected by the First Amendment and academic freedom. Tawwater was terminated for provoking her students to think critically about sexual objectification in media, or, in other words, for doing her job as a sociology professor.

Professor Tawwater's story is all too familiar to *amicus* FIRE and faculty across the country. Faculty expressive rights within and outside the classroom are under siege, with dozens of

faculty members each year facing prolonged investigations, suspensions, or terminations because of their pedagogical choices. And because Professor Tawwater was not yet tenured, Rowan College could terminate her without affording her the procedural protections that come with tenure, a strategy colleges and universities too often use to terminate professors that administrators do not like.

To ensure faculty enjoy the breathing room to teach and explore ideas, which is required by academic freedom and necessary to ensure America's colleges and universities remain incubators for ideas, courts must be open to faculty to vindicate their expressive rights when colleges and universities like Rowan run afoul of the First Amendment, state constitutions, and their own policies. Professors who facilitate meaningful dialogue in their classes should be rewarded for doing their jobs well, not subject to termination based upon students' reactions to controversial subjects. Professor Tawwater's claims should be returned to the trial court for consideration.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS[2]

Amicus FIRE relies on the Procedural History and Statement of Facts set forth in the Brief of Plaintiff-Appellant A. Dawn Tawwater.

ARGUMENT

The First Amendment, academic freedom, and the New Jersey constitution guarantee faculty the right to make decisions about what to teach and how to teach it, including about important, if sometimes controversial, issues. Faculty require breathing room to exercise this right so that they are free to explore controversial, and even offensive, ideas in class. Rowan College subverted this guarantee by terminating Professor Tawwater for exploring the issue of female objectification in her sociology class. In the classroom, both teachers and students should properly "remain free to inquire, to study and to evaluate . . . otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). *Amicus* FIRE's work demonstrates that, unfortunately, Professor Tawwater is one of many faculty who have been disciplined or terminated because of their constitutionally protected teaching. Rowan College further violated Tawwater's expressive rights by conditioning her

[2] *Amicus* FIRE has combined the Procedural History and Statement of Facts for the Court's convenience because the factual background and procedural history of the dispute are intertwined.

continued teaching on a coercive "Last Chance Agreement" that would have entrenched the College's restrictions on her academic freedom.

I. Upholding Rowan College's Termination of Plaintiff-Appellant Tawwater Threatens Free Speech and Academic Freedom.

Our jurisprudence has long recognized the First Amendment's free speech guarantee is central to the academic freedom that undergirds colleges and universities. The Supreme Court of the United States has long held that professorial academic freedom "is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). It is a principle upon which colleges and universities "should be extremely reticent to tread," *Sweezy*, 354 U.S. at 250. *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (explaining that, on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom").

The American Association of University Professors emphasized this point in its 1940 Statement of Principles on Academic Freedom and Tenure.[3] As the Association explained, "Teachers are entitled to freedom in the classroom in discussing

[3] Am. Ass'n of Univ. Profs., *1940 Statement of Principles of Academic Freedom and Tenure with 1970 Interpretive Comments* (1970), https://www.aaup.org/file/1940%20Statement.pdf [https://perma.cc/6GH5-JL2S].

their subject," cabined by the limited exception that faculty should "avoid persistently intruding material which has no relation to their subject."[4] Otherwise, faculty rightly enjoy the discretion to determine how to approach subjects relevant to their courses, and may even choose approaches that are controversial or subjectively offensive. *See Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 674, 683 (6th Cir. 2001) (holding a professor who used racial epithets to exemplify "how language is used to marginalize minorities" enjoyed the academic freedom to do so because expression, "however repugnant," that is "germane to the classroom subject matter" is "protected by the First Amendment").

This Court should reject Defendant-Appellees' assertion that Professor Tawwater cannot vindicate these expressive and academic freedom rights because, without tenure, those rights are unprotected, Defs.'s Resp. Br. 25-27, because that is incorrect as a matter of law. *See* Pl.'s Reply Br. 5-6. Doing so is particularly vital, as the "adjunctification" of higher education already undermines academic freedom,[5] and leaving non-

[4] *Id.*

[5] Jordan Howell & Adam Steinbaugh, *How adjunctification undermines academic freedom, and what FIRE is doing to help*, FIRE (Dec. 6, 2021), https://www.thefire.org/how-adjunctification-undermines-academic-freedom-and-what-fire-is-doing-to-help/ [https://perma.cc/8EDJ-QB2G].

tenured professors without protection from retaliation against exercise of their expressive rights would set a dangerous precedent.

Non-tenured employees like Professor Tawwater often serve on term contracts and lack the substantive and procedural protections of tenure.[6] This means administrators can choose to fire them for a good reason, a bad reason, or for no reason at all. For example, in the last year *amicus* FIRE has litigated on behalf of three professors fired from Collin College in Texas who faced discipline and termination for speech administrators did not like, both inside and outside the classroom.[7] There is, by design, no tenure system at Collin College, so all three of those professors—and likely many others—had no immediate procedural protection from Collin College's custom and practice of terminating professors for speaking out on public issues. Instead, they had to vindicate their rights in court.

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[6] *Id.*

[7] Press Release, FIRE, LAWSUIT: Fired for criticizing Mike Pence and COVID-19 response, a Collin College history professor sues to protect faculty rights (Oct. 26, 2021), https://www.thefire.org/lawsuit-fired-for-criticizing-mike-pence-and-campus-covid-19-response-a-collin-college-history-professor-sues-to-protect-faculty-rights/ [https://perma.cc/GW5Y-PF5V]; Press Release, FIRE, LAWSUIT: A history professor advocated for removing Confederate statutes. Then his college fired him. (Mar. 8, 2022), https://www.thefire.org/lawsuit-a-history-professor-advocated-for-removing-confederate-statues-then-his-college-fired-him/ [https://perma.cc/ARD8-4DEC].

II. *Amicus* FIRE's Work Demonstrates That Faculty Speech Rights Are Under Threat Nationwide.

The case before this Court presents an important question concerning faculty expressive rights, which are under siege at colleges and universities across the nation. A brief survey of *amicus* FIRE's recent work defending faculty rights illustrates the severity of the threat and the corresponding need for faculty like Plaintiff-Appellant Tawwater to vindicate their expressive rights in court. FIRE's "Scholars Under Fire" database has documented hundreds of examples of faculty who were targeted for their scholarship and expression since 2015, and many of these incidents involve colleges and universities that disciplined or terminated faculty, like Professor Tawwater, because of their teaching or expression in class.

A. The data reveal alarming levels of faculty censorship at America's institutions of higher education.

During each of the past two years, *amicus* FIRE has published a report chronicling the threat to faculty expressive rights and academic freedom at America's colleges and universities. "Scholars Under Fire: 2021 Year in Review" details 111 examples of scholars who were targeted for their scholarship and expression in 2021 alone,[8] and documents an additional 537

[8] Komi T. German & Sean Stevens, *Scholars Under Fire: 2021 Year in Review, Executive Summary*, FIRE (2022), https://www.thefire.org/research/publications/miscellaneous-publications/scholars-under-fire/scholars-under-fire-2021-year-

incidents that occurred between 2015 and 2020. These incidents have only increased—and increased dramatically—since Rowan College terminated Professor Tawwater in 2014.

The report considers data related to "targeting incidents" against faculty and other scholars.[9] "Targeting incidents" are "campus controvers[ies] involving efforts to investigate, penalize, or otherwise professionally sanction a scholar" for engaging in constitutionally protected expression.[10] In more than 60% of the targeting incidents FIRE researched in 2021, scholars suffered some form of sanction—investigation, suspension, or termination.[11]

The data demonstrate faculty are most often targeted for speech concerning controversial social issues like race, partisanship, institutional policy, and, like Professor Tawwater, gender.[12] Ironically, another topic for which faculty are frequently targeted is free speech itself.[13] And faculty expression that takes place in the classroom—where a professor's right to academic freedom should properly protect pedagogical

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in-review-full-text/#findings [https://perma.cc/B3AE-K4X6] [hereinafter *Scholars Under Fire 2021*].

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Scholars Under Fire 2021, Findings, *supra* note 8.

[13] *Id.*

decisions—is targeted more often than faculty speech on social media, in public, or in direct interactions.[14]

Again, as the United States Supreme Court explained in overturning legal barriers enforced against faculty with "seditious" views, academic freedom "is of transcendent value to all [Americans] and not merely to the teachers concerned." *Keyishian*, 385 U.S. at 603. Academic freedom, therefore, is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* Despite this, the data and *amicus* FIRE's recent work demonstrate that such a pall of orthodoxy does indeed threaten college and university classrooms today.

B. Plaintiff-Appellant Tawwater is one of many professors disciplined or terminated for protected pedagogical decisions.

Professor Tawwater's case, regrettably, is not an isolated incident. Colleges and universities across the country are curbing faculty academic freedom rights, including in the classroom, to prevent subjective offense.

Marshall University terminated microbiology professor Jennifer Mosher for joking comments she made about mask-wearing and what she saw as risky behavior amidst the COVID-19 pandemic in September 2020, shortly after the university returned to in

[14] *Id.*

person instruction.[15] During the first few minutes of her microbiology and "Biology of COVID-19" courses, Mosher joked about hoping "certain people" holding rallies—alluding to supporters of then-President and presidential candidate Donald Trump—would suffer the effects of the virus.[16] After a video clip of her comments went viral on Twitter, Marshall terminated her employment.[17] Because Mosher was a tenured professor with the procedural protections tenure provides, she was able to successfully challenge her termination before the West Virginia Public Employee Grievance Board. The Board held Mosher's remarks were constitutionally protected and "not an appropriate cause for dismissal."[18]

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[15] Lilah Burke, *Professor on Leave After Statement on Trump Supporters*, Inside Higher Ed (Sept. 21, 2020), https://www.insidehighered.com/quicktakes/2020/09/21/professor-leave-after-statement-trump-supporters [https://perma.cc/YPC5-VBKT].

[16] Letter from Adam Steinbaugh, FIRE, to Jerome A. Gilbert, President, Marshall Univ. (Oct. 7, 2020), https://www.thefire.org/fire-letter-to-marshall-university-october-7-2020/ [https://perma.cc/YHC8-486E].

[17] @BlessUSA2024, Twitter (Sept. 19, 2020, 2:37AM), https://twitter.com/BlessUSA2024/status/1307207048833232896 [https://perma.cc/G3DV-JLW2].

[18] Decision of the W. Va. Pub. Emp. Grievance Bd., Mosher v. Marshall Univ., No. 2021-1040-MU (Dec. 9, 2021), https://www.thefire.org/mosher-v-marshall-university-docket-no-2021-1040-mu-december-9-2021-order-of-the-west-virginia-public-employees-grievance-board/ [https://perma.cc/6LPE-V4HX].

In June 2020, the University of California, Los Angeles, removed adjunct professor Gordon Klein from his teaching post for three weeks after he declined a student request to alter exam dates and grading for black students following the murder of George Floyd, despite the fact that Klein's response was in accord with UCLA policy.[19] In a letter sent to the campus community, a senior UCLA administrator characterized Klein's email to the student declining the request as an "abuse of power," claiming that Klein had demonstrated "a disregard for our core principles."[20] After an investigation of Klein's "offensive" comments, he was eventually reinstated.[21] Klein, who, like Tawwater, did not have the procedural protections of

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[19] Press Release, FIRE, FIRE defends UCLA professor suspended for email on why he wouldn't change exam, grading for black students (June 10, 2020), https://www.thefire.org/fire-defends-ucla-professor-suspended-for-email-on-why-he-wouldnt-change-exam-grading-for-black-students/ [https://perma.cc/W9DL-GZFY].

[20] Colleen Flaherty, *Suspended: Professor Who Mocked Exam Request*, Inside Higher Ed (June 11, 2020), https://www.insidehighered.com/quicktakes/2020/06/11/suspended-professor-who-mocked-exam-request [https://perma.cc/LJ7Q-2DXD].

[21] Colleen Flaherty, *Professor Who Questioned Student's Request Reinstated,* Inside Higher Ed (Sept. 16, 2020), https://www.insidehighered.com/quicktakes/2020/09/16/professor-who-questioned-students-request-reinstated [https://perma.cc/QFA5-ZKTH].

tenure, sued UCLA and its administrators, and recently overcame the defendants' anti-SLAPP motion and motion to dismiss.[22]

Just this March, San Diego State University removed Professor J. Angelo Corlett from the classroom after he quoted racial epithets during a lecture on the use-mention distinction in his course on critical thinking.[23] SDSU removed Corlett from the course, and from his Philosophy, Racism, and Justice course, asserting that he was "not effective" at teaching the course because of "numerous student complaints," which administrators refused to share with Corlett or his attorney.[24] SDSU's spring semester ended May 5, and Corlett was never returned to the classroom because of his pedagogically relevant use of an epithet in class.

In January 2021, the University of Illinois, Chicago investigated law professor Jason Kilborn for using a *redacted*

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[22] Compl., Klein v. Bernardo, No. 21SMCV01577 (Cal. Super. Ct. Sept. 27, 2021); Pl.'s Notice of Ruling, *Klein*, (Cal. Super. Ct. Apr. 1, 2022) (No. 21SMCV01577).

[23] Gary Robbins, SDSU slammed, supported for reassigning teacher who used racial epithets in lectures, San Diego Union-Trib. (Mar. 9, 2022), https://www.sandiegouniontribune.com/news/education/story/2022-03-09/san-diego-state-university-teacher-racial-epithets [https://perma.cc/WGX5-DCDX].

[24] *Id.*; Sabrina Conza, *San Diego State claims to have evidence justifying its removal of a professor for referencing slurs in teaching linguistics. Let's see it.*, FIRE (Mar. 25, 2022), https://www.thefire.org/san-diego-state-claims-to-have-evidence-justifying-its-removal-of-a-professor-for-referencing-slurs-in-teaching-linguistics-lets-see-it/ [https://perma.cc/4RKN-SS66].

reference to a racial slur in an employment law-related exam question.[25] UIC removed Kilborn from the classroom pending an investigation, then reneged on its agreement to allow him to return to the classroom for the spring 2022 term.[26] Kilborn sued UIC on January 27, 2022.[27]

In May 2020, Scottsdale Community College in Arizona investigated professor Nicholas Damask—and attempted to force him to issue an apology drafted by the college's public relations department—after the wording of three quiz questions about Islamic terrorism in his World Politics course offended a student and prompted criticism on social media.[28] The college promised in a social media post of its own that Damask would apologize, then sent him the public relations department's pre-written apology to sign that promised the questions will be "removed from all further courses," along with any "additional

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[25] Andrew Koppelman, *Is This Law Professor Really a Homicidal Threat?*, Chron. of Higher Educ. (Jan. 19, 2021), https://www.chronicle.com/article/is-this-law-professor-really-a-homicidal-threat.

[26] Josh Bleisch, *University of Illinois Chicago reneges on agreement with law professor Jason Kilborn*, FIRE (Nov. 22, 2021), https://www.thefire.org/university-of-illinois-at-chicago-reneges-on-agreement-with-law-professor-jason-kilborn/ [https://perma.cc/53BB-YY7M].

[27] Compl., Kilborn v. Amiridis, No. 1:22-cv-00475 (N.D. Ill. Jan. 27, 2022).

[28] Letter from Katlyn Patton, FIRE, to Christina M. Haines, Interim President, Scottsdale Cmty. Coll. (May 7, 2020), https://www.thefire.org/fire-letter-to-scottsdale-community-college-may-7-2020/ [https://perma.cc/BS6F-3N3Q].

insensitivities."[29] Only after an urgent letter from FIRE did the chancellor of the district apologize "for the uneven manner in which this was handled and for our lack of full consideration of our professor's right to academic freedom."[30]

These are just a few recent examples of public colleges and universities punishing faculty for protected in-class expression. FIRE's archives contain many more. Because of the frequency of institutional attempts to silence outspoken, dissenting, or critical faculty members, in violation of the First Amendment, this Court must reaffirm that faculty have the right to determine what to teach and how to teach it, even when some students may find those pedagogical choices offensive—as was the case with Professor Tawwater's Defined Lines video.

III. "Last Chance Agreements" Are Impermissible Prior Restraints on Faculty Speech.

Rowan College's disregard for Professor Tawwater's expressive rights is compounded by the "Last Chance Agreement" administrators presented her. The agreement required Tawwater to "refrain from using indecent language in the classroom,"

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[29] *Id.*

[30] Lorraine Longhi, *District to investigate Islam quiz questions, criticizes Scottsdale college's 'rush to judgment'*, Ariz. Republic (May 11, 2020), https://www.azcentral.com/story/news/local/scottsdale/2020/05/11/district-investigate-islam-quiz-questions-criticizes-scottsdale-college-criticism-nick-damask/3109055001/ [https://perma.cc/3WVA-PMU5].

"publicly apologize to the affected classes," and "participate in a training program approved by the college." If any future student complained that Tawwater had engaged in any of the proscribed activities, she would be automatically terminated under the agreement. Verified Compl. ¶¶ 66-68, Pa12; Pa 785. Tawwater declined to sign the agreement, which amounted to a prior restraint on speech in violation of her expressive rights.

It is well settled as a matter of federal and state law that a state employer "cannot condition public employment on the surrender of First Amendment rights." *In re* Randolph, 101 N.J. 425, 430 (1986); *Connick v. Myers*, 461 U.S. 138, 142 (1983). The New Jersey Supreme Court "rel[ies] on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution." *Karins v. Atlantic City*, 152 N.J. 532, 547 (1998). And a prospective ban on public employee speech—such as a prior restraint—"makes the Government's burden heavy" because it "deters an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government's interests." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466-67, n.11 (1995).

Rowan College's "Last Chance Agreement" is a prior restraint on Professor Tawwater's speech: It prevented her from engaging in "indecent" or "inappropriate" speech with no regard for her right to make pedagogical decisions concerning the

presentation of material in her course. Both the Agreement's terms and Rowan College's termination of Tawwater when she refused to sign it violate the First Amendment. *See Barone v. City of Springfield*, 902 F.2d 1091, 1105-06 (9th Cir. 2018) (ruling a "Last Chance Agreement" prohibiting a police department employee from engaging in "disparaging or negative" speech an unconstitutional prior restraint, and termination for refusing to sign it First Amendment retaliation). This Court should condemn Rowan College's use of this illiberal mechanism for attempting to silence faculty, and should allow Professor Tawwater to continue to challenge her termination at the trial court.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand Professor Tawwater's claims for full consideration at trial.

Dated: July 7, 2022

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