No. 20-1698

In The
Supreme Court of the United States

PHILIP PALADE, GREGORY BORSE,
AND J. THOMAS SULLIVAN,

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

For the twelfth time in the last half-century, the Board of Trustees of the University of Arkansas amended its policy on promotion and tenure pursuant to a clause that reserves the Board's right to amend the policy at any time. The revised policy, like previous versions, expressly protects academic freedom and free speech, including outside speech "as a citizen." Petitioners sued for an injunction requiring the Board to reinstate the previous version of the policy, notwithstanding the absence of adverse action under the revised policy or a substantial threat of such action. The question presented is:

Whether Petitioners have asserted justiciable claims under the doctrines of standing and ripeness.

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INTRODUCTION

Petitioners seek review of an unpublished, summary affirmance of a district court's dismissal without prejudice under the doctrines of standing and ripeness. The lower courts' judgment reflects a routine, fact-bound application of this Court's settled precedents on Article III, and there is no issue of national importance that warrants further review. Nor is there a circuit split on what the justiciability doctrines require or how they should be applied to the claims at issue here.

This litigation arises from the events of March 2018, when the Board of Trustees of the University of Arkansas amended its policy on tenure, promotion, and post-tenure review for the twelfth time since 1962. Compared to the previous version of the policy, which was adopted in 2001, the most recent version contains a longer list of examples of "cause" for dismissal or disciplinary action. The revised policy also contains more detailed requirements for faculty evaluations and post-tenure review.

The petitioner-plaintiffs, each of whom is a tenured professor at an institution within the University of Arkansas System, brought a class action to compel the Board to reinstate the previous version of the policy. But their constitutional claims are based on speculation about what administrators *might* do in the future, not credible threats of an impending injury. Petitioners have not alleged that they have been subjected to discipline or threatened with adverse action under the revised policy. Nor have they alleged

that they intend to engage in expressive activity that is prohibited by the revised policy but allowed by the previous version or protected by the First Amendment. Given the revised policy's explicit protections for free expression and academic freedom, Petitioners' vague and conclusory allegations of self-censorship do not demonstrate a justiciable controversy under a long line of cases requiring that an alleged "chill" be objectively reasonable. This Court should deny the petition.

STATEMENT OF THE CASE

Board of Trustees Policy 405.1

Since 1962, the Board of Trustees of the University of Arkansas has required the tenure-granting campuses within the University of Arkansas System to follow certain guidelines pertaining to faculty promotions, tenure, and post-tenure review. ECF 4-3. The Board has subsequently amended the policy, denominated as Policy 405.1, twelve times. ECF 4-1, p. 20. The most recent versions of the policy have included an express recognition of the Board's right to amend "any portion" of the policy "at any time in the future." ECF 4-5, ECF 4-6, ECF 4-7. Thus, faculty members have always been on notice that the policy might be amended.

The Board has regularly exercised its reserved right to amend the policy. For instance, from 1962 to 1989, Policy 405.1 stated, without elaboration, that tenured and tenure-track faculty members could be

dismissed for "adequate cause." ECF 4-3, p. 3. The term "cause" was left undefined. The Board eventually amended the policy in 1989 to define "cause" and provide a non-exhaustive list of examples. The 1989 definition stated that "cause" referred to

> 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; examples of such conduct include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty, and moral turpitude.

ECF 4-6, p. 3.[1] The Board amended the policy several more times from 1989 to 2001. ECF 4-7, p. 15.

The March 2018 Revisions

Performance and Conduct Standards

The Board most recently amended Policy 405.1 on March 29, 2018.[2] The revised policy states that "cause"

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[1] In addition to dismissal for cause, tenure ceases to exist due to a *bona fide* financial exigency, reduction or elimination of programs, retirement, or resignation. ECF 4-7, p. 2.

[2] Petitioners erroneously contend (Pet. 10) that the revised policy did not become effective until July 1, 2019. But the policy itself shows that only one aspect of the revised policy was delayed until July 2019. Specifically, Section V.A.9 of the revised policy stated that the provisions regarding annual reviews, remediation plans, and dismissal for repeated periods of unsatisfactory performance were suspended until July 1, 2019. ECF 4-1, p. 19. In a separate provision, Section III postponed the requirement that promotions to the rank of associate professor coincide with the granting of tenure until July 1, 2018. ECF 4-1, p. 7. The other

is 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 a basis for disciplinary action."[3] The definition is followed by a list of examples that, like the previous version, are non-exhaustive (Pet. 11-12). The examples address repeated periods of unsatisfactory performance, significant workplace disruptions, theft, discrimination, insubordination, plagiarism, exploitation, job abandonment, and other situations that no employer should be required to tolerate. In the University's view, the standards are consistent with

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changes became effective immediately upon adoption by the Board of Trustees. Thus, Petitioners lived under the revised policy's definition of "cause" for 14 months prior to filing suit.

[3] The University has interpreted the quoted phrase as referring to the balance of the remaining paragraph, which consists of twelve examples of cause. The phrase is not a catch-all provision that encompasses any conceivable conduct, for it would have made no sense for the Board to have gone to the trouble of listing the examples under such an expansive interpretation. This "narrowing construction" of the policy constrains its scope. *See Virginia v. Am. Booksellers Ass'n, Inc*., 585 U.S. 383, 397 (1988) (noting that a statute must be upheld in response to a facial challenge under the First Amendment if it is readily susceptible to a "narrowing construction").

professional norms[4] and numerous cases.[5] And, contrary to Petitioners' hyperbolic assertions (Pet. 13-15), none of them prohibit faculty members from objecting to bureaucratic misdeeds, questioning administrative behavior, or lacking tact.

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[4] As the American Association of University Professors has recognized, faculty members obviously may be held accountable for "professional misconduct," "malfeasance," "efforts to obstruct the ability of colleagues to carry out their normal functions," "personal attacks," and "violat[ing] ethical standards." ECF 4-8, p. 2. Other commentators agree that a university can (and should) take adverse action with respect to such conduct. *See*, *e.g.*, William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* 57 AAUP Bulletin 328 (1971) (acknowledging that universities have the prerogative of determining what constitutes "adequate cause" and that "there is not now and has never been a claim that tenure insulates any faculty member from a fair accounting of his professional responsibilities to the institution, which counts upon his service"); William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* § 6.6.2, at 671 (6th ed. 2019) ("Since incompetence, insubordination, immorality, lack of collegiality, and unethical conduct are the most commonly asserted grounds for dismissals for cause, institutions may wish to specifically include them in their dismissal policies.").

[5] *See*, *e.g.*, *Schrier v. University of Colorado*, 427 F.3d 1253 (10th Cir. 2005) (upholding a university's demotion of a faculty member who, while serving as a department chair, engaged in speech that impaired harmony among co-workers and detrimentally impacted close working relationships); *Smith v. Kent State Univ.*, 696 F.2d 476 (6th Cir. 1983) (holding that a public university had just cause to terminate a faculty member for persistently flouting the authority of the department's chairperson and refusing to meet scheduled classes); *Roseman v. Indiana Univ. of Penn.*, 520 F.2d 1364 (3d Cir. 1975) (holding that a public university's non-renewal decision did not violate a professor's First Amendment rights after he repeatedly made unsupported allegations against a colleague).

The revised policy also provides greater clarity to faculty members and administrators. As the former Dean of the University of Arkansas at Little Rock Bowen School of Law stated in an October 2017 comment regarding an earlier draft of the revised policy, "[l]isting examples of cause provides faculty with clearer guidance and mitigates the possibility of abuse[,]" and "[s]imilar grounds have been upheld by courts in cases going back several decades even under less specific, more general statutes or policies." ECF 4-11.[6]

In addition to clarifying the University's conduct standards, the revised policy addresses performance expectations. Section V.A.9, which is referenced in the definition of "cause," provides that faculty members who receive an "overall unsatisfactory" performance rating must be placed on a remediation plan. The section further states that:

> If, in the next annual review following an **overall** unsatisfactory performance rating, the faculty member fails either to attain an **overall** satisfactory performance rating or to demonstrate meaningful progress in remediating the overall performance deficiencies, the faculty member may be issued a notice of

[6] The Court has upheld Congress's use of the phrase "such cause as will promote the efficiency of the service" as a basis for terminating tenured federal employees. *Arnett v. Kennedy*, 416 U.S. 134 (1974). Lower courts have applied *Arnett* to universities' tenure policies. *See*, *e.g.*, *Garrett v. Matthews*, 625 F.2d 658 (5th Cir. 1980) (upholding a public university's bare-bones standard of dismissal for "adequate cause").

> dismissal on twelve months' notice as provided for in this policy. . . .

ECF 4-1, pp. 1-2, 19 (emphasis in original). The revised policy thus reflects the view, implicit in previous versions, that unsatisfactory performance should not be permitted to linger indefinitely.[7]

Academic Freedom and Free Expression

The revised policy also protects academic freedom and free expression. ECF 4-1, pp. 2, 11-12. Section IV.A.14's introductory paragraph states that "[n]o faculty member shall be dismissed, or otherwise disciplined, or denied reappointment in violation of the following principles of academic freedom. . . ." ECF 4-1, p. 11. A faculty member's expressions of opinions in matters related to scholarship, teaching, and service activities—"however vehemently expressed and however controversial such opinions may be"—cannot serve as cause for dismissal or disciplinary action. *Id.* at 12. Moreover, "the threat of dismissal will not be

[7] For violations of the conduct standards, the procedural steps that must precede a dismissal for cause must still include the following: (1) commencement of the dismissal process through notice provided by the department chairperson or dean; (2) approval of the action by the chief executive of the campus; (3) a hearing before a committee; (4) a decision by the President of the University of Arkansas System; and (5) an appeal to the Board of Trustees. Dismissals for repeated periods of unsatisfactory performance must follow the relevant procedures in Policy 405.1, in addition to any campus-level policies that are consistent with the Board policy.

used to restrain faculty members in their exercise of academic freedom or constitutional rights." *Id.*

The introduction is followed by three specific areas of protection. *First*, faculty members are "entitled to full freedom in research and in the publication of results." *Id*. *Second*, faculty members are "entitled to freedom in the classroom in discussing the subject of the course. . . ." *Id. Third*, faculty members are "free from institutional censorship or discipline" in "[s]peaking or writing as a citizen." *Id*.

The Board's expressions of its commitment to academic freedom and free expression do not end there. The revised policy's definition of "cause" concludes with the statement that "[n]othing in this provision is intended to inhibit expression that is protected under principles of academic freedom, or state[8] or federal law." *Id*. at 2. This unequivocal statement makes clear that the revised policy's provision on "cause" for dismissal or disciplinary action yields to the First Amendment and to the policy's section on academic freedom in the event of a conflict or ambiguous situation.

Petitioners' Lawsuit

Petitioners filed a class action for declaratory and injunctive relief in May 2019, asserting federal claims

[8] The revised policy's reference to state law encompasses the protections afforded by the Arkansas Whistle-Blower Act, Ark. Code Ann. § 21-1-601, the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-101, and numerous other enactments.

under the Contracts Clause, Due Process Clause, and the First Amendment.[9] They argued that a university's tenure policy is tantamount to a contract with tenure-track faculty members; that the policy's express right-to-amend clause should be disregarded; and that remaining contractual terms cannot be changed for the duration of each faculty member's career. In other words, Petitioners contend that each faculty member's relationship with the university can only be governed by the policy that existed at the time that he or she accepted a tenure-track appointment. The Board's revisions to the provision on "cause" for dismissal or disciplinary action, Petitioners assert, disturb their "reasonable expectations of continuous employment." ECF 1, p. 18, ¶ 71. And the new policy has allegedly caused them to be "extremely cautious of what is said in class" and created a "chilling effect." ECF 1, p. 25, ¶ 122.

The District Court determined that it lacked jurisdiction under Article III, ruling 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." Appx. 12-A (cleaned up). Similarly, the complaint's allegations regarding "the University's possible use of the Revised Policy to discipline or

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[9] Petitioners abandoned their state-law claims in recognition of the Eleventh Amendment's jurisdictional bar. ECF 6, p. 10, n.6; Appx. 8-A. On June 2, 2020, they filed a class action in state court based on similar theories. *See Palade v. Fryar*, Pulaski Co. Cir. Ct., No. 60CV-20-3218. That case is pending.

terminate a faculty member for reasons not covered or beyond those allowed in the [previous] policy are speculative." Appx. 11-A. Perhaps the conduct at issue in a future disciplinary proceeding would have been equally sanctionable under the previous version of the policy. At this juncture, judicial review is premature because "no Plaintiff has alleged that he has faced disciplinary action, threatened action[,] or termination under the Revised Policy." Appx. 11-A. Therefore, the District Court dismissed Petitioners' claims without prejudice to refiling.

On appeal, a panel of the Eighth Circuit summarily affirmed under the local rule that governs dispositions when an opinion would have no precedential value. *See Palade v. Bd. of Trus. of the University of Arkansas System*, 830 Fed. Appx. 171 (citing 8th Cir. R. 47B); Appx. 2-A. The full court denied the petition for rehearing *en banc*, and no judge dissented. Appx. 15-A.

REASONS FOR DENYING THE WRIT

I. The Eighth Circuit's decision that the Contracts Clause claim is nonjusticiable does not warrant further review.

The necessity of a justiciable case under Article III is well settled. *See* U.S. Const., Art. III, § 2 (requiring a "case" or "controversy"). The doctrines of standing and ripeness originate from "the same Article III limitation," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149,

157 n.5 (2014), and their applicability does not depend on the plaintiff's preferred remedy. *California v. Texas*, 593 U.S. ___, No. 19-840, Slip. Op. at 8 (S. Ct. June 17, 2021) ("[J]ust like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement."); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) ("The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights.").

Under the standing doctrine, an injury sufficient to satisfy Article III must be "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Similarly, under the ripeness doctrine, an alleged injury cannot be the subject of judicial review if 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). When standing and ripeness "boil down to the same question," the terms can generally be used interchangeably. *Susan B. Anthony List*, 573 U.S. at 157 n.5; *see also Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) (observing a "close affinity" between standing and ripeness).

Standing and ripeness must be present at the inception of a lawsuit and demonstrated "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. At the motion-to-dismiss stage, a plaintiff can

show that his claims are justiciable with "factual content" that allows a court to draw a "reasonable inference" in his favor on the pertinent issues. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Under Rule 8 of the Federal Rules of Civil Procedure, "labels and conclusions" and "formulaic recitations" of the required elements "will not do." *Id*.[10] In addition to the non-conclusory allegations in the complaint, a court may also consider the "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss," such as "documents incorporated into the complaint by reference" and "matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues*

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[10] *Twombly* and *Iqbal* established a new pleading regime under Rule 8, which Petitioners (Pet. 29) fail to acknowledge. The Court's 1992 decision in *Lujan v. Defenders of Wildlife* predated *Twombly* and *Iqbal*, and its understanding of the pleading standard (as opposed to the standing doctrine more generally) is obsolete. The *Lujan* Court quoted its earlier decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 880 (1990), for the proposition that courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. ("General allegations" are akin to the "conclusory" allegations discussed in *Twombly* and *Iqbal*). The Court's opinion in *Lujan v. National Wildlife Federation*, in turn, cited *Conley v. Gibson*, 335 U.S. 41, 45 (1957), for the same proposition. But page 45 of the *Conley* opinion was the central target of the Court's criticism in *Twombly*. *See Twombly*, 550 U.S. at 563 (noting that "no set of facts" standard on page 45 of the *Conley* opinion has been "questioned, criticized, and explained away long enough" and is "best forgotten"). Thus, the now-rejected passage in *Conley* gave rise to the "general allegations" language in *Lujan v. National Wildlife Federation* and *Lujan v. Defenders of Wildlife Federation*.

& Rights, Ltd., 551 U.S. 308, 322 (2007) (citing 5B Charles A. Wright et al., *Federal Practice & Procedure* § 1357 (3d ed. 2004 and Supp. 2007)).

A. Petitioners failed to allege an actual or imminent injury to their tenured positions.

The lower courts' disposition of Petitioners' Contracts Clause claim was based on a straightforward application of this Court's precedents on the necessity of an injury in fact. Petitioners have not alleged any facts suggesting that their tenured status is in jeopardy or that their alleged contractual right to continuous employment is in doubt. They have not, for example, alleged that they have been threatened with disciplinary action under the revised policy. Nor have Petitioners demonstrated that they intend to engage in any conduct that is remotely sanctionable under it.

Even if the University takes disciplinary action against Petitioners in the future—something that may never occur—the revisions to the policy cannot be a cause of any injury unless the 2018 amendments are what make the adverse action newly permissible. *California v. Texas*, 593 U.S. ___, Slip Op. at 15 (noting that the plaintiff's injury must be "fairly traceable" to the "allegedly unlawful" provision at issue). Put differently, Petitioners have not made any non-conclusory allegations regarding their plans to engage in conduct that would plausibly be *prohibited* by the revised policy but *allowed* by an earlier

version.[11] As the District Court observed, the changed definitional language "may or may not be applied in the future in a manner different from the original policy definition." Appx. 11-A. At this point in time, there is no impending injury.

B. There is no circuit split on how the justiciability doctrines should be applied to Contracts Clause claims.

The Eighth Circuit's summary affirmance does not create a conflict among the circuit courts of appeals on how the doctrines of standing and ripeness should be applied to claims under the Contracts Clause. Petitioners primarily rely (Pet. 21-23) on *Elliott v. Board of School Trustees of Madison*, 876 F.3d 926 (7th Cir. 2017), where the court held that an Indiana law was invalid under the Contracts Clause because it eliminated teachers' contractual right to be retained over non-tenured teachers during layoffs. But *Elliott* did not address standing or ripeness, and the Seventh Circuit likely assumed (without discussion) that standing existed because the plaintiff suffered an actual injury: he was *terminated* under circumstances that would have been impermissible under the previous

[11] Petitioner Sullivan accepted his tenure-track appointment in 1988 (ECF 1, p. 5, ¶ 5.c), which was during the time that the tenure policy referred to "adequate cause" with no elaboration or examples. Therefore, under Petitioners' frozen-contract theory, Sullivan's tenure rights have always been governed by the bare-bones version of the policy that existed prior to 1989, rather than a subsequent version.

agreement. In this case, however, there is no hint that Petitioners are at risk of being terminated (or even disciplined) under any version of Policy 405.1.

Petitioners' only other case on this point (Pet. 24-26) is the Eighth Circuit's decision in *Maytag Corp. v. International Union*, 687 F.3d 1076 (8th Cir. 2012). But *Maytag* is likewise unhelpful. As an initial matter, this Court's review is unnecessary to resolve an alleged intra-circuit conflict. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1952); *cf.* S. Ct. R. 10(a) (referring to conflicts with "another" court of appeals). "[S]uch differences of view are deemed an intramural matter to be resolved by the court of appeals itself." John M. Harlan, *Manning the Dikes*, 13 Rec. Ass'n B. N.Y. City 541, 552 (1958).

What is more, *Maytag* did not involve the Contracts Clause, and the opinion in *Maytag* is not inconsistent with the Eighth Circuit's summary disposition of this case. The labor union in *Maytag* refused to bargain over the issue of retiree health benefits, and Whirlpool (which had recently acquired Maytag) faced imminent litigation and disclosure obligations to retirees under ERISA. *Id.* at 1082-83. Whirlpool thus had an immediate need to obtain a declaration of its rights under ERISA so that it could proceed with its business plans and make the required disclosures. No such impending harm exists in this case, however.

III. The Eighth Circuit's decision that the First Amendment claim is nonjusticiable does not warrant further review.

A. An allegation of a "chilling effect" is insufficient to confer standing.

Petitioners argue (Pet. 17-20) that they suffered an actual injury the moment the Board adopted the revised policy due to its alleged chilling effect on protected speech. But an allegation that a plaintiff's speech has been chilled by the mere existence of a law or policy, standing alone, has never been sufficient to confer standing under this Court's jurisprudence.

In *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), for example, the Court rejected federal employees' First Amendment challenge to the Hatch Act, which prohibited them from taking "any active part" in a political campaign. *Id.* at 75. The Court struggled to discern any specific expressions that had been chilled, and it further concluded that the claim was nonjusticiable because "[n]o threat of interference" with the plaintiffs' constitutional rights "appear[ed] beyond that implied by the existence of the law and regulation." *Id*. at 91.

Similarly, in *Younger v. Harris*, 401 U.S. 37 (1971), two intervenors asserted a facial challenge to an allegedly overbroad and vague California law that prohibited certain acts of "syndicalism." They alleged that the mere existence of the statute inhibited them from peacefully advocating for socialism and teaching about the doctrines of Karl Marx. The Court held that,

whatever right the original plaintiff may have had to challenge the law following his arrest, the intervenors "[could] not share it with him." *Id.* at 42. If the intervenors had also been subjected to prosecution, "then a genuine controversy might be said to exist." *Id.* But the intervenors did not "claim that they had ever been threatened with prosecution, that a prosecution [was] likely, or even that a prosecution is remotely possible." *Id*. The intervenors' allegation that they felt "inhibited" was not "sufficient to bring equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution." *Id.* "[T]he existence of a 'chilling effect,' " the Court concluded, "even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* at 51.

In the following Term, the Court held in *Laird v. Tatum*, 408 U.S. 1 (1972), that the plaintiffs failed to present a justiciable controversy by complaining of a "chilling effect" on their exercise of their First Amendment rights by the mere existence of the Army's intelligence-gathering system. "Allegations of a subjective 'chill,' " the Court held, "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id*. at 13-14. The Court distinguished *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), on the grounds that the teachers who were plaintiffs in *Keyishian* "had been discharged from employment by the State, and [other teachers] were threatened with such discharge, because of their political acts and associations." *Laird*, 408 U.S. at 11.

The Court also distinguished *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), on the grounds that the petitioner in *Baird* had been "denied admission to the bar solely because of her refusal to answer a question regarding organizations with which she had been associated in the past." *Id.* In other words, the plaintiffs in these other cases experienced concrete injuries that went beyond a claim of "chilled" speech.

The Court distilled its jurisprudence into a three-part test in *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979): "When the plaintiff has alleged [1] an intention to engage in a course of conduct arguably affected with a constitutional interest, [2] but proscribed by a statute, and [3] there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 298. Under this test, the plaintiffs in *Babbitt* had standing to bring a facial challenge against some aspects of the challenged law but not others. The plaintiffs had standing to challenge a statutory provision that criminalized certain communications to consumers regarding agricultural products because they previously engaged in speech proscribed by the challenged law; they intended to engage in such expression in the future; and the State never disavowed its intention to invoke the provision against them. *Id*. at 303. In contrast, the plaintiffs' challenge to the law's impairment of their ability to access employer worksites for unionizing activity was nonjusticiable because it was "conjectural to anticipate that access [would] be denied" to locations

suitable for union activities. *Id.* at 304. "We can only hypothesize that such an event will come to pass," the Court observed. *Id*.

More recently, in *Susan B. Anthony List*, the Court held that a pro-life advocacy organization had standing to bring facial and as-applied challenges to an Ohio statute that prohibited false statements concerning candidates and their voting records during political campaigns. SBA issued a press release regarding its plan to publicize a congressman's support for the Affordable Care Act, and it sought to display a billboard that accused the congressman of supporting taxpayer-funded abortion. Under the *Babbitt* test, the Court held that SBA had standing to pursue its pre-enforcement First Amendment challenge to the statute.

First, SBA pleaded "specific statements" that it intended to make in future election cycles that resembled what it said in past years. 573 U.S. at 161. Because SBA's intended expressions concerned pure "political speech," it was "certainly affected with a constitutional interest." *Id.* at 162.

Second, SBA's political statements were arguably proscribed by the statute, as demonstrated by the fact that the Ohio Elections Commission previously found probable cause to believe that SBA violated the statute for making similar statements. There was "every reason to think that similar speech in the future [would] result in similar proceedings." *Id*. at 163.

Third, the threat of future enforcement of the statute was "substantial." *Id.* at 164. The fact that SBA was the subject of an enforcement proceeding in the previous election cycle was "good evidence" that the threat of future enforcement was not "chimerical." *Id.* The Court contrasted these circumstances with those in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013), where the plaintiffs' theory of standing was "substantially undermine[d]" by their failure to offer any evidence that their communications had been monitored under the challenged statute. Moreover, the Ohio Election Commission's enforcement proceedings were hardly a "rare occurrence"; it handled between twenty and eighty false-statement complaints per year. *Susan B. Anthony List*, 401 U.S. at 164-65. And the Commission never disavowed its intent to enforce the statute against SBA in response to similar statements in the future. *Id.* Indeed, the serious threat of enforcement resulted in perceptible acts of self-censorship: the owner of the billboard refused to display SBA's message after receiving a letter threatening Commission proceedings. *Id*. at 165. Finally, the Commission's enforcement powers were supplemented "by the additional threat of criminal prosecution." *Id*. at 166.

In conclusion, "[a]ll of the Supreme Court cases employing the concept of 'chilling effect' involve situations in which the plaintiff has unquestionably suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself." *United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375, 1378

(D.C. Cir. 1984) (Scalia, J.). This Court has consistently used the term "chilling effect" to describe "the *reason* why the government imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it." *Id*. Justice Scalia's observations apply with equal force to the Court's more recent jurisprudence on standing, which continues to require "contemporary enforcement" or a "substantial" threat of future enforcement. *California v. Texas*, 593 U.S. ___, Slip Op. at 6 (quoting *Susan B. Anthony List*, 573 U.S. at 164).

B. The judgment of dismissal without prejudice reflects a routine application of this Court's precedents.

In the proceedings below, the District Court cited *Babbitt*, referenced the three factors, and concluded that Petitioners' allegations "fail[ed] to establish that they were in danger of sustaining an injury as a result of the Revised Policy or that the perceived injury were both real and immediate." ECF 12, at 6-7. On appeal, the Eighth Circuit Court of Appeals summarily affirmed in an unpublished decision. Appx. 2-A. The lower courts thus viewed the justiciability inquiry as a straightforward application of the *Babbitt* test, as it most certainly was.

1. Under the first prong, the complaint contains no concrete allegations regarding a plaintiff's specific plans to make statements that are protected by the First Amendment. The allegation that Petitioners have been "extremely cautious" about what they say in class

or to colleagues (ECF 1, ¶ 95) does not mention any actual statements that they would like to make but have refrained from making. The other allegations are similarly cryptic about what kind of statements have gone unsaid.

2. Under the second prong, Petitioners have not plausibly alleged that their protected speech (whatever it might be) is prohibited by the revised policy. Their principal target—the revised policy's "pattern of detrimental conduct" provision—does not forbid constitutionally protected speech on its face; rather, it echoes settled jurisprudence on the limits of free expression in the workplace. *See*, *e.g.*, *Connick v. Myers*, 461 U.S. 138, 150-51 (1983) ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."); *Arnett*, 416 U.S. at 168 ("Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency."). These concepts apply with equal force to the academy, for "[w]hen the bulk of a professor's time goes over to fraternal warfare, students and the scholarly community alike suffer. . . ." *Webb v. Bd. of Trs. of Ball State Univ.*, 167 F.3d 1146, 1150 (7th Cir. 1999) (Easterbrook, J.).

To assuage any lingering concerns regarding the revised policy's scope, the section on "cause" concludes with an overriding promise that any speech protected by the First Amendment or the University's more

expansive policy on academic freedom will be permitted. This clause serves as an unequivocal disavowal of any intent to target constitutionally protected speech. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (considering a First Amendment savings clause as evidence of Congress's intention not to violate the First Amendment);[12] *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (suggesting that a statute would not have been facially invalid if the state courts had interpreted the statute as limited to unprotected speech).

In short, the revised tenure policy permits a wide range of expression. Whatever the nature of Petitioners' intended speech, they have not shown the requisite intention to bring themselves within the scope of the policy's prohibitions.

3. Finally, Petitioners failed to allege that they face a credible threat of enforcement under the third prong. Petitioners have not alleged that they have been disciplined or threatened with adverse action. Nor have they alleged that the University has a history of enforcing the policy against other persons who have engaged in constitutionally protected acts of expression. They have not even alleged that an administrator has discouraged them from making controversial statements or that they have ever sought clarification on whether an intended form of expression might be

[12] The cited statute, 18 U.S.C. § 2339B(i), provided that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States."

prohibited. And their appearance on cable television belies the notion that they have felt inhibited from criticizing the University.[13]

At most, Petitioners suggest that the revised policy could make it easier for future administrators to act in bad faith by concocting pretextual reasons for retaliating against faculty members who speak out on unspecified matters. But courts do not "assume the worst about those in the academic community," and a claimed "injury to academic freedom" premised on future acts of retaliation is "speculative." *Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990). In fact, the University has repeatedly made clear that it interprets a particular clause in the policy ("otherwise constitutes a basis for dismissal") as merely referring to the list of examples of "cause," and there is no basis for predicting that the University will take a strained, expansive view of other clauses while simultaneously disregarding the policy's unequivocal tolerance of free expression. Standing cannot rest on such a "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410-11.

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[13] Soon after the Board adopted the revised policy, Petitioners freely criticized University administrators on an episode of *Fox & Friends*. The clip is available at the following link: https://video.foxnews.com/v/6052448942001#sp=show-clips.

C. Different outcomes are attributable to different facts, not confusion over the correct legal standard.

The Eighth Circuit, like other courts of appeals, readily allows cases to go forward when the *Babbitt* factors support standing. In *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011), for example, the court found a credible threat of enforcement where the plaintiffs alleged that they wanted to engage in conduct that could reasonably have been viewed as illegal under the challenged election law; the plaintiffs' speech had previously given rise to at least one complaint under the law; and the plaintiffs' fear of enforcement did not rest on speculative notions of bad-faith conduct on the part of law-enforcement officials. *See also Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (finding that the relevant factors supported standing where authorities made clear that they would view the plaintiff's actions as unlawful under the challenged statute, sent "testers" to target noncompliant businesses, and pursued successful enforcement actions against persons engaged in similar conduct).

Similarly, in Petitioners' principal case, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), the court found that a free-speech organization had standing to challenge a university policy that prohibited "verbal harassment." The Fifth Circuit methodically applied the three factors set forth in *Susan B. Anthony List* and *Babbitt* and concluded that the plaintiff satisfied each prong.

Under the first prong, the Fifth Circuit determined that the complaint alleged specific topics of their intended speech: illegal immigration, race, religion, abortion, gun rights, and support for Israel. This political speech was undoubtedly protected. *Id*. at 331.

The plaintiffs in *Speech First* satisfied the second prong by demonstrating that their intended speech was proscribed by the university's policies. On its face, the ban on "rude" and "uncivil" speech arguably encompassed the plaintiffs' intended speech on controversial topics. *Id.* at 332. And the fact that the university amended the definitions during the pendency of the appeal showed that the university understood its policy to cover the plaintiffs' intended areas of speech; otherwise, it would not have changed the policy at that time. *Id.* Moreover, the policy in *Speech First* did not clearly state that students could be disciplined only for speech falling outside the protection of the First Amendment. *Id.* at 337.

Under the third prong, the plaintiff demonstrated that the challenged policy had been enforced "countless times" with respect to "hundreds of events" over a few years. *Id*. at 335. And two of the largest numbers of reported complaints related to affirmative action and Israel—two of the specific topics that the plaintiffs intended to speak upon. *Id*. Moreover, the policy's explicit invitation of anonymous reports "carried particular overtones of intimidation to students whose views [were] outside the mainstream." *Id*. at 338.

The facts that supported standing in *281 Care Committee*, *Telescope Media Group*, and *Speech First* are not present in this case, so the difference in outcomes is hardly surprising. The conduct standards in the revised tenure policy do not restrict constitutionally protected speech, and they have never given rise to threats of adverse action against anyone. Indeed, Petitioners have now lived under the revised policy for over three years, and they have been unable to identify any perceptible instances in which they have refrained from exercising their First Amendment rights. And even if Petitioners have somehow censored themselves—a notion that is belied by their outspokenness after the revised policy became effective—Petitioners "cannot manufacture standing by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

IV. This justiciability case is a poor vehicle to address alleged problems with free speech on campus.

Petitioners suggest (Pet. 27) that this case should be used to address the issues surrounding free speech on university campuses. But an unpublished decision on a threshold question of justiciability is not a good vehicle for this Court to consider broad social questions. Nor does the lower courts' judgment—a dismissal without prejudice to refiling—inoculate

administrators from judicial review in a future, ripe lawsuit brought by individuals with standing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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