United States Court of Appeals
for the Eighth Circuit

No. 20-1786

Phillip 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

Plaintiffs - Appellants

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

Defendants - Appellees

Appeal from United States District Court
for the Eastern District of Arkansas – Central

Submitted: November 19, 2020
Filed: November 24, 2020
[Unpublished]

Before ERICKSON, WOLLMAN, and STRAS, Circuit Judges.

PER CURIAM.

Phillip Palade, Gregory Borse, and J. Thomas Sullivan appeal the district court's[1] without-prejudice dismissal of their action under, inter alia, 42 U.S.C. § 1983. Having carefully reviewed the record and the parties' arguments on appeal, we find no basis for reversal. See Zink v Lombardi, 783 F.3d 1089, 1098 (8th Cir. 2015) (en banc) (per curiam) (standard of review). Accordingly, we affirm. See 8th Cir. R. 47B.

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[1] The Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1786

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Defendants - Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas – Central
(4:19-cv-00379-JM)

JUDGMENT

(Filed Nov. 24, 2020)

Before ERICKSON, WOLLMAN, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 24, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

PHILIP PALADE, et al. PLAINTIFFS

VS. NO. 4:19CV00379 JM

BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS, et al. DEFENDANTS

ORDER

(Filed Mar. 16, 2020)

Pending is the Defendants' motion to dismiss Plaintiffs' complaint. (Docket # 4).[1] Plaintiffs have filed a response and Defendants have filed a reply. For the reasons stated herein, the motion is GRANTED.

On May 31, 2019, Plaintiffs, tenured faculty members employed by the University of Arkansas System filed a Complaint and proposed class action against the Board of Trustees of the University of Arkansas and the individual members of the Board in their official capacities. Plaintiffs allege that on March 29, 2018, the Board adopted and passed revisions to Policy 405.1, governing faculty promotion, tenure and annual reviews (hereinafter "Revised Policy") which unilaterally and without the consent of the Plaintiffs or other purported class members made material changes to tenured and tenure-track faculty member's contractual

[1] The Court will not consider any pleadings outside of the record in deciding the pending motion.

rights and violated their constitutional rights. Specifically, Plaintiffs claim that "the Revised Policy makes highly significant qualitative changes to the definition of "cause" that provides the University of Arkansas System with greatly expanded authority to terminate faculty." (ECF No. 6, p. 7). Plaintiffs seek to invalidate the Revised Policy and request that the Court enjoin the Board from applying the Revised Policy to the class as of March 29, 2018. Plaintiffs advance seven claims:

Count 1 - Declaratory judgment and injunctive relief under the United States Constitution - Contracts Clause.

Count 2 - Declaratory judgment and injunctive relief under the United States Constitution - Due Process Violations.

Count 3 - Declaratory judgment and injunctive relief under the Arkansas Constitution - Contracts Clause.

Count 4 - Declaratory judgment under Arkansas Contract Law.

Count 5 - Declaratory judgment and injunctive relief under the United States Constitution - First Amendment Violation.

Count 6 - Declaratory judgment and injunctive relief under the Arkansas Constitution - Free Communication Violation.

Count 7 - Declaratory judgment and injunctive relief under the United States Constitution - Academic Freedom Violation

Defendants argue that Plaintiffs' state law claims in Counts 3, 4, and 6 are barred by the Eleventh Amendment and sovereign immunity; Plaintiffs lack standing; their claims are unripe; and, Plaintiffs' complaint fails to state a plausible claim for which relief can be granted.

Plaintiffs concede that the Eleventh Amendment likely prohibits the Court from deciding Plaintiffs' claims based on the Arkansas Constitution and Arkansas contract law. Accordingly, by concession, the Court dismisses Counts 3, 4 and 6. Plaintiffs challenge the dismissal of the remaining claims.

Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal

quotation marks omitted). When considering a motion to dismiss under Rule 12(b)(6), the court must accept as true all the factual allegations contained in the complaint and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001).

Discussion

Plaintiffs' claims against the University of Arkansas Board of Trustees are barred by sovereign immunity. *See Monroe v. Ark State Univ.*, 495 F.3d 591, 594 (8th Cir.2007) ("the University argues the Eleventh Amendment bars suit against the University for any kind of relief, not merely monetary damages. We agree."). *See also Buckley v. Univ. of Ark. Bd. of Trustees*, 780 F.Supp.2d 827, 830 (E.D.Ark.2011) ("The governing bodies of state universities enjoy the same immunity from suit as the universities themselves."). Plaintiffs' federal law claims against the individual board members in their official capacities for prospective declaratory and injunctive relief remain.

Defendants argue that Plaintiffs' federal claims are nonjusticiable. The jurisdiction of federal courts is limited to actual cases and controversies by Article III, § 2, of the United States Constitution. *Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003). To establish Article III standing, a plaintiff must establish three elements: (1) an "injury in fact"—an invasion of a legally protected interest which is both "concrete and

particularized" and "actual or imminent;" (2) proof that the injury is "fairly . . . trace[able] to the challenged action of the defendant; and (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id.* at 564, fn4 (internal citation and quotations omitted). "The existence of a case and controversy is a prerequisite to all federal actions, including those for declaratory or injunctive relief." *Philadelphia Fed'n of Teachers, Am. Fed'n of Teachers, Local 3, AFL-CIO v. Ridge*, 150 F.3d 319 (3d Cir. 1998), quoting, *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir.1994).

"The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000). The ripeness doctrine is intended to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.*, citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Under the ripeness doctrine, for the Court to hear a case, there must be a "real, substantial controversy between parties having adverse legal interests. . . ." *Id.*,

citing, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). A claim does not meet the justiciability requirement if it is not ripe, meaning it is dependent on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

Although a declaratory judgment action can be sustained if no injury has yet occurred. *County of Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir.2004), before a claim is ripe for adjudication the plaintiff must face an injury that is "certainly impending." *Pub. Water Supply Dist. No. 8 of Clay Cty., Mo. v. City of Kearney, Mo.*, 401 F.3d 930, 932 (8th Cir. 2005) citing, *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 67 L.Ed. 1117 (1923); *South Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005, 1008 (8th Cir.1998). "Whether the factual basis of a declaratory judgment action is hypothetical—or more aptly, too hypothetical—for purposes of the ripeness doctrine (and concomitantly Article III) is a question of degree." *Id.*

Plaintiffs argue that the most significant changes to the Revised Policy are to the definition of "cause." "Cause" in the Original Policy is defined as: "[C]onduct 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." In contrast, the Revised Policy defines "cause" for termination as: "[C]onduct 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." (ECF No. 6, p. 5-6). Plaintiffs argue that 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. Importantly, however, no Plaintiff has alleged that he has faced disciplinary action, threatened action or termination under the Revised Policy.

The Court finds that the Plaintiffs claims are not ripe. Plaintiffs' allegations of the University's possible use of the Revised Policy to discipline or terminate a faculty member for reasons not covered or beyond those allowed in the original policy are speculative. Plaintiffs rely on *Maytag Corp. v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America*, 687 F.3d 1076 (8th Cir.2012) for the proposition that its controversy with the University is ripe for decision. However, in *Maytag* the Court found that the employer had unilaterally modified the retirees' benefits. The parties had a 25 year history of dispute regarding retiree benefits and the Court found the contractual dispute was real, substantial and existing. In contrast, the policy changes here 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.

Finally, although reasonable self-censorship can be adequate to establish an injury in fact for a First Amendment challenge "[t]he relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was 'objectively reasonable.'" *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794-95 (8th Cir. 2016) citations omitted. "Reasonable chill exists when a plaintiff shows 'an intention to engage in a course of conduct arguably affected with a 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). Plaintiffs' allegations fail to establish 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. 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. *Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003) (To establish an injury in fact, "[t]he plaintiff must show that he or she 'sustained or is immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct and [that] the injury or threat of injury [is] both real and immediate. . . .'").

For the reasons stated herein, Plaintiffs' claims are not ripe and therefore do not present a justiciable controversy. Defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED this 16th day of March, 2020.

/s/ James M. Moody Jr.
James M. Moody Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

PHILIP PALADE, et al. **PLAINTIFFS**

VS. **NO. 4:19CV00379 JM**

BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS, et al. **DEFENDANTS**

JUDGMENT

(Filed Mar. 16, 2020)

Consistent with the Order entered on this day, this case is dismissed without prejudice. All relief sought is denied, and the case is closed.

Dated this 16th day of March, 2020.

/s/ James M. Moody Jr.
James M. Moody Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1786

Phillip Palade, On Behalf of Himself
and all Others Similarly Situated, et al.

Appellants

v.

Board of Trustees University
of Arkansas System, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Central
(4:19-cv-00379-JM)

ORDER

(Filed Jan. 4, 2021)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Smith did not participate in the consideration or decision of this matter.

January 04, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

17-A

20-1786

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PHILIP PALADE, ET AL. PLAINTIFFS/APPELLANTS

v.

BOARD OF TRUSTEES
OF THE UNIVERSITY
OF ARKANSAS, ET AL. DEFENDANTS/APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Honorable James M. Moody, Jr.,
United States District Judge
Case No. 4:19CV00379-JM

PETITION FOR REHEARING *EN BANC* PURSUANT TO RULES 35 AND 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

(Filed Dec. 8, 2020)

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[iv] RULE 35(B) STATEMENT IN SUPPORT OF REHEARING *EN BANC*

1. The panel decision conflicts with decisions of this court to which the petition is addressed and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. Specifically, the panel decision to affirm the district court conflicts with *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 687 F.3d 1076 (8th Cir. 2012) and *North Dakota State Univ. v. United States*, 255 F.3d 599 (8th Cir. 2001), creating an intra-circuit split.

2. The proceeding also involves one or more questions of exceptional importance because the panel decision further conflicts with other authoritative decisions from other circuits. Specifically, the panel decision to affirm the District Court conflicts with *Elliott v. Board of School Trustees of Madison Consolidated Schools*, 876 F.3d 926 (7th Cir. 2017) and *Speech First, Inc. v. Fenves*, No. 19-50529 (5th Cir. Oct. 28, 2020), *as revised* (Oct. 30, 2020), creating an inter-circuit split.

[1] BACKGROUND

Faculty members for the University of Arkansas System are employees who hold a specified academic rank as defined by the Board of Trustees of the University of Arkansas (the "Board"). (Appx. 7.) Members of the faculty are generally divided into three groups: tenured, tenure-track, and non-tenure track. (Appx. 7.) A faculty member who strives to be tenured – which is

the right to continuous appointment absent a for-cause violation of the tenure employment contract – may receive an appointment to a tenure-track position that requires fulfillment of a multi-year "probationary period" in which applicants must prove themselves to the administration as worthy of the full guarantees of a tenure contract. (Appx. 7.)

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. (Appx. 7.) After the tenure-track faculty member has completed the probationary period of this afore-described, multi-year period, the individual is either awarded tenure or is terminated. (Appx. 7.) 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. (Appx. 12.)

[2] Board Policy 405.1 governs faculty members' promotions, tenure, and annual reviews (hereinafter referred to as the "Original Policy"). The Original Policy has made up the key portions of existing faculty's employment contracts since October 2, 2001. (Appx. 9-14.) The Board voted and enacted the revisions to the Original Policy on March 29, 2018 ("the Revised Policy"). (Appx. 20.) The Revised Policy became effective on July 1, 2019. (Appx. 20.)

The Revised Policy constitutes a unilateral alteration of the employment contracts of tenure-track and tenured faculty. 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. (Appx. 8, 9.) The most significant changes to the policy are to the definition of "cause." (Appx. 281.) These changes *expand* the grounds upon which a faculty member may be terminated for "cause," including those who *already* hold a tenure contract containing the old definition. (Appx. 9.)

"Cause" in the Original Policy is defined generally as: "[C]onduct 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," and "examples of such conduct [to] include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty and moral turpitude[.]" (Appx. 9, 10.) Each of these three examples from the Original Policy – the only examples listed therein – aptly reflects [3] an extremely serious problem with a faculty member's performance and thus the examples are limited in both in nature and scope. (Appx. 9-11.)

In contrast, the Revised Policy changes the definition of "cause." The new definition of "cause" for termination is: "[C]onduct 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**." (Appx. 10) The additional language in the

Revised Policy – **"or that otherwise serves as the basis for disciplinary action"** – significantly 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. (Appx. 10.)

Moreover, the new definition of "cause" in the Revised Policy also offers the following *new, broad*, and *vague* "grounds" for termination that were not part of 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*** [4] ***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.' (Appx. 10-11) (emphasis added).

The Revised Policy makes both *quantitative* and *qualitative* material changes to the definition of "cause." (Appx. 282.) It expands the *number* of grounds that can justify termination of a faculty member and adopts wholly new *types* of grounds for dismissal that essentially constitute whistle blowing. (Appx. 283.) Indeed, the *grounds* for dismissal in the Revised Policy are limited only by the imagination of the administrator, setting *a far lower* standard for termination of a faculty member than in the Original Policy. (Appx. 11.) By including new *types* of "grounds" for dismissal, the Revised Policy makes highly significant 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. (Appx. 11.)

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." (Appx. 10.) Thus, while the [5] Original Policy had narrowly defined bases for termination, the Revised Policy's language permits termination for virtually any reason that can be imagined by an administrator. (Appx. 9-11.) This significant alteration in the Revised Policy swallows the old "cause" definition in the Original Policy whole. (Appx. 284.)

ARGUMENT

I. REHEARING *EN BANC* SHOULD BE GRANTED BECAUSE THE PANEL DECISION CONFLICTS WITH THIS COURT'S PRIOR PRECEDENT.

The panel decision to affirm the dismissal of Appellants' Complaint for lack of standing conflicts with decisions of this circuit and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions. Specifically, the panel decision to affirm conflicts with *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 687 F.3d 1076, 1081 (8th Cir. 2012) and *N. Dakota State Univ. v. United States*, 255 F.3d 599, 605 (8th Cir. 2001).

Appellants' Complaint states a justiciable controversy pursuant to controlling circuit precedent, alleging that Appellants 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 v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In determining whether sufficient facts have been alleged for a declaratory judgment, the court looks to "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, [6] between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maytag*, 687 F.3d at 1081 (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). *See also Medimmune,*

Inc. v. Genentech, Inc., 549 U.S. 118, 126-27 (2007) (same standard).

The Board's unilateral modifications of Appellants' contracts via adoption of the Revised Policy, along with the Board's admitted retroactive application of the unilateral modifications against Appellants, is a concrete injury and violation of Appellants' constitutional rights. This injury has already occurred without the need for any further action to be taken. Critically, when Appellants were hired and then tenured, Appellants' tenure contracts did not merely encompass the right to termination for cause, no matter the meaning of the term – as the Board baldly contends. Rather, those contracts included the right to be terminated for cause ***only as specified in the agreement entered into by the parties at the time***. The Board's contention that it can change the definition of the most material term in Appellants' employment contracts at its discretion without any injury occurring to Appellants is not the law and has never been the law. *See Medimmune*, 549 U.S. at 128-29 (recognizing that standing under Article III and the Declaratory Judgment does not require "a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

[7] In *Maytag*, the employer sought a declaration regarding its rights under a labor contract *prior* to taking *any* action on that contract that might result in a breach that harmed the counter-parties and subjected the employer to liability for unilaterally modifying retirees' health care benefits. *Maytag*, 687 F.3d at

1080-81. 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 that modification of the contract was an issue, and that the injury the employer alleged was hypothetical. *Id.* at 1081. The trial court repeatedly rejected the union's standing challenge, and this court affirmed, 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 other words, the employer in *Maytag* did not have to actually alter the benefits—potentially breaching the contract—for standing to exist. *Id.* Instead, the parties could litigate before taking *any* action that might constitute a unilateral modification and breach of the collective bargaining agreement.

The reasoning and application of Article III standing pursuant to the Declaratory Judgment Act by the court in *Maytag* is consistent with the Supreme Court's standing jurisprudence. As the Supreme Court stated in *Medimmune*, when considering a declaratory judgment concerning a patent's validity and enforceability, [8] "[t]he rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights **finds no support in Article III**." 549 U.S. at 134.

As such, *Maytag* clearly controls the outcome in this case. Here, the Board has *already* acted; it has

already unilaterally modified Appellants' employment contracts, altering Appellants' contractual and Constitutional rights for the duration of their relationship with the University of Arkansas System. In *Maytag*, however, the employer had not even acted yet. If the claims the employer brought in *Maytag* were ripe in the face of the union's standing challenge – again, *when no action had been taken yet* by either the employer or union – which they were, then Appellants' claims here *must* be ripe as a matter of law because the Board's action that has caused Appellants' injuries *has happened already* and is not dependent on anything else occurring. As in *Maytag*, the parties have a bona fide dispute over whether the Board's unilateral modifications to Appellants' employment contracts violate the Contracts Clause, Due Process Clause, or 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 Board and Appellants to carry out their business while also ensuring that Appellants' contractual and Constitutional rights are protected.

[9] In addition, the concreteness and immediacy of the injury suffered by Appellants is demonstrated by the fact that tenure is a vested and constitutionally protected property interest in this circuit. In *N. Dakota State Univ.*, 255 F.3d at 605, this court held that a tenured professor at a state institution not only has a constitutional right to procedural due process, but also has "a substantive due process right to be free from discharge for reasons that are 'arbitrary and capricious,'

or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact." *Id.* As such, at the moment that the Board unilaterally changed the Original Policy without Appellants' consent, and applied the wholesale changes of the Revised Policy retroactively, Appellants were injured because their substantive due process rights were violated under the current precedent of this court. Appellant's petition should be granted, and rehearing *en banc* should be ordered.

II. REHEARING *EN BANC* SHOULD BE ORDERED BECAUSE THIS MATTER INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE.

Appellants' petition should be granted because this proceeding involves one or more questions of exceptional importance. Specifically, the panel decision conflicts with other authoritative decisions from the Seventh and Fifth Circuit Courts of Appeal – *Elliott v. Board of School Trustees of Madison Consolidated Schools*, [10] 876 F.3d 926 (7th Cir. 2017) and *Speech First, Inc. v. Fenves*, No. 19-50529 (5th Cir. Oct. 28, 2020), *as revised* (Oct. 30, 2020).

Without any discussion of *Elliot*, this court affirmed the district court's findings. *Elliott*, however, demonstrates Appellants' right to pursue their alleged claim under the Contacts Clause. 876 F.3d 926, 934-35 (7th Cir. 2017). In *Elliott*, Indiana enacted an amendment to its tenure law that cut back the rights of

tenured teachers during layoffs, which substantially impaired their contractual tenure rights. *Id.* Mr. Elliott was fired under the new law, but *critically* the court's decision was based on the *contract modification itself,* ***not*** the firing. *Id.* The court explained that Mr. Elliott's tenure rights became enforceable *the year Elliott earned tenure* and a decrease in job security after that point in time necessarily impairs his rights under his contract. *Id.* The court held that this change to the teachers' tenure rights, by itself, violated the Contracts Clause. *Id.*

The facts of *Elliott* are identical to those in this case. The Revised Policy modifies Appellants' tenure rights by dramatically altering the previous "cause" standard like the revision in *Elliot* modified Mr. Elliot's tenure rights. *Elliott* establishes that such a modification *per se* violates the Contracts Clause, which conflicts with the panel decision here to affirm the district court's ruling. This makes this proceeding one of exceptional importance because the citizens of the Eighth Circuit should not have fewer constitutional protections than the citizens of the [11] Seventh Circuit. Appellants' concrete and tangible injury, which flows from the Board's violation of the Contracts Clause like in *Elliot*, demonstrates that Appellants have standing and requires the granting of this petition and the reversal of the panel's decision to affirm the district court.

Likewise, the recent opinion by Judge Edith Jones in *Speech First, Inc. v. Fenves*, No. 19-50529 (5th Cir. Oct. 28, 2020), *as revised* (Oct. 30, 2020), which was

submitted to the panel pursuant to Federal Rule of Appellate Procedure 28(j), provides support for Appellants' request for rehearing *en banc.* In *Speech First*, 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." *Id.* at pp. 1-3. A student organization sued because of the chilling effects of the new policies, but the trial court found the students lacked standing to challenge the policies. *Id.*

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.* at p. 8. Because their views did not mirror others' views, their speech could be deemed "harassment," "rude," "uncivil," or [12] "offensive," as defined in the University's policies, even before they engaged in any conduct. *Id.* at p. 9. The court reasoned that "[i]t is at least likely . . . that [Appellant]-members at the University have an intention to engage in a certain course of conduct, namely political speech." *Id.* at p. 9. The court, therefore, 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 p. 1.

The Revised Policy's sweeping changes on how speech must be conducted by Appellants is almost identical to the polices in *Speech First.* Appellants' Complaint avers that Appellants want to discuss "matters of public concern" – the term recognized as the core of constitutionally protected speech by *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Indeed, some of the specific and the general descriptions of the topics that the *Speech First* Plaintiffs intended to discuss – "matters such as politics, race, religion, gender identity, abortion, gun rights, immigration, foreign affairs, and countless other sensitive and controversial topics," *Speech First* at p.18 – unquestionably mirror those described in Appellants' Complaint, which the class representatives cover in their classes, scholarship, and service.

[13] Like the policies in *Speech First*, the Board, through the Revised Policy, limits and infringes Appellants' First Amendment rights by *only now* limiting faculty tenure protections to "scholarship," "the subject matter of their assigned teaching duties," and "employment related service." (Appx. 55.) The ability of a faculty member to speak openly and freely in the various settings concerning controversial issues, topics, and ideas, as well as politics, political decisions, and the associated policy implications, without fear of termination is the very essence of what is protected by the

First Amendment. (Appx. 26.) U.S. Const. amend I. This was fully protected under the Original Policy but no longer protected at all under the Revised Policy.

To elaborate, by specifically limiting all faculty members' free speech and academic freedom in the Revised Policy to *only* internal matters the Board deems appropriate, Appellants are no longer protected when engaging in a variety of activities, including academic lectures, authoring newspaper articles, and commenting on legal and political issues in other settings outside the university. Such "public" service – as opposed to "employment related" services – is a fundamental component of a professor's job responsibilities and provides important societal benefits. Yet, by design, public services were removed from the definition of protected activities in the Revised Policy. *Id.* "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." [14] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). This chilling effect caused by the Revised Policy is a limitation on and violation of Appellants' First Amendment protections – a violation that is causing injury right now. (Appx. 25.)

What's more, the infringement of the Appellants' First Amendment rights is inextricably linked with the violations of the Contracts and Substantive Due Process Clauses. Appellee's attempt to use and multiply vague terms to define what "cause" means specifically results in a deliberate infringement of Appellants' First Amendment rights because the substance of Appellants' exercise of their responsibilities as faculty

members *is speech*. That is, in addition to research which results in publication (a form of speech), Appellants' contracts stipulate that a significant proportion of their duties involve teaching, which itself is a protected form of speech. Furthermore, Appellants' responsibilities to participate in university governance on leadership teams and committees is accomplished *through speech*. Hence, the *purpose and intent* of the Revised Policy, which is also a violation of Appellants' contract and other constitutional rights on its face, *is to infringe upon the First Amendment rights* of Appellants by threatening termination through the proliferation of new vague terms for "cause."

In short, as tenured professors with academic freedom, the Revised Policy's chilling effect on Appellants' free-speech rights is of greater harm here than in *Speech First* because the injury and harm not only impacts Appellants but also [15] deprives students of exposure to contrarian views, undermining the maintenance of the free exchange of ideas in the first instance.

The assurances provided by the university in *Speech First*—namely, that expressions of opinion would be tolerated so long as they do not violate state or federal law *or university* rules—provided no comfort at all to the Fifth Circuit. The Board Policy here should not provide this court with any comfort either, as the Revised Policy mirrors that in *Speech First*: "Pursuant to procedures set out herein or in other University or campus policies, a faculty member may be disciplined or *dismissed for cause on grounds including, but not*

limited to . . . (12) *violation of University policy . . .* ". (Appx. 86-87) (emphasis added).

Accordingly, this proceeding is one of exceptional importance because the Revised Policy's attack on speech is almost *identical* in all relevant respects to the university's policies in *Speech First*. Thus, if the students in *Speech First* have standing, Appellants have standing here, and their petition should be granted.

III. CONCLUSION.

For the foregoing reasons, this court should grant Appellants' Petition and order rehearing *en banc* of the panel decision to affirm the district court's dismissal of Appellants' Complaint.

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[17] CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f), 32(g), and 35(b)(2)(A), I hereby certify that the textual portion of the foregoing Petition contains 3,504 words as determined by the word counting feature of Microsoft Word 365 and consists of no more than 15 double-spaced pages in 14 point font.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Petition have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

/s/ Joseph W. Price II
Joseph W. Price II

Attorney for Appellants

Date: December 8, 2020

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[18] CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2020, I electronically filed the foregoing Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I also hereby certify that I served a copy of the foregoing Petition for Rehearing *En Banc*, via email and United States mail, postage prepaid, on the following:

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