STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 09 CVS 1789

TERRI GINSBERG,

Plaintiff,

v.

BOARD OF GOVERNORS
OF THE UNIVERSITY OF
NORTH CAROLINA,

Defendant.

RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the plaintiff, Terri Ginsberg ("Plaintiff" or "Dr. Ginsberg"), by and through her attorneys, and responds to the Motion for Summary Judgment of the defendant, Board of Governors of the University of North Carolina ("Defendant" or "the University"), as follows:

STATEMENT OF FACTS

Plaintiff was a non-tenure track Temporary Assistant Professor ("TAP") at North Carolina State University in the Film Studies Program. She is a prolific scholar and performed her job duties in a manner that met or exceeded the defendant's legitimate expectations at all times during her employment. Members of the English Department at NCSU strongly encouraged her to apply for a tenure-track position in Film Studies that was to begin in the 2008-2009 academic year. Dr. Ginsberg applied for this position.

Because of Dr. Ginsberg's interest in Middle Eastern cinema, Defendant arranged that the Film Studies Program would coordinate with the Middle East Studies Program to produce a film screening series which Dr. Ginsberg would curate. The Directors of the two programs began the

collaboration by largely deferring to Dr. Ginsberg in film selection because of her greater expertise in the area. During her introductory remarks to one of the films, *Ticket to Jerusalem*, which was about a Palestinian film director and his struggles to show the film in Occupied East Jerusalem, Dr. Ginsberg thanked the audience for supporting the screening of alternative viewpoints such as the one in the film. Drs. Khater and Orgeron, worried that this statement would cause audience members to impute a political bias on the two programs. They reprimanded Dr. Ginsberg for the statement and forced her to resign from the screening series. Drs. Orgeron and Khater also began steering the screening series committee away from films that they feared would be too political and too controversial.

Dr. Ginsberg has strong convictions about the Palestinian-Israeli conflict, some of which are reflected in her religious beliefs as well as her scholarly work. After her remarks at the film series, Drs. Orgeron and Khater regarded Dr. Ginsberg as "pro-Palestinian," which they felt was inappropriate, particularly from a Jewish professor. (Dr. Orgeron is also Jewish, and Dr. Khater is a Christian of Lebanese origin). Suddenly, Dr. Ginsberg was no longer a favored candidate for the tenure-track position and she was not even granted an interview. The position was instead offered to a candidate whose publication and teaching records were not as strong as Dr. Ginsberg's but who did not write or speak publicly about the Holocaust and the Middle East in the same controversial manner that Dr. Ginsberg did. Dr. Ginsberg's contract was not renewed, and her employment ended in June of 2008.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS UNDER THE NORTH CAROLINA CONSTITUTION.

A. Summary Judgment Standard

Summary judgment "is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue." *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C.App. 676, 681, 535 S.E.2d 357, 361 (2000). It is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rules Civ. Proc., G.S. § 1A-1, Rule 56.

The moving party has the burden of establishing that there are no genuine issues of material fact. *Hines v. Yates*, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005). The moving party can meet the burden by either: "1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim." *Id.* (quoting *Price v. Davis,* 132 N.C.App. 556, 559, 512 S.E.2d 783, 786 (1999)). The motion must be denied where the non-moving party shows an actual dispute as to one or more material issues." *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C.App. 676, 681, 535 S.E.2d 357, 361 (2000). In making the summary judgment determination, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party. *Iglesias v. Wolford*, 667 F.Supp.2d 573, 583 (E.D.N.C. 2009).

Summary judgment is "particularly inappropriate where issues such as motive, intent, and other subjective feelings and reactions are material and where the evidence is subject to conflicting interpretations. *Creech v. Melnik*, 347 N.C. 520, 530, 495 S.E.2d 907, 913 (N.C. 1998). *See also*

Collinson v. Gott, 895 F.2d 994, 1001 (4th Cir. 1990) ("Questions of subjective states of mind are of course notoriously ill-adapted to summary resolution . . . ."). Indeed, "[c]onstitutional cases in general pose special problems for the summary judgment procedure, particularly where the ultimate constitutional issues require carefully developed factual predicates for fair resolution." *Jackson v. Bair,* 851 F.2d 714, 718 -719 (4th Cir. 1988).

B. **North Carolina Courts are not bound by Federal Law and the North Carolina Constitution affords more protection for fundamental rights than the Federal Constitution.**

North Carolina courts often give "great weight" to federal decisions involving constitutional provisions that are identical or "parallel" to those in the state's constitution. *State v. Arrington*, 311 N.C. 633, 643 (1984). However, generally speaking, the North Carolina Constitution "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (N.C. 1992) (citing *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983). Indeed, North Carolina courts "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Id.* (citing *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)). Consequently, North Carolina State courts are "not bound by decisions of federal courts, including the United States Supreme Court" in interpreting the State's own constitution. *See State v. Jackson,* 348 N.C. 644, 648 (1998).

The North Carolina Supreme Court has delineated specific guidelines for the analysis of parallel federal and state constitutional claims:

> [T]he only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and

> beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.

Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 475 (1999) (quoting *State v. Jackson*, 348 N.C. 644, 648 (1998)). In accordance with these guidelines, the North Carolina Court of Appeals has held as follows:

> Accordingly, we first determine whether the policy violates the Fourth Amendment; if so, the policy also violates [North Carolina's equivalent law]... If we determine that the policy does not violate the Fourth Amendment, we may then proceed to determine whether....[North Carolina law] provides "basic rights in addition to those guaranteed by the [Fourth Amendment]."

Jones v. Graham County Bd. Of Education, 677 S.E.2d 171, 178 (N.C. App. 2009) (internal citations omitted).

There are important considerations that make academic speech protections in North Carolina stronger than the federal protections. Section 15 of the North Carolina Constitution provides, "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." (N.C. Const. art. I, § 15).Moreover, Article IX further emphasizes the importance of education in section, which reads, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. art IX, § 2. This grant of fundamental status stands in stark contrast to federal law. The U.S. Supreme Court made clear that the federal constitution does <u>not</u> protect the right to education as fundamental. *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 959 (1973).

One Supreme Court case, decided before *Rodriguez*, considered education's centrality to our Constitution when interpreting the scope of academic freedom. Justice McReynolds wrote that "liberty" within the meaning of the due process clause

> denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge . . . The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' . . . [T]he individual has certain fundamental rights which must be respected.

Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923). The Court therefore rejected a purely individualistic conception of liberty when determining the contours of academic freedom, and viewed the teacher's rights in view of his role, as a teacher, in the broader society. Similarly, a later McCarthy-era case put the matter in even stronger terms, stating that to deny freedom of inquiry and impose any "straight jacket on the intellectual leaders in our colleges and universities" would be to cause "our civilization [to] stagnate and die."' *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589, 603 (1967) (*quoting Sweezy v. State of N.H.*, 354 U.S. 234, 250 (1957)). Although the Court's reasoning was contextualized firmly in the First Amendment with no explicit reference to any right to education, the Court did set academic freedom apart from other first amendment freedoms in its reasoning. Therefore, there is a strong indication in our nation's jurisprudence indicating that the Court values academic freedom precisely because of the fundamental and essential role education, and specifically university professors, fulfill in our democracy.

The North Carolina free speech provision, because it guarantees education as a fundamental right, therefore protects academic freedom to a higher degree than its federal counterpart. Students' right to acquire knowledge should be taken into account when defining the scope of academic freedom in North Carolina law.

C. There are questions of material fact as to whether Dr. Ginsberg's constitutional right to freedom of speech was violated.

Section 14 of Article I of the North Carolina Constitution provides, "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art.I, § 14.According to federal law, for a constitutional speech claim to be properly advanced, the speech at issue must 1) involve a matter of public concern, and 2) must have been the motivating or "but for" cause for the plaintiff's non-hire. *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (N.C. App. 1999) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Warren v. New Hanover County Bd. of Education*, 104 N.C. App. 522, 525-26, 410 S.E.2d 232, 234 (N.C. App. 1991)).Once it is determined that speech comes within the purview of the First Amendment of the federal constitution and was one of the reasons for the government's action against the employee, the Court must determine whether "the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace." *Warren v.New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 526, 410 S.E.2d 232, 234 (N.C. App. 1991).

1. The speech in question relates to a matter of great public concern.[1]

When determining whether speech relates to a matter of public concern, the court must look to the content, form and context of the speech involved. *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (N.C. App. 1999).With respect to the content of the speech, speech is of public concern when it "involves an issue of social, political, or other interest to a community." *Kirby v. City Of Elizabeth City, North Carolina*, 388 F.3d 440, 446 (4th Cir. 2004). "The test for determining

[1] In *Iglesias*, the court held that whether speech is a matter of public concern is a question of fact that is not to be decided in summary judgment. *Iglesias v. Wolford*, 667 F.Supp.2d 573, 587 (E.D.N.C. 2009).It held, "For the purposes of summary judgment, the court assumes (without deciding) that Iglesias' speech . . . involved a matter of public concern. *Id.* (citing *Campbell v. Towse,* 99 F.3d 820, 828 (7th Cir.1996); *Cromer v. Brown,* 88 F.3d 1315, 1330 (4th Cir.1996)). The court then proceeded to apply the *Connick-Pickering* balancing test and consider the government's interest in maintaining a disciplined and harmonious workplace. *Id.* Other courts, however, do address the public concern issue at the summary judgment stage, and Plaintiff therefore responds to a possible "public concern" argument here.

whether plaintiff's expression was one of 'legitimate public concern' is whether the matter is one in 'which free and open debate is vital to informed decisionmaking by the electorate.'" *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419, 417 S.E.2d 277, 283 (1992) (quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983)). In other words, the inquiry should consider "whether the 'public' or the 'community' is likely to be concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." *Scallet v. Rosenblum*, 911 F.Supp. 999, 1012 (W.D.Va. 1996) (citing *Berger v. Battaglia,* 779 F.2d 992, 999 (4th Cir. 1985).

With respect to the form of the speech, the *Munn-Goins* court found it relevant that the plaintiff's speech was of a private nature; although the private nature of a statement does not necessarily mean it does not relate to a matter of public concern, courts may consider to whom the statement was made when determining whether the speech was consistent with the plaintiff's role as citizen. *Munn-Goins v. Board of Trustees of Bladen Community College*, 658 F.Supp.2d 713, 726 (E.D.N.C. 2009); *see also Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996) ("Public employees do not forfeit the protection of the Constitution's Free Speech Clause merely because they decide to express their views privately rather than publicly") (internal citation omitted)).

As to context, matters of purely personal interest such as conditions of employment or internal office affairs generally are not matters of public concern. *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (N.C. App. 1999). If the individual's employment would not be affected by the substantive matter s/he is speaking about, the issue is not one of merely personal interest. *Kariotis v. Glendening*, 229 F.3d 1142 (4th Cir. 2000) ("[W]e find no support in the record for the conclusion that Kariotis' position-or that of any other academic director-would have been affected by the plan to eliminate all full-time faculty in favor of adjunct professors."). Another factor courts find significant in determining whether an issue is a matter of public concern is whether the

"plaintiff ever voiced her concerns publicly outside the employment setting." Id. at 10, 510 S.E.2d at 176 (citing *Godon v. N.C. Crime Control & Public Safety*, 959 F. Supp. 284 (E.D.N.C.1997). In *Munn-Goins*, for example, the plaintiff's reason for requesting the information was to give her friends an estimate of how much money they could expect to make if they were employed at the college, and the court did not deem that speech to be a matter of public concern. In addition, "a public employee's expression of grievances concerning her own employment is not a matter of public concern." 658 F.Supp.2d at 726-727.

a. Plaintiff's introductory remarks at the film screening and her in-class speech fall within the scope of the First Amendment and Section 14.

Applying all of those factors here, it is clear that Dr. Ginsberg's introduction to the *Ticket to Jerusalem* film, as well as her *Holocaust and the Cinema* course, related to issues of great public import. First, Dr. Ginsberg frequently talks or writes publicly about film and other issues related to the Palestinian-Israeli conflict outside of the employment context. (Ex. E 900, 905); (Ex. G 43:13 – 46:10). Her remarks at the *Ticket to Jerusalem* film were made at a public event which members outside the NCSU community were welcome to attend and did attend.(Ex. I 39:3-5).

Second, her remarks had nothing to do with a condition of her employment or internal office affairs; she was talking about the Palestinian-Israeli conflict, a matter which is discussed on a daily basis in public forums, including the media, congress, college campuses, the internet and others. The Chancellor of NCSU said he thought the Palestinian-Israeli conflict was an important public issue for the people of North Carolina and the world. (Ex. L 32:2-6). Dr. Khater describes it as "absolutely" an important public issue to the people of North Carolina. (Ex. I 67:23 – 68:3). Plaintiff also made a reference to the fact that the film was an example of an alternative film production, and expressed gratitude to the audience for the airing of the perspective in the film; she was thus expressing support for the public airing of an under-represented view, a public value that is central to the speech guarantees in the North Carolina constitution itself. These comments relate to

matters of social and political interest and can hardly be characterized as a personal or personnel issues. (Ex. A ¶¶ 5-10).

Finally, the feedback Dr. Ginsberg received about her course and the film series, especially when the audience was given the opportunity to discuss the film *Offside* and hear from the film's director, signified that the issues discussed were indeed of great public interest to the NCSU community and whatever members of the public attended the screening. Dr. Orgeron, after attending Dr. Ginsberg's course on *Holocaust and the Cinema*, remarked on the "enthusiasm of student response to both the short and the feature." (Ex. E 411). A number of attendees of the *Offside* discussion expressed gratitude for the film and discussion they had as part of the series (Ex. E 30). One student remarked, "It's about time something like this came to NC State!" (Id.)Another remarked that he or she had been waiting for years for such an event. (Id.) Clearly, then, not only was Dr. Ginsberg's speech of public concern, but there was a significant amount of public interest in her speech as well.

b. Plaintiff's discrimination complaint falls within the scope of the First Amendment.

Dr. Ginsberg's complaint to Dr. Khater about NCSU policies that had a discriminatory effect on a guest speaker is a matter of public concern because it involved an issue of social and political interest to the community at large. In *Cromer v. Brown*, the court held that an anonymous letter on behalf of a group of black police officers that complained of racial discrimination inherently involved a matter of public concern. 88 F.3d 1315, 1326 (4th Cir. 1996).

Furthermore, in *Godon v. North Carolina Crime Control*, the court held that the content of an internal complaint about racial and sexual discrimination in the school context could fundamentally addressed a public concern, even where the complaint gave no insight into the form or context of the complaint. 141 F.3d 1158, 2 (4th Cir. 1998) (deciding on a motion to dismiss); *aff'd*, 238 F.3d 412, 2 (4th Cir. 2000) (denying defendant's motion for summary judgment and holding that the

evidence tended to show that Godon spoke as a citizen on matters of public concern in her complaint); *cert denied,* 534 U.S. 813 (2001).

Similar to the complaints raised in the aforementioned cases, Dr. Ginsberg raised a complaint about racial and ethnic discrimination in an email to her colleagues, Drs. Khater and Orgeron. (RFP Response 20, 39). In her letter, Dr. Ginsberg suggested that the continued delay of reimbursement for Sha'ban, a visiting speaker of Syrian origin and nationality, was unethical and unconscionable, and had the effect of contributing to the discrimination he faced in the United States, particularly in traveling in and out of the country. *Id.* In fact, Dr. Khater also admitted that the content of Dr. Ginsberg's focused on discrimination towards the Sha'ban, of which he was personally concerned, because he mistakenly understood her email to accuse himself of colluding with Homeland Security in persecuting Sha'ban. (Ex. I 46:9-10, 93:9-18). Furthermore, Dr. Ginsberg stated that students who attended the film and discussion with Sha'ban showed enthusiasm for bringing such individuals to their campus and suggested concern with the Defendant's failure to do so in the past. (Ex. G 215: 10-14); (Ex. E at 30).

Secondly, the form of Dr. Ginsberg's complaint does not preclude it from being a matter of public concern because her complaint was submitted privately. In *Cromer v. Evans*, the court held that the private, anonymous submission of a letter of complaint on behalf of members of an association did not deprive the matter of public import. 88 F.3d at 1326.What matters most is whether the speech is private or public in nature in *Munn-Goins v. Board of Trustees of Bladen Community College,* the court found that the private nature of the plaintiff's speech (giving her friends salary information) was what made it outside the scope of the First Amendment. 658 F.Supp.2d 713, 726 (E.D.N.C. 2009). As Plaintiff discussed *supra*, her e-mails alleged discrimination and therefore were of public concern.

Finally, the context of Dr. Ginsberg's complaint suggests a public concern because Dr. Ginsberg did not make the complaint for personal reasons. Although Dr. Ginsberg sent her email to Drs. Khater and Orgeron, she did not accuse them of personally discriminatingagainst Sha'ban. (Ex. G 211:4-8). In fact, Dr. Ginsberg informed Dr. Khater that the basis for her allegation of discrimination towards Sha'ban had originated with his difficulty in traveling to and from the United States and continued with the delay in his reimbursement of funds. (Ex. G213:1-3). Dr. Ginsberg was not speaking for personal interest or in opposition to Khater personally, but rather against the discrimination towards Sha'ban in general.

c. *Garcetti* does not serve to remove Plaintiff's speech claim from the freedom of speech context.

Defendant may argue that because Plaintiff's speech occurred within the scope of her job duties, it therefore falls outside the scope of the First Amendment because of the Supreme Court's ruling in *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006). First, it must be noted that Plaintiff was unable to find a single North Carolina state case that followed the *Garcetti* rule; rather, "North Carolina courts apply the Connick-Pickering standard under Section 14." *Iglesias v. Wolford*, 667 F.Supp.2d 573, 590 (E.D.N.C. 2009). Similarly, the Fourth Circuit continues to follow *Pickering*, and specifically declined to apply *Garcetti* to speech related to teaching. *Lee v. York County School Div.*, 484 F.3d 687, 695 (4th Cir. 2007) ("Thus, we continue to apply the *Pickering-Connick* standard as articulated in *Boring* to this appeal.") (internal citations removed). *See alsoKerr v. Hurd*, 694 F.Supp.2d 817, 843-44 (S.D.Ohio 2010) ("Even without the binding precedent, this Court would find an academic exception to *Garcetti*. Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values.")

Even under the more restrictive *Garcetti* standard, however, Plaintiff's speech relates to a matter of public concern. The *Garcetti* case does not stand for the proposition that any speech that happens within the employment context is removed from First Amendment protection. To the

contrary, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti,* 547 U.S. at 411 (2006).

Second, although the *Garcetti* Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," the Court pointed out that it had not applied this standard to the academic context. It held,

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.
>
> *Garcetti*, 547 U.S. 410, 421, 425.

Other Supreme Court precedent strongly suggests that a different standard should indeed apply in the university setting when determining whether a professor's speech is a matter of public concern. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); *see also Sweezy v. New Hampshire,* 354 U.S. 234 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation...."). As the *Scallet* case points out, to allow the University, as an employer, to control professors' speech simply because of the employment relationship would be absurd. It held,

> Unlike the plaintiff in *Holland,* Scallet, as an educator, routinely and necessarily discusses issues of public concern when *speaking as an employee.* Indeed, it is part of his educational mandate. More importantly, defendants' argument seriously misconceives the

> relevance of classroom debate in our democratic society. To suggest that the First Amendment, as amatter of law, is never implicated when a professor speaks in class, is fantastic.
>
> *Scallet v. Rosenblum*, 911 F.Supp. 999, 1013 -1014 (W.D.Va. 1996) (internal citations removed). *See also* section 2 *infra.*

Here, Defendant concedes that Plaintiff's introduction to the *Ticket to Jerusalem* film, the main "speech" at issue in this case, fell outside the course of her job duties. Dr. Orgeron explains that TAPs did not have a service requirement, and that curating the film screening series was extracurricular and "never a part of the formal position." (Ex. J 42:14-25, 44:7-8). Dr. Harrison, the Department Head, also confirmed the extracurricular nature of the speech, saying, "Dr. Ginsberg's participation on that committee was purely optional and not part of her job duties at NC State." (Harrison Aff. ¶ 13). In sum, Dr. Ginsberg's classroom speech falls under the First Amendment as well, since it dealt with a public issue and constituted academic speech.

2. Defendant's interest in preventing the appearance of bias and preventing offense to Dr. Khater does not outweigh Plaintiff's interest in speaking on a significant matter of public concern.

If the plaintiff's speech does touch upon a matter of public concern, the court must determine whether "the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace." *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 526, 410 S.E.2d 232, 234 (N.C. App. 1991).

It is the government's burden to prove that there was justification for the restriction, and that burden "varies depending upon the nature of the employee's expression." *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 420, 417 S.E.2d 277, 283 (1992) (quoting *Connick v. Myers,* 461 U.S. 138, 150 (1983)). "The more substantially the employee's speech touches or involves a matter of public concern, the stronger the showing and the heavier the burden is for the State to prove justification for terminating the plaintiff." *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 420,

417 S.E.2d 277, 283 (1992) (internal citations removed). *See also Jackson v. Bair*, 851 F.2d 714, 717 - 718 (4th Cir. 1988) (*quoting Connick,* 461 U.S. at 150) ("[W]hile speech that 'touche[s] upon matters of public concern in only a most limited sense ... does not require [a public employer to] tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships,' 461 U.S. 154, 103 S.Ct. at 1693, other speech concededly disruptive of these interests might nevertheless be protected precisely because it directly touches upon matters of grave public concern.").

The government must "'clearly demonstrate' that the speech involved 'substantially interfered' with official responsibilities." *Connick*, 461 U.S. at 150. The government has only met its burden when it can demonstrate that the benefit gained outweigh the loss of constitutionally protected rights. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976). In addition, the government cannot meet its burden by merely establishing a legitimate state interest; rather, the "interest advanced must be paramount, one of vital importance." *Id.* at 362.

When weighing the importance of the employee's speech, "[a]t the center of the employee's interest is the first amendment protection of the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' . . . '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 526-527, 410 S.E.2d 232, 235 (1991) (internal citations removed).

In performing the *Connick-Pickering* balancing test, the court may also consider the interests of the larger community in hearing the employee's speech. *Iglesias v. Wolford*, 667 F.Supp.2d 573, 587 (E.D.N.C. 2009).As the Supreme Court made clear in *Keyishian* when the hiring and retention of employees alleged to be subversive was challenged,

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. . . .The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas

> which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection. . . .The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are acquired as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'

Nova University v. Board of Governors of University of North Carolina, 305 N.C. 156, 165-166, 287 S.E.2d 872, 879 (N.C. 1982) (citing *Keyishian v. Board of Regents of University of State of N. Y.*, 385 U.S. 589, 603 (1967) (internal citations removed)).

Another case expressed reservations about applying the *Pickering* balancing test to the in-class speech of university professors and graduate school instructors "since the test does not explicitly account for the robust tradition of academic freedom in those quarters." *Scallet v. Rosenblum*, 911 F.Supp. 999, 1011 (W.D.Va. 1996). The court concluded, however, "that this interest can be accounted for within the parameters of the balancing test by properly defining the extent of the teacher's interest in the speech." *Id.*

Federal jurisprudence therefore places a heavy emphasis on the importance of free speech in the academic context, and urges that the balancing test be applied especially carefully when assessing the weight given to professors' speech. North Carolina's academic freedom protections are even greater, however. As argued *supra*, North Carolina's constitutional protections are more specific than the federal ones, and are given a more liberal interpretation.

On the other hand, when considering the government's interest in effective and efficient fulfillment of its responsibilities to the public, "[t]he essential question is whether plaintiff's expression impedes his or her ability to fulfill the responsibilities of the job." *Howell*, 106 N.C.App.

at 420, 417 S.E.2d at 283. The nature of the employee's position is of particular relevance to the weight given to the government's interest in controlling employee behavior. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (4th Cir. 1984) ("In analyzing the weight to be given a particular job in this connection 'nonpolicymaking employees can be arrayed on a spectrum, from university professors at one end to policemen at the other.") Because "[s]tate inhibition of academic freedom is strongly disfavored," the freedom and discretion granted to professors stands "[i]n polar contrast" to "the discipline demanded of, and freedom correspondingly denied to policemen." *Id.* (citations removed).

Because of the importance of professors' role in our democracy and the nature of their position, it is important for the state to "encourage them to exercise their independent judgment" and give them latitude as they carry out their roles. *Wieman v. Updegraff*, 344 U.S. 183, 197-198 (1952) ("A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves.") (internal citations removed).

a. The government's interest in close working relationships

The government often claims is that a plaintiff's speech disrupted office functioning, undermined the authority of supervisors, and destroyed close working relationships "for which personal loyalty and confidence are necessary."*Corum v. University of North Carolina Through Bd. of Governors*, 330 N.C. 761, 776, 413 S.E.2d 276, 286 (N.C. 1992); *Howell*, 106 N.C. App. At 420, 417 S.E.2d at 283.

The government's interest in maintaining strict discipline less important in an academic context in which professors are considered autonomous than in, for example, a police department, where strict hierarchical structures are necessary. *Cromer v. Brown*, 88 F.3d 1315, 1327 (4th Cir. 1996)

("In weighing the sheriff's interests, we bear in mind that when the employer runs a law enforcement organization where 'discipline is demanded,' he has 'greater latitude ... in dealing with dissension in [the] ranks.'") (internal citations omitted); *see also* 7 First Amend. L. Rev. 1, 19 (Fall 2008) ("Any suggestion that state university professors could, like others who work for government, be subject to 'managerial discipline' because of statements unwelcome to superiors or contrary to agency policy would be wholly at variance with the most basic standards of academic freedom.").

The mere fact that a plaintiff's speech offended an employer or caused it discomfort is not sufficient to overcome a plaintiff's speech rights. *Corum*, 330 N.C. at 776, 413 S.E.2d 276, 286 ("While the speech may have affronted Dr. Durham, it cannot be said that the speech impeded Corum's duties or interfered with the regular operation of the University . . . .). In addition, when an employee approaches an employer privately and doesn't provoke a public confrontation, the government's assertion of interest in maintaining discipline and order is not given great weight. *Id.* at 1328.

When the government asserts that a particular interest the government must show that <u>the effect</u> of the speech on the community as a whole or on the university in particular was such that it impeded the asserted government interest. *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 567, 571 (1968) (emphasis added). That showing requires more than an assertion that other employees were angry or uncomfortable. *Id.* at 571 ("[T]he fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board.").

In Dr. Ginsberg's case, however, Defendant's only discernable interest in suppressing Plaintiff's complaint of discrimination towards Sha'ban is to prevent Dr. Khater from being

personally offended. Defendant may claim that Dr. Ginsberg's e-mail offended Dr. Khater and therefore harmed close working relationships within the University.

Dr. Khater reacted negatively to Dr. Ginsberg's concerns that the bureaucratic obstacles to payment of their guest speaker, Sha'ban, who was of Syrian origin and nationality, and who was Muslim, was aggravating discriminatory screenings he had faced elsewhere. (Ex. I 83:2 – 85:13, 90:16 – 94:21). Dr. Khater believed that Dr. Ginsberg's complaint accused him of colluding with Homeland Security in persecuting and humiliating Sha'ban, to which he took offense. (Ex. I 46:9-10, 47:1-20, 85:3-13). In fact, he told her explicitly that the main thing that angered him about the e-mails was the fact that they related to discrimination; he took offense to her raising the issue since he was Arab himself and had been discriminated against himself. (Ex. I 93:5-18). The Defendant's interest in preventing Dr. Khater from being personally offended falls very short of outweighing the public's interest in Dr. Ginsberg's speech. Dr. Ginsberg's complaint regarded the discrimination of Sha'ban, based on his race, ethnicity, and national origin, which is inherently a matter of public concern. *See Connick*, 461 U.S. at 16; *Cromer,* 88 F.3d at 1326. Dr. Khater did not work in the same department as Dr. Ginsberg, so the fact that they might not have gotten along in the future would not be a grave concern. (Ex. I 72:24 – 73:3). Finally, excluding Dr. Ginsberg from the University would not have been a proportionate response to a genuine concern that she and Dr. Khater might not get along.

b. The government's interest in controlling the audience's perception of the Middle East Film Screening Series

In this case, Defendant states that its interest in suppressing Plaintiff's introduction to the *Ticket to Jerusalem* film stems from its desire to ensure that the audience did not perceive Dr. Ginsberg as implying that the Middle East Studies and Film Studies programs were "pro-Palestinian" or "biased" and thereby ensuring that they maintained an open dialogue about the conflict.

Plaintiff agrees that maintaining an open dialogue about the conflict is an important government interest. Merely asserting such an interest, however, is not enough. Defendant's stated interest fails to outweigh the public's interest in hearing Plaintiff's speech because 1) Defendant has not sufficiently demonstrated that Plaintiff's speech harmed that stated interest, and 2) Plaintiff's speech relates to a matter of grave public concern and outweighs any danger that audience members would impute specific political beliefs onto the programs.

Courts are very hesitant to allow suppression of protected speech when it is questionable whether a government's stated interest was actually harmed. As the court in *Jackson* explained,

> [W]here the public employer's retaliatory action is taken in response to merely threatened rather than actual disruption of employer interests, the reasonableness of the employer's perception must be weighed in the balance. For though protection of the right does not require the public employer always to await actual disruption before acting, it does require that action taken in response to a mere potential for disruption be objectively justifiable under the circumstances . . . . Otherwise, the right would be no stronger than the timidity or nervousness or impatience of the particular employer, in which case it would be effectively no right.

Jackson v. Bair, 851 F.2d 714, 718 (4th Cir. 1988) (citing *Jurgensen v. Fairfax County,* 745 F.2d 868, 879 (4th Cir.1984)).

Thus, if the summary judgment record does not support a factual determination that a threat to what Defendant characterizes as "open dialogue" has actually materialized or was imminent, the balance cannot tip in favor of the employer. *Jackson*, 851 F.2d at 721-22 ("But when the employer acts on mere potential for disruption, there must be an objectively justifiable basis for his apprehension of the threat. On the summary judgment record here, <u>the balance could be tipped in favor of public employer interests only if statements such as Jackson's are *per se* unprotected . . .</u>, without regard to their actual potential for injury to employer interests. We decline to adopt such a rule.") (emphasis added); *see also East Hartford Ed. Ass'n v. Board of Ed. of Town of East Hartford*, 562

F.2d 838, 846 (2d Cir. 1977) ("[W]e cannot "accept unquestioningly the school authorities' judgment as to the effects of classroom conduct or speech," but rather must require a regulation of the sort at issue here to be "drawn as narrowly as possible to achieve the social interests that justify it" and to be "reasonably related to the needs of the educational process.").

This caution should be even more pronounced in the case of a professor, who, as argued *supra*, enjoys more discretion in the exercise of academic speech than other public employees. Dr. Orgeron and Plaintiff may well disagree on the appropriateness of certain forms of academic speech, but that doesn't mean administrations may place restrictions on the manner in which professors relay information within their area of expertise. *See Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) ("Education is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view.").

Although Plaintiff acknowledges that the Fourth Circuit *Urofsky* court opined that academic freedom protects institutions, not individual academics, that case is inapplicable here, since it dealt with the right of the institution to be free from coercion by the state legislature, and the issue of an individual's academic freedom was not before it. Moreover, the right of the institution to be free from interference by the state and the right of professors to autonomy in their exercise of their academic duties are not mutually exclusive. Indeed, even *Urofsky* acknowledged that the American Association of University Professors defined academic freedom as protecting individual professors. It wrote, "[T]he AAUP was concerned with obtaining for professors a measure of professional autonomy from lay administrators and trustees. . . . The AAUP defined academic freedom as "a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or

beyond the institution." *Urofsky v. Gilmore*, 216 F.3d 401, 410 -411 (4th Cir. 2000) (internal citations removed).

Moreover, *Urofsky*'s characterization of academic freedom as an exclusively institutional right was contradicted by several Supreme Court rulings which directly addressed the issue of individual professors' academic freedom rights. *Sweezyv. New Hampshire,* 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); *see also Keyishian v. Board of Regents of University of State of N. Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").

More specifically, several courts have held that professors have discretion over the manner in which they present the substantive material they were hired to teach. *See e.g. Emergency Coalition to Defend Educational Travel v. U.S. Dept. of the Treasury*, 545 F.3d 4, 12 (D.C. Cir. 2008) ("Any substantive governmental restriction on Smith's academic lectures would obviously violate the First Amendment.") *See also Scallet v. Rosenblum*, 911 F.Supp. 999, 1013 -1014 (W.D.Va. 1996) ("To suggest that the First Amendment, as a matter of law, is never implicated when a professor speaks in class, is fantastic."); *East Hartford Ed. Ass'n v. Board of Ed. of Town of East Hartford*, 562 F.2d 838, 843 (2d Cir. 1977) ("Freedom to teach in the manner of one's choice is a form of academic freedom that is universally recognized, if not invariably protected, <u>at the college level</u> . . .") (emphasis added); *Cooper v. Ross*, 472 F.Supp. 802, 811 (D.C.Ark. 1979) ("The Court concludes only that, at least in the context of a university classroom, Cooper had a constitutionally protected right simply to inform his

students of his personal political and philosophical views.”).

The *Moore* court explained that to allow academic institutions discretion to control the way in which teachers performed their duties would serve to restrain the scope of ideas teachers would be willing to explore. It held,

> When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom. . . . However wide the discretion of school officials, such discretion cannot be exercised so as to arbitrarily deprive teachers of their First Amendment rights. This Court cannot, on the facts of this case, find any substantial interest of the schools to be served by giving defendants unfettered discretion to decide how the First Amendment rights of teachers are to be exercised.
>
> *Moore v. Gaston County Bd. of Ed.*, 357 F.Supp. 1037, 1041 (D.C.N.C. 1973) (internal citations removed).*See also Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (“Our Constitution does not permit the official suppression of *ideas*.”) (emphasis in original).

Implicit in many of the decisions cited above is that the interest of university administrations in regulating professors’ speech is less powerful than grade schools’ interests to regulate teachers’ speech. As the *Scallet* court explained:

> [T]he “significant interests” discussed in *Hazelwood* that justify the restriction, in certain instances, of teachers' in-class speech, are not implicated to the same extent, if at all, in the context of higher education. Certainly the interest in assuring “that readers or listeners are not exposed to material that may be inappropriate for their level of maturity” is not implicated in the graduate school context. Furthermore, the interest in assuring that “the views of the individual speaker are not erroneously attributed to the school” is not as strongly implicated in the context of higher education, where students are not so easily cowed by the assertion of the apparent authority the classroom fosters. In addition, while the Supreme Court has recognized that communities have a legitimate interest in attempting to inculcate certain values in students through public education, achieving some sort of uniform value system is not part of the mandate of higher education. Indeed, it is anathema to the

> intellectually maverick environments of the university and graduate school. Thus, the pedagogical interest in restricting teacher's in-class speech is not as strongly implicated in the context of higher education.

Scallet v. Rosenblum,911 F.Supp. 999, 1011 (W.D.Va.1996). If universities' interests in restricting in-class speech is not as strong, certainly they have even less of an interest in regulating professors' extracurricular speech.

Here, Defendant claims that Dr. Ginsberg made a statement as part of her introduction to the film *Ticket to Jerusalem*, that might cause the audience members to impute bias on the Film Studies and Middle East Studies programs. Assuming arguendo that NCSU stated a legitimate state interest in preventing public misperception about the politics of the Middle East Studies program, Defendant does not credibly claim that the non-hiring of Dr. Ginsberg for the tenure-track position threatened that interest, or that the remedy of excluding her from the University was proportionate.

First, the claim that the main purpose of the film screening series was dialogue, or that hiring Dr. Ginsberg to a full-time position would have disrupted it, is not credible.[2] For one thing, Dr. Khater admits that the program did not even hold a discussion after the *Ticket to Jerusalem* film, nor was a discussion planned, and in fact, discussion was not even a consistent feature of several other screening series films. (Ex. I 39:19 – 41:1). However, Dr. Ginsberg herself requested that discussion be held after every film, but Drs. Khater and Orgeron told her there would be no discussion. (Ex. G131:22-23, 132:13-16). Dr. Khater said that unless the filmmaker was actually speaking at the film screening, it was NCSU tradition *not* to have discussion after the film. (Ex. I 40:19-21). So, it was Drs. Khater and Orgeron, not Dr. Ginsberg, who prevented dialogue, since

[2] Several of Defendant's affidavits include commentary about Dr. Ginsberg's supposed lack of collegiality. Because Defendant does not claim to have taken Dr. Ginsberg's collegiality into account when making the hiring decision, it is not material to the issues at hand. Plaintiff will therefore spare the Court a lengthy rebuttal of those assessments. She will, however, note that the record contains an example of the tone of Dr. Ginsberg's communications with her colleagues (and their communications with her), and that her tone is very differential, demonstrates flexibility, and matches the tone of her colleagues. (Pl. Docs. 21-31).

they never planned to have a dialogue in the first place. Had they allowed a discussion after the film, any misunderstanding audience members might have had about Dr. Ginsberg's introduction could have been addressed and corrected during discussion.

Because of the requirement discussed *supra* in the *East Hartford* case that the remedy to any perceived compromise of government interests be narrowly drawn and reasonably related to the harm, then even if we are to assume that her introduction did harm the stated interest, removal of Dr. Ginsberg from the University is disproportionate. There are several intermediate remedies one could imagine, including having a discussion session after the program, counseling Dr. Ginsberg not to make similar statements in the future, or making an announcement to attendees at the event clarifying the statement in the introduction.

Also, since Dr. Ginsberg was forced to resign from the screening series at the November 9 meeting, before the decision on the tenure track position was made, NCSU already knew she would not be speaking at any subsequent Middle East film screening series events, and could not have been worried that she would make similar statements at subsequent screenings. (Ex. F 541-54).In addition, NCSU did not even have a screening series the following semester, and they did not have a screening series in the 2008-2009 academic year. (Ex. I at 35:22 – 36:2). For a year and a half subsequent to Dr. Ginsberg's introduction, therefore, the Middle East Studies program did not show any films at all. In addition, Dr. Orgeron described the Film Studies program's collaboration on the screening series as a one-time collaboration that was "based on Dr. Ginsberg's interests." (Ex. J 63:17-24). Fostering dialogue about the films that addressed the Middle East was clearly not as important of a concern to the English Department and the University as Defendant claims, not to mention "necessary for [the University] to operate efficiently and effectively." *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).The likelihood that Dr. Ginsberg's supposed imposition of her views on the audience was a genuine concern is further undermined by the fact that Dr. Orgeron admitted Dr.

Ginsberg didn't impose her views on students. (Ex. J 34:14-17). In fact, she wrote in Dr. Ginsberg's evaluation, "It is a pleasure to watch someone lead a discussion who appears to take her students' thoughts so seriously." (Ex. E 410).

There is certainly a question of fact in the record about whether Dr. Ginsberg even made the statement that Dr. Orgeron and Dr. Khater attribute to her. Dr. Orgeron claims that Dr. Ginsberg was telling the audience "something to the effect" that "their attendance at the film "signaled their support for the Palestinians or the Palestinian cause." (Ex. J44:10-17, 62:13-14). There is no indication that any students or members of the general public interpreted the introduction the way Defendant did. (Ex. J 48:22 – 49:2). In fact, neither Dr. Orgeron nor Dr. Khater could remember a single instance of a student or member of the general public complaining about Dr. Ginsberg's introduction, nor was any such instance mentioned in Defendant's affidavits. (Ex.I 37:19-24, 38:19-22, 53:12-18); (Ex. J 48:22 – 49:2, 50:3-9).

In addition, Dr. Orgeron's memory about the content of the statement was admittedly vague, and she admits Dr. Ginsberg would not likely be so simplistic as to believe there's only one Palestinian view or "cause." (Ex. J 44:18-45:7). Dr. Khater's memory was also admittedly vague: "I'm paraphrasing because I don't recall the exact words -- that by their very presence, the audience is supporting the Palestinians and the Palestinian cause. (Ex. I 37:9-12). Similarly, Dr. Bigelow uses the exact same language as Dr. Khater and Dr. Orgeron- that "the audience's presence that evening showed support for the Palestinians or the Palestinian cause," yet admits, "I don't remember her exact words, but they were to that effect." (Bigelow Aff. ¶ 7).

Dr. Ginsberg, on the other hand, remembers what she said during the introduction in detail, as explained in her affidavit but only excerpted briefly here. In response to the deposition question about whether she told the audience that their attendance signified support for the Palestinian cause, she responded, "I did not say that at all." (Ex. G 124:5-9). She spoke, rather, about the presence of

spectators at an alternative screening as support for *expression* of views that support Palestinian liberations struggles. She explains,

> I concluded my introduction by thanking the audience for choosing to attend, free of charge, this independent, Palestinian film rather than a mainstream, commercial or Hollywood film; by doing so, I stated, the audience was showing its support for the airing of Palestinian cultural perspectives, especially those which promote Palestinian liberation, and that for this reason, I was very proud to be able to present the film to them, and hoped they would enjoy it.

(Ex. A. ¶ 8). Dr. Ginsberg is not telling the audience about their views regarding the Palestinian-Israeli conflict, but rather thanking them for supporting the airing of the film, for supporting the public viewing of an alternative perspective. That statement is entirely consistent with the Defendant's stated desire to "open up dialogue" about the region.(Orgeron Affid ¶ 14).Dr. Ginsberg's version of her introduction is corroborated by Andrea Mensch's affidavit, which adamantly denies that Plaintiff told the audience they were pro-Palestinian. (Ex. B ¶ 9).The fact dispute on the record is well-summarized in Dr. Pramaggiore's affidavit, in which she wrote, "Dr. Ginsberg and Dr. Orgeron gave me somewhat divergent accounts of what Dr. Ginsberg said in her introduction to the film, and they interpreted her remarks differently." (Pramaggiore Aff. ¶ 5).Dr. Pramagiore said she would explain what Plaintiff meant to Dr. Orgeron, but Dr. Orgeron continues to repeat the same characterization of the introduction, despite being a film studies specialist who claims to understand apparatus theory, which Plaintiff was referencing. (Ex.A ¶ 18).

Finally, there is substantial evidence on the record that Dr. Khater and other members of the search committee who denied Dr. Ginsberg an interview for the tenure-track position were very concerned about appearing biased about the conflict, and were uncomfortable with associating the views Dr. Ginsberg presented with the university. As Dr. Pramaggiore puts it, "I think it is likely that Dr. Orgeron and Dr. Khater were being overly cautious about the reputations of their programs and what people would think about the film series." (Pramaggiore Aff. at 6).Dr. Khater and Dr.

Orgeron admitted frankly that Dr. Ginsberg was more qualified than they to give the introduction because she was the expert.[3] So, their interference with and reaction to Dr. Ginsberg's introduction is simply not within the realm of their authority under the First Amendment; it goes against the *Wieman* requirement that professionals be given discretion within their area of expertise.

Defendant simply does not make a showing that the non-hiring of Dr. Ginsberg prevented disruption of "open dialogue."

[3] Dr. Khater said Dr. Ginsberg should be the one to give the *Ticket to Jerusalem* introduction because she was the expert in the field. (Pl. Doc. 11). Dr. Orgeron said she would stay out of the film selection process because it was "way out of [her] area of expertise. (Pl. Doc. 10). She added, though, that she liked "the idea of the films being from different countries and about different subjects." (Pl. Doc. 10).

3. Plaintiff's speech was a motivating factor in her non-hire for the tenure-track position.

If this Court decides that Plaintiff's speech involved a matter of public concern and that NCSU's interest in suppressing her speech does not outweigh her right to speak, the question becomes whether the speech was one of the motivating factors in the employer's adverse action. The issue of motivation "depends in large part on the credibility of the witnesses' oral testimony." *Ollman v. Toll*, 704 F.2d 139, 140 (4th Cir. 1983). Courts hesitate to grant summary judgment where motivation is an essential element of the alleged offense. *Scallet v. Rosenblum*, 911 F.Supp. 999, 1013, 1020 (W.D.Va. 1996) (holding that the causation inquiry is a factual determination) (citing *Jones v. Dodson,* 727 F.2d 1329, 1337 (4th Cir.1984)).

Circumstantial evidence such as changes in behavior can be helpful in determining whether the employment action was influenced by the speech. In *Warren*, a teacher was suddenly given poor teaching evaluations, was denied a promotion, and was treated with hostility after having consistently receiving excellent evaluations in the past. *Warren v. New Hanover County Bd. of Educ.*, 104 N.C.App. 522, 527, 410 S.E.2d 232, 235 (1991). The court held that the plaintiff had sufficiently alleged that the denial of the promotion resulted not from a sudden change in performance, but from the fact that just a few days earlier, his remarks about dissatisfaction with the experimental merit pay program were published. *Id.*

Another situation that raises a suspicion of improper motivation is when there is an indication that the employer is uncomfortable about the controversial nature of the employee's speech. In *Dube*, for example, the court held there was a question of fact about whether a professor's statement that Zionism was racism motivated the University's decision to deny him tenure. *Dube v. State University of New York*, 900 F.2d 587, 597 (2d Cir. 1990). It emphasized that one administrator wrote a statement disassociating the administration from the views of the professor, and that the

controversial nature of the issue was on another administrator's mind during his decision-making process. *Id.* Although the administration cited academic criteria for the tenure denial, including a claim that the plaintiff's scholarship was insufficient, the court held that a reasonable jury could find the plaintiff was denied tenure as a result of his speech, and therefore took the plaintiff's "assertion of retaliatory motive as true." *Id.*

Finally, courts view with suspicion employer claims that an individual is overqualified. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1290 (9th Cir. 2000) (commenting that 'overqualification' as a reason for firing an employee may be a mask for age discrimination); *Taggart v. Time Inc.*, 924 F.2d 43 (2d Cir. 1991) (holding that rejecting an applicant on the ground that he was 'overqualified' defied common sense when the applicant was unlikely to have other employment opportunities); *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 192 -193 (2d Cir. 1991) (finding the concern about a lower salary for an allegedly overqualified employee unconvincing when the employee had no occasion to express views on the matter, and concluding that a trier of fact would be free to conclude that this explanation was pretextual and not made in good faith); *Gray v. New York State Elec. & Gas*, 2004 WL 1570260, *6 (W.D.N.Y. 2004) (noting that the employer did not point to any evidence in the record to suggest that 'overqualification' would negatively affect the plaintiff's performance); *Brewton v. Propulsion Technologies, Inc.*, 1995 WL 597377, *5 (N.D.Ohio 1995) (although an employer may use "an overqualification policy which has an objective and measurable criterion, *e.g.,* a policy against hiring a college graduate for certain jobs," claimed overqualification is probably pretextual when it is only applied to the plaintiff or is applied inconsistently). Plaintiff respectfully suggests that the "overqualified" concern is particularly bizarre in the academic context, which involves "conversation on the highest level for the very best people you can think of" *Wieman v. Updegraff*, 344 U.S. 183, 197-198 (1952) (internal citations removed).

Defendant may argue that Dr. Khater's hostility to Dr. Ginsberg's views are immaterial because he had no control of the hiring decision. He had control over the disciplinary meeting of Plaintiff and her involvement in the Middle East Screening Series, however, as argued above. In addition, although Dr. Khater did not serve on the Search Committee, Dr. Orgeron asked him what he thought of Dr. Ginsberg as a colleague while she was deliberating about candidates, because she knew he might work with her. (Ex. I 72:8-9). Dr. Khater responded that he did not think she was very "collegial." (Id. at 11-12). Also, Dr. Orgeron changed her mind about whether to bring an Israeli film that Dr. Ginsberg suggested be screened on campus after Dr. Khater shot it down. (Ex. G 225:9 – 226:16).

Along the same lines, if Defendant argues that Dr. Parcel made the final employment decision but was not implicated in any of the suppression of speech, that argument fails because it is clear Dr. Parcel relied exclusively on her conversation with Dr. Harrison. Dean Parcel rubber-stamped the recommendations of departments regarding assistant professor-level hires. (Ex. N 13:3, 12:14). The extent of her investigation into Dr. Ginsberg's complaint that her academic freedom was violated was to speak to Dr. Harrison, who assured her that the Department had followed proper procedures, and Dr. Khater's department head. (Ex. N 15:15 – 16:2, 18:1-9) (see also Ex. F 1037). The fact that Dr. Harrison's own decision-making was based on improper considerations is addressed in the pretext argument in point b. *infra*. Besides, his decision appeared to have itself been heavily influenced by the Search Committee's recommendation. (Ex. K 24:11-21).

a. Evidence that Defendant acted in reaction to Plaintiff's speech

There is direct evidence that Dr. Ginsberg was berated at the November 9 meeting and removed from the films screening series because of her speech about the Palestinian-Israeli conflict and about her remarks about discrimination against Dr. Sha'ban. Dr. Khater told Dr. Ginsberg

explicitly during the November 9 meeting[4] that *because of* her introduction to the *Ticket to Jerusalem* film, there would be no further collaboration in the future between the Film Studies Program and the Middle East Studies. (Ginsberg Dep 219:18-25; Ex.A ¶ 11).He also told her if she didn't like the way he did things, she could join Cat Warren, who had resigned from the Women's Studies Program because it accepted money from the politically conservative Pope Foundation, and that he was thinking of accessing that money for the Spring series as well. (Ex. E 134; Ex.A ¶ 12); (Ex. G 220:1-15).Dr. Khater also reacted negatively to Dr. Ginsberg's concerns that the bureaucratic obstacles to payment of their guest speaker was aggravating discriminatory screenings he had faced elsewhere. (Ex. I83:2 – 85:13, 90:16 – 94:21). In fact, he told her explicitly that the main thing that angered him about the e-mails was the fact that they related to discrimination; he took offense to her raising the issue since he was Arab himself and had been discriminated against himself. (Ex. I 93:5-18). And while Dr. Khater continued to chastise Dr. Ginsberg, Dr. Orgeron failed to interrupt or comment on Dr. Khater's berating of Dr. Ginsberg. (Ex. I73:19-23). Dr. Khater therefore admits that it was Dr. Ginsberg's speech (both the introduction and the e-mail about discrimination) that provided the impetus for the November 9 meeting in which he severely berated her. (Ex.I 45:12 – 20, 46:7-10; Ex.A ¶ 11).

There is also quite a bit circumstantial evidence that Dr. Ginsberg was not hired for the tenure track position because of Defendant's discomfort with her point of view. The first type of circumstantial evidence is the change in behavior by Drs. Orgeron, who were on the search committee that declined to interview Plaintiff for the position, Dr. Harrison, who acted on the search committee's recommendation, and Dr. Khater, on whom Dr. Orgeron relied for advice about Dr. Ginsberg's candidacy. Before Dr. Ginsberg's fateful remarks at the *Ticket to Jerusalem* screening,

[4] Although Dr. Khater and Dr. Orgeron claim that Dr. Ginsberg remained silent during the meeting when they tried to have a discussion with her, this claim is contradicted in the record. Dr. Ginsberg responded both about the reimbursement e-mail (Ex. G 212:9-17) and the introduction to the film (Id. at 218:15-18).

several members of the English Department at NCSU strongly encouraged Dr. Ginsberg to apply for the tenure-track position in film studies, as did Dr. Khater. Drs. Marsha and Devin Orgeron and Dr. Harrison encouraged her to apply several times, both before and after her acceptance of the TAP position. (Ex.A ¶ 2); (Ex. K 18:5-17). In fact, they even encouraged her to apply before the English department was authorized to begin recruiting for the tenure-track position.(Memorandum to Dr. Harrison, July, 13, 2007); (Def's supplementary response to Interrogatory No. 23); (Plaintiff's response to Interrogatory No. 12).Dr. Orgeron helped Dr. Ginsberg find a place to live and she held a welcoming party for Dr. Ginsberg, which the English Department had never done for a TAP in the past. (Ex. J 27:2-19, 26:1-9). Dr. Ginsberg viewed that encouragement as strong enough that she gave up a one-year position at another university that was closer to home and accepted the temporary position at NCSU, believing that the following year she would continue teaching in the permanent position. (Ex. A ¶ 3). They all continued to encourage her to apply for the position after the fall semester started, as did Dr. Khater, Dr. Pramaggiore, and Mr. Wallis. (Pl. Response to Interrogatory No. 12); (Ex. I 19:22 – 20:2). Plaintiff was even told she was a top contender for the tenure-track position until her "pro-Palestinian" introduction to Ticket to Jerusalem changed Dr. Orgeron's mind. (Pl. Resp. Interrog. Nos. 12-14). Further, although they had induced her to move all the way from New York to North Carolina, Defendant never informed Plaintiff that her TAP was temporary, despite the statement in her appointment letter that the position carried the "possibility of renewal." (Ex. A ¶ 2-3).A reasonable juror could conclude that the department members did not mean to mislead Dr. Ginsberg about the temporary nature of the position, but rather assumed the temporary position would transition to a permanent tenure-track position the following year.

This strong encouragement disappeared completely after Dr. Ginsberg gave her introductory remarks at the film screening and after the November 9, 2007 meeting. Not only was her

application for the tenure-track position turned down, but she was not even granted an interview. (Ex. A ¶ 19).Dr. Ginsberg went from being listed on the Search Committee notes as first in the top tier of candidates to not even being in the top tier. (Ex. F 541-54).Marsha Orgeron began speaking negatively about Dr. Ginsberg's involvement in the film screening series. (Prammagiore Aff.[5] ¶ 5); Ex. A ¶ 18).As recorded in Dr. Ginsberg's November 9, 2007 e-mail to her AAUP representative and confirmed in Dr. Pramaggiore's affidavit, Dr. Orgeron apparently expressed concerns to Dr. Pramaggiore about Dr. Ginsberg's involvement on the screening series committee, and that she was not surprised to hear about Dr. Ginsberg's "resignation" from the committee. (Ex. E 133). Dr. Orgeron also exhibited hostility toward Dr. Ginsberg. (Ex. E 119). Dr. Ginsberg was then excluded from involvement in the European Film Series that the Film Studies Program produced during the Spring of 2008, even though one of the films screened in the series was the German film "Paris, Texas," about which there was an essay in her anthology on German film. (Ex. H 109:11 – 110:4).

Dr. Orgeron also spoke to Dr. Khater about Dr. Ginsberg's application for the tenure track position, although Dr. Khater was in the History Department, while Dr. Ginsberg was in the English Department. (Ex. I 72: 7-16, 73:2-7). Dr. Orgeron implied that Dr. Ginsberg might be difficult to work with, (Ex. I 74:1-4), and asked him about Dr. Ginsberg's collegiality, to which Dr. Khater replied that he did not find her to be collegial. (Ex. I 72:7-16, 73:2-7). Dr. Khater assumed that Dr. Orgeron asked him this question in his capacity as an academic who dealt with Middle Eastern studies, similar to that of Dr. Ginsberg. *Id.* But he admits that Dr. Orgeron did not actually phrase her question to him in this way; rather, her question to him was about her collegiality in general. (Ex. I 73: 13-14).

[5] The affidavits of Drs Pramaggiore, Marsha Orgeron, Devin Orgeron, Khater, Harrison, Bennett, Thompson, and Bigelow are all attached to Defendant's Motion for Summary Judgment.

It must be noted that Defendant's frequent protestations that that the individuals involved agree completely with Dr. Ginsberg's political views are immaterial. The question is not whether they agreed with Dr. Ginsberg, but whether they prevented her from airing those views publicly on campus. Defendant did not, in its interrogatory responses, name a single professor in the English Department who, between 2005 and the present, produced scholarly work or gave/coordinated a public presentation about Israeli, Zionism or the Palestinian people, as Dr. Ginsberg has. (Def. Response to Interrogatory Nos. 9, 10). Although Dr. Khater claims he and Plaintiff have "very similar – if not the same – views on the Palestinian/Israeli conflict", he admits he was "concerned about the effect that [her introduction] might have on our programs . . . ." (Khater Aff. ¶¶ 14, 18). Dr. Orgeron, moreover, was "uncomfortable" when Dr. Ginsberg praised the audience for supporting the airing of a Palestinian liberation perspective. (Orgeron Aff. ¶ 13). She and Dr. Khater "had the responsibility to protect the public face of our programs." (*Id.* at ¶16).

In addition, it is clear from the record that they most certainly do *not* hold the same views as Dr. Ginsberg about the conflict. She disagrees with the characterization by the Orgerons and others at Defendant of the conflict as "complex and not nearly as concrete as either side would hope to make it seem." (Orgeron, D. Aff. ¶ 11); (Orgeron, M. Aff. ¶ 35) (Ex. A ¶ 13). Dr. Ginsberg sees the overall dynamics of the Palestinian Israeli conflict as very straightforward—as a colonial situation in which one party controls the land, borders and airspace of the other in a context of military occupation, and one in which the solution is also clear—creation of one democratic state for all the country's inhabitants. (Ex. A ¶ 14). While Dr. Devin Orgeron describes himself as "cautiously anti-Zionist," there is nothing cautious about Dr. Ginsberg's beliefs, nor was she cautious about making them public. (Ex. A ¶ 14). She disagrees with Dr. Khater's belief that it is possible to be "objective" about the conflict, and believes, rather, that we all approach the question with our respective backgrounds and understanding in mind. (Khater Aff. ¶ 5; Ex. A ¶14). Whereas

Dr. Marsha Orgeron's "knowledge of this issue comes mostly from mainstream media sources," and she "does not spend much time talking about it," Dr. Ginsberg has been exposed to a wider range of sources, including first-hand observation, of the occupation, and spends quite a bit of time and energy talking about it. (Orgeron Aff. ¶ 35). Although Dr. Orgeron wrote about the Holocaust, as did Dr. Ginsberg, she stayed away from the topics of Israel and Zionism. (Ex. H 59:13-22). Moreover, Dr. Orgeron asked the guest speaker Dr. Ginsberg brought to campus whether he thought that the Arab world didn't somehow deserve the violence it has experienced; as Dr. Ginsberg explained, this question implies certain ideological conclusions about the relationship between the Arab world and the West with which Plaintiff does not agree. (Ex. H 126:13 – 128:8). Dr. Bigelow implies that there is a difference in the nature of Dr. Ginsberg's views when she says Dr. Ginsberg is "very single-minded about her views. . . ." (Bigelow Aff.¶ 5). So, it is clear from the record that Dr. Ginsberg and the individuals who influenced her non-hire held divergent perspectives. More importantly, a distinction must be made between disagreement with the perspectives themselves and disagreement with the *airing* of those perspectives at NCSU.

There were several instances in which Dr. Khater and Dr. Orgeron expressed discomfort with the films Dr. Ginsberg sought to show as part of the film screening series. Dr. Khater told her in an e-mail and while he was berating Plaintiff at the November 9 meeting that the films she wanted to show, or that others had suggested that she agreed to, were too "didactic" and "heavy-handed," "bleeding edge artistic films that would . . .[and] generally be far beyond the cultural and intellectual grasp of most of our student body." (Ex. E 27; Ex. A ¶ 11) (Ginsberg Dep 219:6-16). Dr. Orgeron agreed with him. (Ex. G 157:7-22). Dr. Khater preferred to show films that were not political. (Ex. I 41:18-23, 42:10-14). Dr. Bigelow, despite having initially suggested one of those films, subsequently referred to it as "heavy handed," echoing Dr. Khater's language; Dr. Khater described that filmmaker's work as "polemical."(Pl. 28, 29); (Ex. G 159:15 – 160:9); (Ex. E 16).

Dr. Orgeron's perception of Dr. Ginsberg's teaching of her "Holocaust and the Cinema" course, as recorded in part in the teaching evaluation, contributed to the search committee's decision not to hire her for the tenure-track position. Government interference with the content of a professor's scholarly materials is prohibited. *See Garcetti v. Ceballos*, 547 U.S. 410, 439 (2006) (Souter, J., dissenting) ("[A] governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression--areas in which government should be extremely reticent to tread") (quoting *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957)).When Dr. Orgeron evaluated Dr. Ginsberg's teaching, she said she would have preferred skipping a "controversial" clip Dr. Ginsberg showed her class because it was not relevant to the subject matter of the course. (Ex. E 411).

Furthermore, Dr. Orgeron abstained from purchasing many films that were pro-Palestinian or directed by Arabs, Muslims, or Palestinians for Dr. Ginsberg's classes, claiming that she simply could not find the films to purchase online, that the films were only available on VHS, or were too expensive. (Ginsberg's second dep transcript, pgs 86-87; Ex. E 65-70; 72-74, 87, 92). Conversely, Dr. Orgeron was able to purchase most of the Israeli films requested by Dr. Ginsberg for her classes. (Ex. E 75-78, 87, 90-92). However, most—if not all—of the films Dr. Orgeron claimed she could not find on Amazon.com were available for purchase on Amazon.com or for a reasonable price. (Pl. Docs 697-737). Her omission only underlines Dr. Orgeron's discomfort with the controversial nature of Dr. Ginsberg's classes and raises a suspicion of improper motivation. Other faculty did not have the same issues. (Pl. Resp. Interrog. No. 10)

Several events reveal that Defendant was worried Dr. Ginsberg's remarks would cause the audience to impute a public opinion on the Film Studies Program and the Middle East Studies Program. When Dr. Khater confronted Dr. Ginsberg about her introduction to the *Ticket to Jerusalem* film he seemed most concerned with the fact that the audience might impute a political

opinion on the Middle East Studies program. This is not normally a problem; Dr. Orgeron says professors publicly express political opinions "all the time," and according to her there is nothing inappropriate about giving a political opinion at a film screening. (Ex. J 28:6-12, 42:3-6). But clearly she and Dr. Khater were bothered not simply by the fact that she stated an arguably political opinion, but by the subject matter that that opinion addressed. Dr. Khater stated that he was worried the audience would impute "bias" to the programs. (Ex. H 140:18:24). Dr. Orgeron told Plaintiff that her introduction "alienated" students. (Pl. Interrog. Resp. 1(b)(iii)). Other faculty such as Andrea Mensch did not view Dr. Ginsberg's introduction as inappropriate. (Ex. B ¶¶ 7-11). After Dr. Ginsberg and other suggested a wide range of films and documentaries from the Arab world for the Middle East screening series, Dr. Khater suggested staying away from "political hot spots" and instead focusing on films about "social issues" such as "gender in the Middle East, Islam in the Modern World, music, popular culture, etc." (Ex. E 27). Dr. Bigelow followed up with a suggestion that they select films that are more "fun." (Ex. E 29) ("at the Umm Kulthoum Orchestra, both Akram and I felt like one of the coolest things was just how much fun everyone was having. does anyone know of documentaries that would be really fun to watch?").

There is some indication on the record that Defendant was concerned about the reception some of the films Dr. Ginsberg proposed would have on campus. The course on film and the Palestinian-Israeli conflict that Plaintiff taught in the spring semester, Dr. Orgeron thought, would be an "alien concept to many of our students that they don't really know what they'd be getting into." (Ex. E 106). Dr. Khater worried that "bleeding edge artistic films" would be "beyond the cultural and intellectual grasp of most of our student body." (Ex. E 27). Similarly, Dr. Bigelow thought the Israeli musical production Plaintiff suggested was a "better fit for Duke or UNC." (Ex. E 24). When Dr. Ginsberg responded that she did not think the piece would be beyond NCSU

students, Dr. Bigelow responded that she would be delighted to be underestimating them. (Ex. E 25-26).

Finally, several of Defendant's witnesses seemed uncomfortable with the idea of presenting a Palestinian perspective without a qualifier or opposing view. Although Dr. Khater acknowledged that it is appropriate to give the Palestinian narrative greater time because it is largely absent from American media, whenever he gives a speech he presents Israeli views and says, "[T]his is how it is seen from this point, but this is how the Palestinians would view it." (Ex. I 14:1-3, 16:12-15). Dr. Khater, knowing that Dr. Ginsberg had been on a delegation sponsored by Faculty for Israeli-Palestinian peace, suggested she go on a trip to Israel sponsored by a group that Dr. Khater described as providing "propaganda for the State of Israel" because it "might be helpful for her teaching" [Dr. Khater had never observed her teaching].(Ex. I 27:10-17, 77:21 – 78:6). Drs. Orgeron and Bigelow seemed very concerned with presenting an Israeli film in order to, as Dr. Orgeron put it, "balance out the perspective of the Palestinian film." (Ex. E 22, 24); (Ex. J 106:18-22). Dr. Ginsberg agreed and suggested some Israeli productions, but they were not apparently the kind of Israeli films Dr. Khater was looking for, as he again reiterated that the Middle East Film Screening Series needed to "allow for multiple points of views." (Ex. E 23, 27). Although Dr. Ginsberg is by no means opposed to presenting different perspectives, she does not believe that every Palestinian perspective has to be accompanied by an equal and opposite Israeli one. Indeed, such a restriction constitutes an unreasonable restriction of her scholarly discretion and academic freedom, and also reveals the underlying comfort Defendant's witnesses had with Dr. Ginsberg's substantive views.(Ex.A ¶ 13).

Defendants' affidavits do try to claim that although Dr. Ginsberg's introduction bothered them, it was not a big deal. (Bigelow Aff. ¶ 8); (Orgeron Aff.¶¶ 16-17, 34).(Khater Aff.¶ 14). The record contains several contradictory statements that undermine those characterizations, however.

Dr. Khater admits that he was "unhappy" about and "took exception to" Plaintiff's remarks, and that there was "more than one" meeting about her remarks. (Ex. I 43:21 – 44:24). Dr. Ginsberg describes the fact that Dr. Khater communicated his extreme displeasure with the introduction to her at the November 9 meeting. (Ex. G 216:16-25). Dr. Orgeron says she talked about Dr. Ginsberg's introduction with Dr. Bigelow, who said "somebody needs to address" the issue with Plaintiff, and then had a separate conversation on the same issue with her husband, Dr. Devin Orgeron and a separate conversation with Dr. Khater. (Ex. J 48:22 – 49:7, 50:10-21). Dr. Pramaggiore also said Dr. Orgeron talked to her about it. (Pramaggiore Dep. ¶ 5).

Finally, Dr. Oblinger, who made the decision not to consider Dr. Ginsberg's grievance, was involved in organizing campus events that were co-sponsored by the neoconservative Pope Foundation. (Ex. L 22:7-16). He admits that Dr. Ginsberg did file her grievance timely, but that he granted Drs. Orgeron and Khater's appeal letter saying it was untimely even though their appeal letter itself was *not* timely. (Ex. L 10:12 – 11:11, 18:24 – 19:6, 25:12-16). He thereby prevented the formation of the grievance committee that would have considered whether her speech rights were violated. (Ex. L 16:2:5).

All of these comments and circumstantial evidence demonstrate that Dr. Khater, Drs. Orgeron and Dr. Bigelow felt a significant aversion to the public airing at NCSU of issues they deemed controversial.

b. Defendant's stated reason for declining to hire Dr. Ginsberg is unworthy of belief.

Defendants give some alternative reasons, however, for the denial to Dr. Ginsberg of an interview for the tenure-track position in film studies. They claim she was not hired because 1) Dr. Ginsberg was overqualified for the positions because she had more publications than most assistant professors, 2) they had concerns about the ranking of the publisher of one of her books, and 3) they were looking for a specialist in European film, and although she has expertise in European film, she

also demonstrated recent interest in Middle Eastern film. Plaintiff is able to raise questions of fact about the genuineness of these purported reasons, and asserts instead that she was not hired because of her expressions about Palestinian film and the Holocaust.

Plaintiff first responds to the claim that she was overqualified for the position. First, it is the clear policy of the NCSU that the most qualified professor should get the position. The job announcement itself emphasized that it was looking for scholars with "excellent research and teaching" records. (Ex. F 73). Moreover, NCSU's "Recruitment and Hiring" policies state, "The goal of the selection process is to find the best available person for the job . . ." and that the "individual selected for the position must be chosen from the pool of the most qualified applicants." (Ex. M). Dean Parcel confirmed that NCSU policy was that it sought to hire the most highly qualified applicant for tenure-track positions. (Ex. N 9:5-13). She also confirmed that NCSU was a "Research I" university, which means the institution values research and requires its professors to be active researchers. (Ex. N 12:12-19). *See also* (Ex. K 15:3-17). In addition, although Drs. Orgeron and Harrison said that Dr. Ginsberg's publication record qualified her for an Associate Professor position, which is one rank above the job she was applying for, they acknowledged that professors with particularly impressive publication records can be given years of credit toward tenure to account for that. (Ex. K47:14-20) (Ex. J 87:13 – 87:5).

Dr. Ginsberg was applying for a position that was more highly ranked than the one she had at the same institution, unlike in the "overqualification" cases cited *supra*. Also unlike those cases, Defendant did not claim its worry about Dr. Ginsberg's overqualification stemmed from concern that she would soon leave and get another position elsewhere, but rather that Dr. Ginsberg's impressive record might cause other Assistant Professors "feelings of weirdness." (Ex. K 40:3-10). Not only was that concern incongruent with the Department's initial enthusiasm with Dr. Ginsberg's candidacy, but it's a rather bizarre consideration for a university that seeks to hire the

best scholars it can. In addition, Dr. Harrison did not worry when he hired Dr. Ginsberg for the TAP position that the more highly-ranked Dr. Orgeron, who was her boss, would feel "weirdness." (Ex. K 45:20-47:13).

Defendant also cited as a reason for Dr. Ginsberg's non-hire the fact that one of her books was published in a non-top-tier press.[6] This claim is irreconcilable with the first claim that she was overqualified; Defendant is saying that she was underqualified and too qualified at the same time. Moreover, it is doubtful that this concern was really a strong factor in Dr. Ginsberg's non-hire. For one thing, Dr. Orgeron herself admitted to publishing in at least one lesser quality press, but she did not think that was significant because she had published in several higher quality presses. (Ex. J 101:10 – 102:10). Dr. Ginsberg's publication was only one of many publications in highly-ranked presses; in fact, she had more publications in top-tier presses than the candidate who got the position, even by Dr. Orgeron's count. (Ex. J98:10 – 99:6, 102:11 – 103:24).

The third, and perhaps most highly emphasized, reason Defendant gave for Dr. Ginsberg's non-hire was the allegation that her focus was not in European film. This reason is unworthy of belief for a number of reasons. First, the job announcement called for someone with a primary focus in European film but was explicit about the fact that it did not have to be an exclusive focus. (Ex. F 73). Indeed, it said "additional areas of expertise are welcome," including expertise in "other national cinemas." (*Id.*)Film Studies Professors often specialize in more than one area. (Ex. B ¶ 6)

Second, the idea that Dr. Ginsberg is not primarily a scholar of European film is simply ludicrous. While Dr. Gelley, the person who was hired for the position, had never published a book or anthology, Dr. Ginsberg had published an anthology on German cinema and a monograph on

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[6] Dr. Orgeron had never heard of Cambridge Scholars Publishing, but arrived at the conclusion that it was not top tier because none of the people on the committee had heard of the press, did not recognize the scholars publishing in the press, and saw a blog discussion in which people expressed concerns with the press. (Orgeron Dep. 100:16 – 101:9).

Holocaust film and was much more qualified for the position.[7] (Ex. J 90:1-23) (Ex. F 293-94)(Ex.A ¶ 20). Although Dr. Orgeron argues that Holocaust film is not necessarily European, the person Dr. Ginsberg would have replaced also taught Holocaust film. (Ex. J 72:24 – 73:1). In fact, European film was not his exclusive focus either. (Ex. F 1713-54) (Bennett Aff. ¶ 7).Even if it was true that Plaintiff's focus was shifting to Middle Eastern film (which Plaintiff does not concede), her expertise still clearly qualified to teach *courses* in European film; Dr. Orgeron herself taught African-American Film even though she had not published a single article on the topic. (Ex. J 11:1-12) (see also Mensch Aff. ¶¶3-5).Moreover, Dr. Orgeron conceded that, to the best of her memory, Dr. Ginsberg's monograph on Holocaust film did address some European films. (Ex. J 90:24 – 91:4). Even a cursory review of the book's description confirms its European dimensions. (Ex. E 454).

In any case, surely Defendant does not seriously contest that Dr. Ginsberg's anthology on German cinema was European. (See e.g. Ex. E 496-502). Her book was used in German Studies courses at NCSU and elsewhere. (Pl. 492-493, 508-510, 512-516). It was described by a reviewer as "the most authoritative single-volume scholarly resource on German Cinema ever published." (Ex. E 556-57). Even the supposed shift in her scholarly focus to study of the Middle East has a European origin; as Dr. Ginsberg pointed out, Zionism began as a European colonial project. (Ex. H 129:24 – 130:12). The first time Dr. Ginsberg taught a course on Palestine/Israel was in 2007. (Ex. E 131). In addition, Dr. Orgeron made a judgment about the likely focus of Dr. Ginsberg's

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[7] Plaintiff's teaching and service record was far more extensive and more diverse than Dr. Gelley's. Plaintiff's publication record on European film is exceptional. (Pl. Second Interrog. Resp. 1). Additionally, Dr. Gelley had never published a book length text focused exclusively on European national cinema, while Plaintiff published an anthology on German national cinema that has been described as one of the most important books in that area. She had also been invited to edit a second anthology on German cinema . (Pl. Interrog. Resp. 19). Also, Dr. Ginsberg published a book on Holocaust film that focuses almost exclusively on European films and which has been described by its endorses as groundbreaking and as a harbinger of an entirely new generation of cinema scholarship. *Id.* She also published one of the very few articles on Italian neorealist cinema on homosexual representation, which Dr. Richard Dyer--one of the field's top gay film critics, describes as never having been surpassed. (Pl. Interrog. Resp. 19).

future work[8] that does not seem to have been made until after Dr. Ginsberg's introduction to the *Ticket to Jerusalem* film and the meeting about the introduction; the first time it occurred to the committee to raise an issue about Dr. Ginsberg's research focus was November 13, and Dr. Ginsberg was listed as the top candidate for the position until November 22. (Ex. J 122:13-20); (Ex. F 79, 85).Further, it is contradicted by Plaintiff's application letter for the tenure-track position, which indicated that she was continuing her work on German cinema. (Ex. H 64:10-15). Anyway, these are the kinds of issues the search committee could have clarified had they granted Plaintiff an interview for the position. (Ex. A ¶19). They are precisely the types of questions they *did* pose to candidates for the position during interviews, according to a document titled, "MLA Interview Questions;" they asked candidates about the "direction future projects are headed" and "what kinds of courses in European cinema would you teach?" In addition, Dr. Bennett's claim that Dr. Ginsberg did not even strike her as being in the top twenty candidates is not credible because it contradicts an earlier e-mail she sent listing Dr. Ginsberg as her <u>third choice</u>, her only concern being that she was "now working with Palestinian/Israeli" and she had "too much focus on Jewish/Israel." (Ex. F 552, 548). Combined with the fact that search committee members, including its Chair, were very uncomfortable with Dr. Ginsberg's Palestine-related speech, these notes certainly raise a question of fact about whether Defendant's purported reasons for her non-hire were pretext for their desire to prevent her from speaking on that issue.

These inconsistencies are significant enough that a jury should be permitted to examine the witnesses' credibility with respect to their stated reason for declining to hire her. Plaintiff has shown that her speech was protected, that the public's interest in her speech outweighed the government's stated interests in suppressing it, and that her speech motivated Defendant's adverse employment actions.

[8] This forecast did in fact turn out to be incorrect, as a review of Dr. Ginsberg's current resume demonstrates. (Pl. Docs. 899-906).

D. There are questions of material fact as to whether Dr. Ginsberg's beliefs are "religious" as defined by the right to conscience protected by the North Carolina Constitution.

The North Carolina Constitution guarantees, "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." (N.C. Const. art.I, § 13.

The *In re Williams* case provides that an individual's religious liberty cannot be constrained by others' beliefs that fall within mainstream religious beliefs. Dr. Ginsberg was raised in the Jewish tradition and continues to observe some of the traditional religious holidays. Some of her non-traditional beliefs, though, relate to her activism and her political convictions.

In *In re Williams*, a church pastor, Williams, refused to testify as a witness in another case, even though the defendant had confided in Williams. Both parties belonged to the Williams' church and he wished not to side with one party. 152 S.E.2d 317, 319-322. (N.C. 1967). The court held that requiring Williams to give testimony that the State sought did not violate Williams' 'right of conscience' as guaranteed by the religious liberty clause of the Constitution of North Carolina. *Id.* at 327. The court construed the term 'rights of conscience' "in relation to the right to worship God according to the dictates of one's own conscience." *Id.* at 325. The court thus held that "the freedom protected by this provision of the State Constitution is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States." *Id.* The freedom or 'right of conscience' is not limited to beliefs shared by others and extends "to the unorthodox, unusual and unreasonable belief as truly as to the belief shared by many." *Id.* The court held that this freedom, however, does not extend to an individual's ethical beliefs and is also limited by the 'compelling interest' of the state in doing justice." *Id.* at 325, 326.

The court has also addressed whether the constitutional provision guaranteeing religious liberty extends to drug use. In *State v. Carignan*, the defendant contended that his use of marijuana comported with his ministerial ordinance and religious observance in two churches and that prosecuting him for such drug use violated his constitutional right to religious liberty. 631 S.E.2d 892, at 3 (N.C. App. 2006). The court held that the "'[t]he use of drugs may be prohibited notwithstanding the user's asserted belief that such use is required by Divine Law.'" *Id.* at 4 (quoting *Williams,* 152 S.E.2d at 326). While *Carignan* does not address 'rights of conscience' as it pertains to political beliefs, it does provide an example of a limitation to the 'rights of conscience' clause.

The free exercise clause of the federal constitution permits citizens to follow the dictates of their conscience. *Murphy v. I.S.K. Con. of New England, Inc.*, 409 Mass. 842, 855-856, 571 N.E.2d 340, 348-49 (Mass. 1991). This principle strengthens our nation because "the people respect a government that treats its charges as free-willed, discerning moral beings" and "[o]ur republic prides itself on the enormous diversity of religious and political beliefs which have been able to find acceptance and toleration on our shores." *Murphy v. I.S.K. Con. of New England, Inc.*, 409 Mass. 842, 855-856, 571 N.E.2d 340, 348-49 (Mass. 1991).

In *Welsh*, the Court held that a conscientious objection could qualify as a religious belief, reasoning that the plaintiff "held them 'with the strength of more traditional religious convictions.' *Welsh v. U.S.*, 398 U.S. 333, 343 (1970).

The Arkansas's Constitution provision on the right to conscience is almost identical to North Carolina's. It provides, "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.... No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience...." *Thorne v. Arkansas Dept. of Human Services*, 2010 WL 1988182 (Ark. App. 2010) (quoting Ark. Const. art II, sec. 24). Summarizing the federal and state right to conscience standards, the *Thorne* court held that

"[r]eligious and political beliefs, no matter how bizarre and nonconforming, are personal matters, and the courts are not instruments of orthodoxy charged with the responsibility of keeping citizens on the ideological straight and narrow." *Id.* (quoting *Miller v. Tony and Susan Alamo Found.,* 748 F.Supp. 695, 698 (W.D.Ark.1990) (citing *West Virginia State Board of Educ. v. Barnette,* 319 U.S. 624, 642 (1943)).

In *Overton*, the defendants claimed that the plaintiff's identified religion, Rastafarianism, was not a bona fide religion, but merely a set of persona political beliefs, and outside the scope of the First Amendment of the federal Constitution. *Overton v. Department of Correctional Services*, 131 Misc.2d 295, 297, 499 N.Y.S.2d 860, 862 (N.Y.Sup. 1986). The court offered guidance about how to go about determining whether a belief can be characterized as religious:

> In determining whether one's beliefs are religious, courts have moved from defining "religious" in terms of one's views of his relations to his Creator to whether one's beliefs are 'based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.' This "parallel belief" approach has been widely adopted. Courts 'must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs. . . . In *Malnak v. Yogi, (supra),* the court, applying such analysis, set forth three criteria in the determination of the existence of a religion: (1) a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters; (2) a religion is comprehensive in nature-belief-system rather than an isolated teaching; and (3) a religion consists of certain formal and external signs. Impulses prompted by dictates of conscience as well as those engendered by divine commands are therefore safeguarded against secular intervention, so long as the claimant conceives of the beliefs as religious in nature"

Id. at 298-99, 499 N.Y.S.2d at 862-63 (internal citations removed). The court found that the plaintiff's Rastafarian beliefs could be classified as religious, noting that the principals and behavior were grounded in biblical passages and the tenets of Rastafarianism are accepted and followed by large numbers of people around the world. *Id.* at 299-300, 499 N.Y.S.2d at 863-64.

Plaintiff has been involved with several activist groups that identify themselves as coming from the same identifiable religious and moral tradition. She has been a member of the organization, Jews Against the Occupation and the International Jewish Solidarity Network, both of which are comprised of a group of Jewish individuals who work to educate the public about the history of Zionism and the Israeli occupation of Palestine. (43:20 – 44:24).

Plaintiff sees her religious beliefs as inextricable from her political ones. Plaintiff critiques and disassociates herself from the way Zionism is sometimes interpreted as a necessary tenet of Judaism. She explains that the film Balagan, which she showed in one of her classes at NCSU, is saying that "[t]he Holocaust is the new religion," one that holds an otherwise "disjointed group of people called Jewish Israelis together. (Ex. G 172:22 – 173:16). Dr. Ginsberg and other members of Jewish anti-Zionist organizations, on the other hand, believe that Zionism has nothing to do with Judaism, and that being Jewish does not entail being Zionist. (Ex. G 47:8-9).

Plaintiff sees herself as religiously observant and believes in God. (Ex. G 80:5-6). She observes major holidays, including Yom Kippur, Rosh Hashanah, Chanukah, Passover, TishaB'Av, Purim, and Sukkos. (Ex. G 83:4-8). She also sees as part of her religious observance that she engages in work that "derives from [her] religious understandings and sometimes beliefs." (Ex. G 39:6-17).

Plaintiff's religious beliefs are different from the concerns asserted by the pastor in the *Williams* case. Whereas Williams' action was prompted by his ethical feeling that he should not take sides with one church member over another, Dr. Ginsberg's religious beliefs relate to her right to practice as her conscience dictates and not as the Anti-Defamation League and others define Judaism. Like the plaintiff in *Welsh*, Plaintiff's moral convictions are derived from and inextricable from her religious ones. Her belief system addresses fundamental questions of morality to which an identifiable group of people adheres.

E. There are questions of material fact as to whether Defendant violated North Carolina's Equal Protection Law in failing to hire Plaintiff.

North Carolina courts use the same test as federal courts when analyzing state equal protection cases. *Duggins v. N.C. State Bd. of CPA Examiners,* 294 N.C. 120, 131 (1978). To prove an equal protection violation, an employee must show 1) that she belongs to a protect class 2) that she suffered an adverse employment action, and 3) that such action "gives rise to an inference of discrimination." *See Hilliard v. North Carolina Dept. of Correction*, 173 N.C. App. 594 (2005) *and E.E.O.C. v. Sears Roebuck & Co.,* 243 F.3d 846, 851 (4th Cir. 2001).

In this case, Dr. Ginsberg belongs to a protected class because she is a Jewish person with a particular set of beliefs and ideas. *See* argument in section D, *supra.*

Furthermore, Dr. Ginsberg argues that she was discriminated against because she associated with Muslims and Arabs, who are members of a protected class by virtue of their religion and race.

Dr. Ginsberg also satisfies the second prong of the equal protection test because she suffered adverse actions. As argued in Part II, Dr. Ginsberg suffered adverse actions when she was not hired and considered for hire for a tenure-track position, when her contract as a TAP was not renewed the following year, as well as other actions, such as when she was severely reprimanded after engaging in protected activity.

Finally, as argued in section Part III(C)(3), Defendant engaged in materially adverse actions against Plaintiff because of her non-traditional Jewish beliefs. In addition, NCSU clearly disapproved of Plaintiff's association with Muslims and Arabs when she voiced a complaint on behalf of one such individual. For example, Dr. Khater admonished Plaintiff for requesting a travel reimbursement for one guest speaker who was of Syrian and Muslim background, claiming she had no right to tell an Arab (Christian) to prevent the discriminatory effect of University procedures on another Arab. The University also deducted taxes from the speaker's honorarium despite the guest speaker's submission of paperwork showing he was exempted from such taxation. (Ex. E 38-51).

Additionally, Dr. Khater admonished Dr. Ginsberg for inviting an Iranian filmmaker to the Middle Eastern Screening Series. The filmmaker did not receive his full travel expenses for his trip to NCSU until nearly six months after his campus visit. (Ex. E 17-18, 693-695).

Defendant discriminated against Plaintiff because of her religious beliefs and because she associated with individuals of Middle Eastern descent and Muslim religion.

F. Several of the University's Actions Constitute Materially Adverse Actions.

Defendant may also argue that Plaintiff suffered no adverse action because as an adjunct professor, she had no right to continued employment. The Fourth Circuit applies the same analysis of Title VII discrimination claims to Equal Protection claims. *See Rosenbaum v. Board of Trustees of Montgomery Community College*, 1999 WL 182358, 3 (4th Cir. 1999; *Grice v. Baltimore Cty.,* 2009 WL 4506395, at 3 (4th Cir. 2009). Under Title VII, the Fourth Circuit defines an adverse employment action as an action that affects the "terms, conditions or benefits of employment." *Munday v. Waste Mgmt. of North America, Inc.,* 126 F.3d 239, 243 (4th Cir.1997). "[A]n employment action need not be "ultimate" to be "adverse," but just needs to have 'some significant detrimental effect' on his employment." *SeeMosley v. Bojangles' Restaurants, Inc.*, 2004 WL 727033, 5 (M. Dist. N.C. 2004) and *Wagstaff*, 233 F.Supp.2d at 744 (quoting *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

The standard for what constitutes an adverse effect in the First Amendment context is even less stringent. According to the U.S. Supreme Court, an adverse effect need not rise to the level of a discharge (or the "substantial equivalent of a discharge") to be actionable. *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 73-76 (1990); *Blankenship v. Manchin*, 471 F.3d 523, 528 (4th Cir. 2006). To establish retaliation in the First Amendment context, "the employee must establish retaliation of some kind-that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights."*Goldstein v. Chestnut Ridge Volunteer Fire Co.***,** 218 F.3d 337 (4th Cir. 2000) (citation omitted); *Edwards v. City of*

Goldsboro, 178 F.3d 231, 248 (4th Cir. 1999). Consequently, an adverse act can be one that is "threatening, coercive, or intimidating so as to intimate that punishment, sanction, or adverse regulatory action will imminently follow." *Blankenship v. Manchin*, 471 F.3d at 528 (finding a retaliatory act when the governor's remarks, as relayed in a news article about the plaintiff's involvement in an election, amounted to a threat of an adverse action, especially in light of the governor's increased scrutiny, characterized as "punitive machinery," over plaintiff after his protected speech).

1.Defendant's failure to hire Plaintiff was an adverse action.

In both the Equal Protection and First Amendment retaliation context, failure to hire is an adverse employment action. *SeeGoldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 356 (4th Cir. 2000) (Citing *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 73-76 (1990)); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 576-77 (1978); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 285-87 (1977). Even the failure to *consider* hire may be a separate unlawful and materially adverse action, provided that Plaintiff establishes that other candidates were considered for the position (in addition to establishing causation). *Tabor v. Thomas Built Buses, Inc.*, 2010 WL 148431 (M. Dist. N.C. 2010).

In this case, despite Plaintiff's qualifications as well as the administration's strong indication that she would be hired the following year for a tenure-track position, Plaintiff was not offered the tenure-track position. (Ex. H 117:12-13; Ex. I 19:22; Ex. K 18:5; Ex. J 80:3-83:5; 88:5; Ex. E 138, 418-424). The University had a tenure-track opening for a professor who specialized in European film, and Dr. Ginsberg not only specialized in European film, but was more qualified and experienced (both in teaching and research) than Dr. Gelley, who ultimately filled the position, and who did not share the same political or religious views as Dr. Ginsberg. (Dep. Ginsberg part I p. 19:9)(Dep. Ginsberg part II p. 108 127, 129) (Pl. Docs 454, 474,502) (Ex. B¶¶ 3, 4-6) (Pl. Second

Interrog. Resp. No. 1). Plaintiff maintains that the University's failure to hire her the following year was unlawfully discriminatory and in retaliation for her speech.[9] In fact, the University barred Plaintiff's ability to even grieve the University's decision to not hire her, despite her grievance being timely. (Ex. L 10:12 – 11:11, 16:2-5; 18:24 – 19:6, 25:12-16)

2. The University's failure to renew Plaintiff's contract as a TAP is an adverse action.

In both the discrimination and First Amendment retaliation context, the "[f]ailure to renew an employment contract constitutes an adverse employment action." *Johnson v. Trustees of Durham Technical Community College*, 139 N.C. App. 676, 682 (2000) (*CitingMt. Healthy City Board of Ed. V. Doyle,* 429 U.S. 274 (1977)); *See Also Shumate v. Board of Educ. Of Jackson County*, 478 F.2d 233, 234 (1973) ("While failure to renew a contract may not be an affirmative action, it was in each case a deliberate inaction...The absence of any contractual or tenure right does not affect Shumate's constitutional claims.")*and Kozlowski v. Hampton School Bd*., 77 Fed. Appx.133 (4th Cir. 2003); *Rutan v. Republican Party,* 497 U.S. 62, 79 (1990). During the 2007-2008 academic year, Plaintiff was employed as a TAP. Plaintiff's argues as an alternative adverse action that her contract as a TAP was not renewed. Her contract for the TAP position specified that it was renewable. (Ex. F 50).

3. The University's other actions, such as its disciplinary reprimands and its attempts to curtail her course content constitute materially adverse actions.

In retaliation to her speech, the University engaged in several actions that were "adverse" to Plaintiff's employment. The Fourth Circuit has held defendants accountable for using "punitive machinery" to threaten or punish plaintiffs for exercising their first amendment rights. Following the Middle Eastern Screening Series, Dr. Ginsberg was called into a meeting by Dr. Khater, the Director of the Middle East Studies Program. In the meeting, Dr. Khater harshly rebuked Plaintiff for the introduction she gave during the Middle Eastern Screening Series, yelling at her to the point

[9]Furthermore, the fact that the University did not even afford Plaintiff an interview can be viewed as a separate materially adverse action. Plaintiff is now currently unemployed and unable to find a job. (Ex.A ¶ 22).

where Dr. Ginsberg felt she was unsafe. (Ex. G212:1-25; 217:15-25, 219:18-25)(Ex.I 11:1-9, 73:19-23) (Ex.A ¶ 11).Dr. Khater told Dr. Ginsberg that the Middle East screening series would no longer cooperate with the Film Studies Program to which Dr. Ginsberg belonged. (Ex. G 219:18-25).

In addition, Dr. Khater explicitly suggested Dr. Ginsberg join Cat Warren who resigned from a different program. (Ex. G 220:1-15). Dr. Ginsberg submitted her forced resignation from the Middle Eastern Screening Series soon thereafter, and Dr. Khater refrained from holding the Middle Eastern Screening Series event the following semester. (Ex. H 13:14-25, 14:1-17; Ex.I36:6-7). Other actions, such as Dr. Orgeron's probing into the content of Dr. Ginsberg's courses in Dr. Ginsberg's teaching evaluation, refraining from the purchase of certain films, as well as Dr. Khater's refusal to reimburse travel expenses of Plaintiff's Muslim guest speakers surely functioned to deter and punish Plaintiff for speaking freely. (Ex. E 34-51, 409-411; Def. Docs 000724, 000730). Such actions clearly threatened and intimidated Plaintiff so as to suggest that "punishment, sanction, or adverse regulatory action will imminently follow," and thus constitute adverse actions under the First Amendment retaliation context.

In the equal protection context, Plaintiff argues that these same actions adversely affected the terms, conditions, privileges and benefits of her employment. By making clear its disapproval of her course content and views, the University curtailed Dr. Ginsberg's very ability to teach and advance in her specialization and research. (Ex.A ¶ 21, 23).In fact, after severely reprimanding her for her introduction to the *Ticket to Jerusalem* event, Plaintiff was told her department would no longer be able to participate on the Middle Eastern Screening Series, effectively barring her own participation. (Ex. G 219:18-25). Consequently, each of the University's actions were literally "steps in the process" of deciding not to hire or rehire Plaintiff the following year. *C.f. Monroe v. BellSouth Telecommunications, Inc.***,** 2003 WL 22037720, at 5 (M. Dist. N.C. 2003) (Where the court provided that if a certain disciplinary warning was "one of the steps in the process to terminate Plaintiff," it would

have constituted an adverse employment action in the discrimination context.); *Mosley v. Bojangles' Restaurants, Inc.*, 2004 WL 727033, 5 (M. Dist. N.C. 2004) (Where the disciplinary action did not have any adverse consequences nor did the action cause Plaintiff to miss an opportunity for promotion, the warning was not an adverse action); and *Thompson v. Potomac Elec. Co.*, 312 F.3d 645, 651 (4th Cir.2002) (Where employee was disciplined, the action had no consequence to his position or pay).

II. THE DOCTRINE OF QUALIFIED IMMUNITY DOES NOT BAR PLAINTIFF'S CLAIMS.

Lastly, the Defendant may argue that Plaintiff's claim is barred by the doctrine of sovereign immunity. That argument has been flatly rejected by the North Carolina Supreme Court, however. In *Craig*, the Court held that if the doctrine of sovereign immunity bars state law claims, those claims cannot be considered "adequate state remedies" so as to prevent a plaintiff from bringing a direct constitutional claim. *Craig ex rel. Craig v.New Hanover County Bd. of Educ.*, 363 N.C. 334, 339-340 (N.C. 2009). In so holding, the *Craig* Court relied on *Corum*, which held that the "provision of our Constitution which protects the right of freedom of speech is self-executing," and a direct constitutional claim could therefore be brought pursuant to the common law. *Id*; *Corum v. University of North Carolina Through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (N.C. 1992).

CONCLUSION

For all the reasons detailed herein, there are multiple issues of material fact that warrant denial of Defendant's Motion for Summary Judgment.

Respectfully Submitted,

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Certificate of Service

I, Rima Kapitan, hereby certify that on October 21, 2010 I caused to be served via U.S. and electronic mail a copy of the foregoing motion to all attorneys of record in this case, addressed as follows:

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