No. _____

In The
Supreme Court of the United States

PHILIP PALADE, On Behalf of Himself and all Others Similarly Situated; GREGORY BORSE, On Behalf of Himself and all Others Similarly Situated; J. THOMAS SULLIVAN, On Behalf of Himself and all Others Similarly Situated,

Petitioners,

v.

BOARD OF TRUSTEES UNIVERSITY OF ARKANSAS SYSTEM; EDWARD O. FRYAR, JR., PH.D., In his Official Capacity as Trustee; STEVE COX, In his Official Capacity as Trustee; TOMMY BOYER, In his Official Capacity as Trustee; SHEFFIELD NELSON, In his Official Capacity as Trustee; C. C. GIBSON, In his Official Capacity as Trustee; STEPHEN BROUGHTON, M.D., In his Official Capacity as Trustee; KELLY EICHLER, In her Official Capacity as Trustee; MORRIL HARRIMAN, In his Official Capacity as Trustee; MARK WALDRIP, In his Official Capacity as Trustee; JOHN GOODSON, In his Official Capacity as Trustee,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioners, members of a class of tenure-track and previously-tenured faculty at institutions in the University of Arkansas System, filed a declaratory judgment action pursuant to 28 U.S.C. §§ 2201 and 2202 to determine whether the Board of Trustees for the University of Arkansas System could retroactively apply newly-revised policies concerning the grounds for dismissal and academic discipline to faculty who are on the tenure-track and faculty who have already earned tenure under prior Board of Trustees policies. Tenure is contractual in nature and vests as a constitutionally protected property right. The lower courts held that the class lacked standing because members did not show that they had been adversely impacted by the new policies, which constituted a unilateral modification of the employment agreements that members have with the University of Arkansas system.

The question presented is:

1. Whether the lower courts erred in holding that Petitioners lacked standing to seek declaratory relief concerning the retroactive application of newly-revised policies concerning the grounds for dismissal and academic discipline to faculty who are on the tenure-track and faculty who have already earned tenure under prior Board of Trustees policies.

RELATED CASES

- *Palade, et al. v. Board of Trustees of the University of Arkansas System, et al.*, No. 4:19-cv-00379, U.S. District Court for the Eastern District of Arkansas. Judgment entered March 16, 2020.
- *Palade, et al. v. Board of Trustees of the University of Arkansas System, et al.*, No. 20-1789, U.S. Court of Appeals for the Eighth Circuit. Judgment entered November 24, 2020.

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PETITION FOR WRIT OF CERTIORARI

Philip Palade, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order denying panel rehearing and rehearing en banc (15-A) is unreported. The per curiam opinion of the Court of Appeals (1-A) is unreported. The District Court's order (17-A) is unreported.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the Court of Appeals was entered on November 24, 2020. A timely petition for rehearing and rehearing en banc was denied on January 4, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

28 U.S.C. § 2201(a) provides in relevant part, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of

a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202 provides in relevant part, "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

U.S. Const. art. I provides in relevant part, "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. Const. amend. XIV provides in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. I provides in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. art. III provides in relevant part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

INTRODUCTION

Petitioners Palade, Borse, and Sullivan ("Petitioners") represent tenured and tenure-track professors for the University of Arkansas System whose employment contracts were unilaterally modified without their consent by The Board of Trustees of the University of Arkansas ("The Board" or "Respondents"). The Board's action in unilaterally modifying Petitioners' contracts constitutes a present and immediate injury in violation of Petitioners' rights pursuant to the United States Constitution's Contracts Clause, Due Process Clause, and First Amendment. Critically, the significant constitutional issues raised by Petitioners' claims reaches far beyond University faculty members and affects *any* party who has a contract with a state entity.

Yet, the merits of the action were not allowed to proceed despite the present and immediate injury alleged by Petitioners. The Eighth Circuit erred in affirming the District Court's dismissal for lack of standing and ripeness. The decision of the Court of Appeals is inconsistent with well-established principles of standing set forth in the precedents of this Court and directly contradicts holdings of other circuit courts. The rulings below will negatively affect Professors across the country who are battling bureaucratic systems to protect their tenure rights specifically and academic freedom generally, as well as all other natural and artificial persons who have contractual relationships with any public entity across the country.

STATEMENT OF THE CASE

The District Court held that Petitioners lacked standing to bring claims under the Declaratory Judgment Act for violations of the Contracts Clause, Due Process Clause, and First Amendment because the claims were not ripe. The District Court determined that because the Petitioners had not yet suffered a "concrete injury" they did not have standing. But the District Court was wrong: Petitioners in fact suffered concrete injury when the Board unilaterally modified their employment contracts, substantially altering the principal foundation of tenured faculty. The Eighth Circuit essentially adopted the District Court's improper application of established standing law when it found no basis for reversal and affirmed the decision.

For several reasons, the Eighth Circuit's decision should not stand.

First, the decision below improperly applied controlling standing principles in a manner that departs from this Court's holdings and creates a conflict between circuits. In particular, the Eighth Circuit has created a higher hurdle for standing than permitted by numerous precedents construing Article III. In the context of the Contracts Clause and the Due Process Clause, other circuits have determined that a public body's unilateral modification of a contract is, alone, sufficient injury to establish standing under the Constitution. But here, the Eighth Circuit has determined that no harm occurs until a professor is terminated or disciplined under the changes to the contract. In the context of the First Amendment, the lower courts concluded that Petitioners' allegations failed to establish that they were in danger of sustaining injury to their speech rights as a result of the unilateral contractual change, or that the Petitioners' perceived injury was both real and immediate. The Fifth Circuit has recently ruled, however, that standing exists in a First Amendment case indistinguishable from the present action.

Second, allowing universities, or any other public institution, to freely modify contracts over the objection of the counterparty – and especially contracts that create protected property interests – creates a breathtaking opportunity for abuse and oppression by public bodies. Most especially, the ability of a faculty member to speak openly and freely in the academic setting

concerning fundamental and controversial issues, topics, and ideas, without fear of termination, is at the very core of what is protected by the First Amendment. If the professors do not have standing to seek a judicial remedy when such imperative constitutional rights are restricted, then their only options are to either conform to what a university administration deems acceptable speech or risk their careers by engaging in speech deemed unacceptable. Tenure is hard-earned and provides job security, which encourages academic freedom. Any loss of that security strips tenure of its substance. Allowing university administrators this much authority and control over academic freedom will have profound effects across the country.

Third, allowing the Eighth Circuit to establish a more rigorous standing requirement for contract disputes will deprive future harmed parties of the opportunity to seek declaratory relief to determine their rights and obligations under a contract. The Declaratory Judgment Act was created as an avenue for harmed parties, such as Petitioners, to seek assistance by the courts *before* an irreparable injury occurs. However, the Eighth Circuit, in affirming the District Court's decision, has essentially and improperly merged the standing requirements for a declaratory judgment action with the standing required for a claim for damages, fatally corrupting the law in this area.

I. The Tenure Process at the University of Arkansas.

The University of Arkansas System has twenty-one principal campus units, divisions, or administrative units (the "University of Arkansas System"). The Board of Trustees of the University of Arkansas (the "Board")[1] is the governing body of the University of Arkansas System. Pursuant to Arkansas Code Annotated § 6-64-202, the Board is made a body politic and corporate, whose powers are restricted by the United States Constitution, Constitution of the State of Arkansas, and the laws of the State of Arkansas. The Board is entrusted with the policy-making decisions for the University of Arkansas System. The Board specifically manages and controls all faculty-related policy for the University of Arkansas System.

Faculty members for the University of Arkansas System are employees who hold a specified academic rank as defined by the Board. Members of the faculty are generally divided into three groups: tenured, tenure-track, and non-tenure track. Tenure is the right to continuous appointment absent a for-cause violation of the tenure employment contract. A faculty member who strives to be tenured may receive an appointment to a tenure-track position that requires fulfillment of a multi-year period in which applicants must prove

[1] For purposes of this petition, the "Board" refers not only to the body politic as a whole but also the ten individual Trustees from each of Arkansas' four congressional districts that make up the Board.

themselves to the administration and other faculty as worthy of the full guarantees of a tenure contract.

As a tenure-track faculty member, the individual is required to complete significant research or other scholarship in the field of study in which the faculty member is appointed, teach with a high level of expertise, and engage in various forms of time-consuming service for the benefit of various constituencies both inside and beyond the University. After the tenure-track faculty member has completed the "probationary period" of this afore-described, multi-year timeframe, the individual is either awarded tenure or terminated. Academics take on significant risk in investing overwhelming efforts to obtain the benefits of a tenure contract given the make-or-break nature of the endeavor.

II. History of The Rules Governing Tenure at the University of Arkansas.

Board Policy 405.1 governs faculty members' promotions, tenure, and annual reviews at the University of Arkansas and constitutes the heart of each faculty member's employment agreement with the University of Arkansas System. Two versions of this policy are at issue. These two versions will be referred to as the "Original Policy" and the "Revised Policy."

The Original Policy has set forth key portions of existing faculty's employment contracts since October 2, 2001. In September 2017, however, the University of Arkansas System released an initial draft of proposed

revisions to the Original Policy. In a subsequent undated document, the University of Arkansas System's Counsel's Office asserted that the revisions were intended to ensure the Board's policies were appropriate in the light of what the Board believes is the changing "landscape" of higher education. The proposed revisions changed the rules and regulations applicable to the promotion, tenure, and annual review for both new faculty members and *existing* faculty members who had been hired or hired *and* tenured pursuant to the Original Policy. As detailed below, the proposed revisions substantially changed the rules applicable to dismissal of faculty in the University of Arkansas System, and thus constituted a unilateral modification of each faculty member's employment agreement with the institution.

In mid-February 2018, the University of Arkansas System released a new draft of the proposed revisions to the Original Policy, but this time with explanations for some of the revisions in response to feedback received through January 2018. The University of Arkansas System's explanations lacked: (1) any reasonable identification of how or why the public interest would be served by the proposed revisions to the Original Policy, (2) the legal basis to change existing tenure contracts, (3) or how the changing "landscape" of higher education justified the proposed revisions. A final draft of the modifications to the Original Policy was released on March 19, 2018. The Board voted and enacted the revisions to the Original Policy on March 29, 2018, on the campus of the University of Arkansas at Monticello

("the Revised Policy"). The Revised Policy became effective on July 1, 2019.

Remarkably, by its terms, the Revised Policy purports to apply to *all* faculty employed by the University of Arkansas System, including those who obtained tenure or entered the tenure-track prior to the adoption of the Revised Policy. And, in a memorandum released in November of 2017 that addressed various questions regarding the amendments, the Counsel's Office for the University expressly stated that the Revised Policy is intended to apply to *all* faculty, regardless of tenure status. In other words, the Revised Policy constituted a unilateral alteration of the employment contracts of tenure-track and tenured faculty. When the Board passed the Revised Policy, the Board did so with almost no faculty support and, as noted, without any objective research or contemporaneous statements of reason in support of the Revised Policy.

III. The Unconstitutional Changes to the Tenure Policy.

The most significant changes to the policy are to the definition of "cause" for dismissal or academic discipline. These changes unquestionably expand the grounds upon which a faculty member may be terminated for "cause," including faculty who *already* hold a tenure contract containing the old definition of cause as a term thereof. "Cause" in the Original Policy is defined generally as "conduct which demonstrates that the faculty member lacks the ability or willingness to

perform his or her duties or to fulfill his or her responsibilities to the University[.]" The Original policy further provided that "examples of such conduct include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty and moral turpitude[.]" Each of these examples from the Original Policy – the only examples listed therein – reflects an extremely serious problem with a faculty member's performance, and thus the grounds for cause termination were quite limited in both nature and scope under the Original Policy.

The Revised Policy drastically changed the definition of "cause" for termination. First, under the new policy, "cause" is generally defined as "conduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the University, ***or that otherwise serves as the basis for disciplinary action***." (emphasis added). The additional language in the Revised Policy – "**or that otherwise serves as the basis for disciplinary action**" – exponentially expands the scope of the definition of "cause" for dismissal of a faculty member and modifies the faculty member's contract with the Board without the faculty member's consent.

Moreover, the new definition of "cause" in the Revised Policy also offers the following *new*, *broad*, and *vague* "grounds" for termination that were not set forth in the original policy:

> (1) ***unsatisfactory performance . . . concerning annual reviews***;
>
> (2) professional dishonesty or plagiarism;

(3) discrimination, including harassment or retaliation, prohibited by law or university policy;

(4) ***unethical conduct related to fitness to engage in teaching, research, service/outreach and/or administration, or otherwise related to the faculty member's employment or public employment***;

(5) misuse of appointment or authority to exploit others;

(6) theft or intentional misuse of property;

(7) incompetence or a mental incapacity that prevents a faculty member from fulfilling his or her job responsibilities;

(8) job abandonment;

(9) ***a pattern of conduct that is detrimental to the productive and efficient operation of the instructional or work environment;***

(10) ***refusal to perform reasonable duties***;

(11) threats or acts of violence or retaliatory conduct; or

(12) violation of University policy, or state or federal law, substantially related to performance of faculty responsibilities or fitness to serve the University.

(emphasis added to the most problematic changes).

This list of examples is fundamentally different from the list in the Original Policy. As a result, the Revised Policy makes both *quantitative* and *qualitative* changes to the definition of "cause" in the employment contracts of University of Arkansas faculty. On the quantitative front, the Revised Policy dramatically expands the *number* of grounds that can justify termination of a faculty member, tripling the list from four to twelve. On the qualitative front, the Revised Policy adopts wholly new *types* of grounds for dismissal, including grounds that essentially constitute whistle blowing; faculty can now be terminated for objecting to bureaucratic misdeeds and questioning administrative behavior. Indeed, the *grounds* for dismissal in the Revised Policy are limited only by the imagination of the administrator holding the axe over a faculty member's head. This means that the Revised Policy sets a *far* lower standard for termination of a faculty member than does the Original Policy. By including new *types* of "grounds" for dismissal that are often feckless in nature and are nothing like the serious problems set forth in the Original Policy (e.g., moral turpitude and incompetence), the Revised Policy makes highly significant quantitative and qualitative changes to the definition of "cause" that provides the University of Arkansas System with greatly expanded authority to terminate tenure-track and even *tenured* faculty.[2]

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[2] Take, for instance, the expansion of the examples for cause termination from the Original Policy to the additional grounds created for cause termination in the Revised Policy. A fundamental principle of contract interpretation – *Ejusdem generis* – states

Furthermore, while both the Original Policy and the Revised Policy define "cause" as "conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her" duties and responsibilities to the University, the Revised Policy goes an additional step, adding that cause *also* includes conduct "that otherwise serves as a basis for disciplinary action." Thus, while the Original Policy had narrowly defined bases for termination, the Revised Policy's language permits termination for virtually any reason

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that, when a general term is coupled with specific illustrations, as is the case here, those illustrations play a central role in defining the scope of the general term. *See Edwards v. Campbell*, 2010 Ark. 398 at 5, 370 S.W.3d 250, 253 ("[W]e recognized in *Oldner* the doctrine of *ejusdem generis*, which provides that when general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (internal citation and quotation marks omitted). In other words, the meaning of a general word or phrase fundamentally depends on the specific illustrations included to help define the general word or phrase. Due to the quantitative and qualitative changes to the list of examples that constitute cause for dismissal, even if the general "cause" standard set forth in the Original Policy still applied ("lacks the willingness or ability to perform duties or responsibilities") it would now instantly possess a much broader meaning. Yet in the Revised Policy, the remarkable expansion of the changes to the list of examples that constitute cause for dismissal, while alone a significant alteration, is accompanied by a much more general definition of cause as well. ("lacks the willingness or ability to perform duties or responsibilities . . . ***or that otherwise serves as the basis for disciplinary action***." (emphasis added)). Each of these alterations to the material aspect of the tenure contract alone (no less, when combined) cause an immediate, concrete injury to Petitioners by virtue of the Board's violation of the Constitution's Contracts Clause and Due Process Clause**.** *See Edwards*, 2010 Ark. 398 at 5, 370 S.W.3d at 253.

that can be imagined by an administrator. For instance, if a tenured or tenure-track faculty member is rude or lacks tact in a discussion with a colleague or administrator, the Revised Policy provides the administration with new weapons to terminate faculty that did not exist before. This significant and unilateral alteration in the Revised Policy swallows the old "cause" definition in the Original Policy whole. In sum, the Board's Revised Policy, if allowed to stand, fundamentally changes the existing employment contracts of its faculty, including those tenured with the old contract, without their consent, without consideration, and in violation of their constitutional rights.

REASON FOR GRANTING THE PETITION

This petition should be granted because the Eighth Circuit's ruling conflicts with this Court's precedents and those of other circuits on critically important matters. Sup. Ct. R. 10(a). The Eighth Circuit's decision will have wide-ranging and destructive effects. It distorts standing doctrine. It damages university professors. And it gives States strikingly expanded power to modify contracts and control free speech on college campuses. This Court should review, and set aside, that decision which will provide critical guidance to the lower courts regarding the scope of standing under Article III of the United States Constitution.

I. The Eighth Circuit's Standing Determination Is Directly In Conflict With Multiple Courts Of Appeal And Its Own Precedent.

This Court has taken great strides to clarify and delineate standing requirements to bring an action in federal court. The Eighth Circuit's ruling in this case only creates new confusion, backsliding on the clarity litigants need regarding standing. Prior to the ruling below, claimants in the Eighth Circuit and across the country were nearly certain of the pleading requirements necessary to establish constitutional standing, and specifically to demonstrate that their claims were ripe. The District Court's decision conflated standing and ripeness as one entangled issue for violations under the Contracts Clause as well as the First Amendment regardless of the remedy sought by litigants. That ruling is contrary to other circuits on both fronts and creates immense confusion.

A. The Eighth Circuit's Interpretation Of Standing Under The First Amendment Is Directly Contradictory To The Fifth Circuit.

The Board, through the Revised Policy, limits and infringes Petitioners' First Amendment rights by now limiting faculty tenure protections to "scholarship," "the subject matter of their assigned teaching duties," and "*employment related* service." (emphasis added). However, the ability of a faculty member to speak openly and freely in the academic setting concerning fundamental and controversial issues, topics, and

ideas, without fear of termination, is the very essence of what is protected by the First Amendment. U.S. Const. amend. I. This was correctly protected under the Original Policy, but no longer is under the Revised Policy.

By specifically limiting all faculty members' free speech and academic freedom in the Revised Policy to *only* internal matters – i.e., "*employment related* service" – that the Board deems appropriate, Petitioners are no longer protected when engaging in academic lectures and service that benefit society, known in academia as "public service." Put simply, public service is excluded from protection under the Revised Policy.

Professors across the University of Arkansas System immediately felt the effects of these rule changes on their conduct, both in and out of the classroom. For example, Petitioners' complaint explained that Petitioner Sullivan and other faculty members who would like to speak out on matters of university policy and other matters of public concern, currently feel the suffocating and chilling effect of the new rule and are being more cautious with their speech in the classroom and to colleagues for fear of retaliatory termination grounded in the Board's Revised Policy. Petitioner Palade has also been fearful of salary cuts due to the amount of leeway provided to administrators by the Revised Policy if he resisted problematic university action. And these fears have only grown in significance since the inception of this lawsuit against the Board of Trustees. "If the First Amendment means anything, it means that regulating speech must be a last – not first

– resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373, 122 S. Ct. 1497, 1507, 152 L. Ed. 2d 563 (2002). The chilling effect caused by the Revised Policy is a limitation on and violation of Petitioners' First Amendment protections that is causing injury *right now*.

The District Court opinion found that Petitioners failed to establish either that they were in danger of sustaining injury as a result of the Revised Policy or that the perceived injury was both real and immediate. Most importantly, the court stated that "Plaintiffs' allegations of possible, but not threatened, enforcement of the Revised Policy in a manner that might but might not violate federal law is insufficient to establish injury in fact." (12-A) In making the determination, the District Court cited this Court's own language that "Reasonable chill exists when a plaintiff shows 'an intention to engage in a course of conduct arguably affected with constitutional interest, but proscribed by [the] statute [or policy], and there exists a credible threat of prosecution.'" *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). But the District Court – and the Eighth Circuit in adopting the District Court's reasoning – fundamentally misapplied the principle in *Babbitt*. As a result, the lower courts' rulings critically limited the circumstances in which persons can sue for violation of their free speech rights. And the holding that the professors' fears of retaliation, termination, or salary decrease are not reasonable, because the enforcement of the revised

policy might or might not violate federal law, cuts directly against free speech precedent across the country.

In *Speech First, Inc. v. Fenves*, the University of Texas implemented new policies for students that prohibited "verbal harassment" defined as "hostile or offensive speech, oral, written, or symbolic" and prohibited "incivility," stating: "[s]tudents are expected to behave in a civil manner that is respectful of their community and does not disrupt academic or residential activity. Uncivil behaviors and language that interfere with the privacy, health, welfare, individuality, or safety of other persons are not permitted." 979 F.3d 319 (5th Cir. 2020), *as revised* (Oct. 30, 2020). A student organization sued because of the chilling effects of the new policies, but the trial court found the students lacked standing. On appeal, the Fifth Circuit reversed, agreeing that students who wished to engage in debate on timely and controversial political topics from a contrarian point of view had standing to file suit. *Id*. Because their views did not mirror others' views, their speech could be deemed "harassment," "rude," "uncivil," or "offensive," as defined in the University's policies, even before they engaged in any conduct. *Id*. The Court held that "[t]he chilling effect of allegedly vague regulations, coupled with a range of potential penalties for violating the regulations, was, as other courts have held, sufficient 'injury' to ensure that Speech First 'has a 'personal stake in the outcome of the controversy.'" *Id*. at 322.

In the present case, as tenured professors with academic freedom, Petitioners suffer greater harm from

the chilling effect of speech-squelching policies than did students in *Speech First*. That is because the policies' chilling effect on Petitioners' free-speech rights deprives Petitioners of the right to speak and deprives students of exposure to contrarian views of disciplinary experts, undermining the free exchange of ideas on campus. As mentioned above, Professors Sullivan and Palade are just two examples of professors who are currently modifying their expressive activities in fear of retaliation because of the unilateral modification of their tenure contracts as manifested in the Revised Policy.

This Court should grant cert to resolve the stark contrast between circuits regarding free speech on college campuses. Specifically, this Court has the power to provide clarity for students and faculty members of university campuses across the country who are regularly battling to maintain their First Amendment rights.

B. The Eighth Circuit's Interpretation Of Standing For A Claim Under The Contracts Clause Is Inconsistent With Its Own Precedent *And* Creates A Split Between Circuits.

The Board's unilateral modifications of Petitioners' contracts via adoption of the Revised Policy, along with the Board's admitted retroactive application of the unilateral modifications against Petitioners, is a concrete injury and violation of Petitioners' constitutional

rights that has already occurred without the need for any further action to be taken. The ruling by the Eighth Circuit, however, creates a heightened injury requirement that must be met before a claimant has standing to bring a declaratory judgment action for a contract-related claim. If permitted to stand, the Eighth Circuit's decision will require that some unfavorable consequence must occur *beyond* the improper and unconstitutional contract modification before standing exists. This would essentially eliminate the purpose and utility of the Declaratory Judgment Act in any case involving a contract.

To elaborate, when Petitioners were hired and then tenured by the University of Arkansas System, Petitioners' tenure contracts included the risk of being terminated for cause ***only as specified in the agreement entered into by the parties at the time***. Any contention that the university can change the definition of the most material term in Petitioners' employment contracts at its discretion unilaterally without an injury occurring to Petitioners is equivalent to contending that the university has the right to change the benefit of the bargain of any contract into which it enters with any third party. This has never been the law, and the Eighth Circuit's affirmation of the District Court's order creates a direct circuit split. In *Elliott v. Board of School Trustees of Madison Consolidated Schools*, 876 F.3d 926, 934-35 (7th Cir. 2017) the Seventh Circuit determined a claimant in similar circumstances had standing to bring suit. For over 85 years teachers' contracts in Indiana included job security

when school districts needed to reduce their teaching staffs: as long as they were qualified for an available position, tenured teachers had a right to be retained over non-tenured teachers. *Id*. at 928. However, in 2012, Indiana passed a new law eliminating that priority right and ordered school districts to base layoff choices on performance reviews without regard for tenure status. *Id*. That same year, Mr. Elliott, a teacher who earned tenure fourteen years before the new law had taken effect, was laid off while his school district retained non-tenured teachers in positions for which Elliott was qualified. *Id*. Mr. Elliott sued, claiming that the amendment violated the Contracts Clause when applied to him. The trial court granted summary judgment in Mr. Elliott's favor, and the Seventh Circuit affirmed.

The Seventh Circuit reasoned that, when Mr. Elliott decided to become a tenured teacher, the State and school district promised him a substantial degree of job security in that, during a downsizing, Elliott's job would be more secure than that of a non-tenured teacher. *Id*. The Seventh Circuit elaborated:

> The promise of job security, especially during layoffs, lies close to the core of teacher tenure. Having job security, even in tough economic times, was a central term to induce people to become teachers and seek tenure in Indiana. It is a term with significant value to teachers, who as a matter of economics have traded higher salaries for the protections that tenure offers over the course of a career. Teachers earn lower salaries than similarly educated

> professionals. They receive part of their compensation through other benefits, including better job security, which includes a reduced risk of termination during staff reductions. This lower risk has material value and was a primary consideration that teachers could rely upon when seeking tenured employment.

Id. at 934-35. The court found that teachers properly relied on a "stable job-security scheme to plan their personal and professional lives, their investments of time and money, and their retirements" and held that it is "not fair to change the rules so substantially when it is too late for the affected parties to change course." *Id*. at 935. In closing its analysis, the Seventh Circuit lamented that "[t]enured teachers cannot have do-overs in their careers, either to earn more money to make up for the lost job security or to find better job security in another school district or in another field entirely." *Id*. at 935. The Seventh Circuit thus held that the amendment substantially impaired teachers' contractual tenure rights, and the amendment was not reasonable and necessary to serve important public purpose when applied to teachers.

Like the elimination of the job-security provision in Mr. Elliott's case, the Revised Policy undermines the central undertaking and expectation found in Petitioners' contracts at the time Petitioners were awarded tenure. The general "cause" standard now plainly has a much broader meaning under the Revised Policy than it did in the Original Policy because of the

expansive, non-exclusive list of "grounds" associated with that general phrase.

As the Eighth Circuit itself has recognized previously, in the context of disputes between parties to a contract, the declaratory judgment remedy is intended to provide a means of settling an actual controversy *before* it ripens into a violation of the civil or criminal law, or a breach of a contractual duty. *Maytag*, 687 F.3d at 1081. If there is "a real, substantial, and existing controversy. . . . a party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute a breach." *Id.* (quoting *Keener Oil & Gas Co. v. Consol. Gas Utils. Corp.*, 190 F.2d 985, 989 (10th Cir. 1951)). "In these situations, relevant Article III considerations include whether the contractual dispute is real, in the sense that it is not factually hypothetical; whether it can be immediately resolved by a judicial declaration of the parties' contractual rights and duties; and whether 'the declaration of rights is a *bona fide* necessity for the natural defendant/declaratory judgment plaintiff to carry on with its business.'" *Id.*

In *Maytag*, an employer filed suit against a labor union and representatives of a putative class of retired employees, seeking a declaratory judgment that the employer had the right to unilaterally modify retirees' health care benefits provided for under the union and employer's collective bargaining agreement. *Maytag*, 687 F.3d at 1080-81. Stated differently, the employer sought a declaration regarding its rights under a contract *prior* to taking *any* action that might result in a

breach that harmed the counterparties and subjected the employer to liability. *See id*. The union challenged the employer's standing to file the lawsuit, arguing that the employer had taken no action to modify the contract, had not disclosed the modification of the contract that was at issue, and that the injury the employer alleged was hypothetical. *Id*. at 1081. The trial court repeatedly rejected the union's standing challenge, and the Eighth Circuit Court affirmed those decisions, holding that the employer had standing to bring an action for declaratory judgment because the controversy regarding the contract rights was real and could be immediately resolved, without requiring the employer to breach the contract first to create standing. *Id*. at 1081-82.

In dismissing Petitioners' Complaint, the District Court reasoned that *Maytag* does not control the case at hand because the parties in *Maytag* had a 25-year history of contract dispute that was real, substantial, and existing. (Add. 1.) The District Court contended that the policy changes here, in contrast, did not make changes to historically disputed benefits, but instead changed definitional language which may or may not be applied in the future in a manner different from the Original Policy definition or in a manner which violates federal law.

But the Eighth Circuit's ruling in *Maytag* is fundamentally inconsistent with the rulings below in this case. In fact, by finding no standing in the present case, the Eighth Circuit has essentially ruled that there is *never* standing for a dispute over a contract

modification until a party is irreparably harmed as a result of the modification. The critical point is this: In the present case, the University of Arkansas System has *already* acted; it has already unilaterally modified Petitioners' employment contracts, altering Petitioners' contractual and Constitutional rights for the duration of their relationship with the University of Arkansas System. But in *Maytag*, as noted above, the employer had not even acted yet. Accordingly, if the claims the employer brought in *Maytag* were ripe in the face of the union's standing challenge – again, *when no action to alter the contract had been taken yet* by either the employer or union – then Petitioners' claims here *must* be ripe as a matter of law because the University has already modified the Petitioner's contracts; the Petitioners' injuries *have happened already* and are not dependent on anything else occurring. The dispute here is thus even more *bona fide* than in *Maytag*: The parties in this case are disputing whether the Board's executed, unilateral modifications to Petitioners' employment contracts violate the Contracts Clause, the Due Process Clause, and the First Amendment. The entry of a declaratory judgment in this case would immediately resolve the parties' controversy. And, most importantly, a declaration would enable both the university and Petitioners to carry out their business while also ensuring that Petitioners' contractual and constitutional rights are protected. The District Court and Eighth Circuit findings that Petitioners' claims are not ripe must therefore be reversed.

II. The Legal Errors Committed Below Will Have Destructive And National Consequences.

Allowing universities, or any public institution, to freely modify contracts creates a dangerous threat of abuse and oppression. The Contract Clause provides that no state may pass a law impairing the obligation of contracts. The ruling below undermines this constitutional imperative by allowing public bodies like the University of Arkansas System to unilaterally modify contracts without fear of litigation. At this juncture in the litigation, the issue is only whether Petitioners have standing. But a determination by this Court is crucial to protect all parties to public contracts from being taken advantage of by their public counterparties. On college campuses around the United States, administrators are slowly chipping away at the academic freedom expected by professors and students, by changing tenure policies with the ultimate goal of creating more authority over the professor's speech, actions, research, and imposing orthodoxy in the classroom. If faculty and students cannot seek redress in court immediately upon the enactment of such dangerous and unconstitutional rules, the damage to the academic enterprise will be incalculable. And it will create powerful incentives for other government entities, such as municipalities, counties, and states, to unilaterally modify every type of public contract.

III. The Eighth Circuit Is Wrong.

The Eighth Circuit misapplied well-founded standing law in this case. As explained above, the Court even failed to follow its own precedent as explicitly laid out in *Maytag*. Simply put, Petitioners have standing to bring this action right now because the injury has already occurred.

In ruling on a motion to dismiss for lack of standing, this Court has explained that, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Standing exists if Plaintiffs demonstrate they suffered (1) a concrete injury (rather than a hypothetical one), (2) that is fairly traceable to the Board's challenged action, and (3) that the injury would likely be redressed by a favorable decision. *Lujan*, 504 U.S. at 561.

One cannot seriously dispute that Petitioners meet these elements. First, the Board's unilateral modifications of Petitioners' contract via adoption of the Revised Policy, along with the Board's admitted intention to retroactively apply the unilateral modifications against Petitioners, is a concrete injury that has already occurred. The Board's conduct constitutes an improper stripping of Petitioners' contractual and constitutional rights, which are plainly concrete injuries. Accordingly, element one was satisfied.

Indeed, the University of Arkansas System even admitted the existence of a concrete injury through its argument below that Petitioners already waived their right to challenge the Revised Policy. The University contends that because Petitioners have continued to work at the school, they have somehow accepted the Revised Policy as their contract. It flies in the face of reason and common sense for the University of Arkansas System to argue that Petitioners are not injured for purposes of standing because nothing has occurred yet while *also* arguing Petitioners' claims are barred because they have *already* consented to and accepted the change. The Board cannot have it both ways.

The second and third *Lujan* elements are even more obviously satisfied. The injury has a causal connection to the Board's conduct: the injury is the Board's adoption and retroactive application of the Revised Policy, stripping Petitioners and the absent class members of their contractual and constitutional rights. Therefore, Petitioners' harm is directly traceable to the challenged action of the Board and not to anything else, such as an independent action of a third party not before the court. And, if the Court rules in favor of Petitioners, the injury sustained by Petitioners will be redressed because the Board's unilateral application of the Revised Policy to Petitioners and the Class will be enjoined.

All of the facts establishing that the *Lujan* test was satisfied were laid out in detail in the Complaint, which is what controls the analysis of this matter at the pleading stage. Paragraphs 30-41 of the Complaint

describe in detail the unilateral modifications the Board has made to Petitioners' contracts without Petitioners' consent or authorization, and paragraphs 47-50, 70-77, 83-89, and 121-125 of the Complaint explain how those unilateral modifications injure Petitioners by striking at the heart of their contractual and constitutional tenure protections.

The concreteness and immediacy of the injury suffered by Petitioners is further demonstrated by the fact that tenure is a vested and constitutionally protected property interest. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1972) (stating that "a public college professor dismissed from an office held under tenure provisions. . . . [has] interests in continued employment that are safeguarded by due process," and due process protection only attaches to liberty or property rights) (citing *Slochower v. Bd of Higher Ed. of City of New York*, 350 U.S. 551 (1956) and *Wieman v. Updegraff*, 344 U.S. 183 (1952)); *Harden v. Adams*, 760 F.2d 1158, 1167 (11th Cir. 1985) (holding that a tenured professor has a vested property interest in his employment); *Jasper School Dist. No. 1 of Newton County v. Cooper*, 2014 Ark. 390, 441 S.W.3d 11 (holding that principal's contract created a protectable property interest in her job); *Stewart v. Fort Wayne Community Schools*, 564 N.E.2d 274, 280 (Ind. 1990) (holding that teacher with tenure has a vested property interest in her job, which the Constitution protects); *Williams v. Board of Supervisors et al.*, 272 So.3d 84, 89 (La. App. 2019) (holding that teacher tenure vests a property right interest in the teacher's employment).

Deprivation of such a property interest is the quintessence of an injury-in-fact sufficient to create standing under Article III. *See, e.g.*, *Cahoo v. Fast Enterprises LLC*, No. 17-10657, 2020 WL 7493103, *10, __ F. Supp. 3d __ (E.D. Mich. Dec. 21, 2020) (deprivation of property interest in unemployment benefits constituted injury-in-fact); *Swepi, LP v. Mora County*, *N.M.*, 81 F. Supp. 3d 1075, 1156 (2015) (holding that "[d]eprivation in a property interest's value and the inability to exploit one's property interest is sufficient injury in fact"); *Zavolta v. Lord, Abbett & Co.*, No. 2:08-cv-04546, 2010 WL 686546, *5 (Feb 24, 2010) (explaining in the trust context that a property interest is "the *sin qua non* of Article III standing"); *Experian Marketing Solutions, Inc. v. U.S. Data Corp.*, No. 8:09CV24, 2009 WL 2902957, *6 (Sep. 9, 2009) (invading property interest in trademark satisfied injury-in-fact requirement).

In sum, the adoption of the Revised Policy presently and immediately injures Petitioners because it provides the University of Arkansas System with nearly limitless administrative authority to dismiss tenured faculty. This strikes at the very heart of the bargain Petitioners made with the university when they accepted their positions: It eviscerates the right to continuous appointment – the right to be terminated only for cause as defined by Petitioners' contracts at the time they were granted tenure. The cause standard is the very core of any tenure contract. Accordingly, the act of revising the definition of cause in and of

itself plainly satisfies the first element necessary for standing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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