CV-21-624

In the Arkansas Supreme Court

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

Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES OF THE
UNIVERSITY OF ARKANSAS *ET AL.,*

Defendants-Appellees.

On Appeal from the Pulaski County Circuit Court (6th Judicial Circuit)
Hon. Mackie M. Pierce, Circuit Judge (17th Division)
Case No. 60CV-20-3218

APPELLEES' BRIEF

David A. Curran (2003031)
Associate General Counsel
University of Arkansas System
2404 N. University Ave.
Little Rock, AR 72207-3608
Telephone: (501) 686-2536
dcurran@uasys.edu

Counsel for Appellees

TABLE OF CONTENTS

POINTS ON APPEAL

I. The professors' claims are nonjusticiable.

- *Baptist Health Systems v. Rutledge*, 2016 Ark. 121, 488 S.W.3d 507
- *McLane Southern, Inc. v. Arkansas Tobacco Control Bd.*, 2010 Ark. 498, 375 S.W.3d 628

II. The professors are precluded from relitigating the federal judiciary's conclusion that they have not suffered an injury in fact and do not face an imminent threat of future harm.

- *Matthews v. State*, 2015 Ark. App. 692, 477 S.W.3d 539
- *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987)

III. The professors have not stated facts that overcome sovereign immunity, but beyond that, their merits-related issues are not available for appellate review.

- *Temco Constr., LLC v. Gann*, 2013 Ark. 202, 427 S.W.3d 651
- *Ground Zero Constr. Inc. v. Walnut Creek, LLC*, 2012 Ark. 243, 417 S.W.3d 579

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Books and Treatises

Miscellaneous

STATEMENT OF THE CASE AND THE FACTS

Appellants' statement of the case and the facts omits important information about the history of the University's policy on tenure and promotion, its section on academic freedom, and the policy's express reservation of the Board's right to amend it. Appellants have also failed to address other important issues, such as J. Thomas Sullivan's retirement and the dismissal of Appellants' similar claims in federal court. For these reasons, the University submits this alternative statement under Supreme Court Rule 4-2(b).

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. (RP167). The Board has subsequently amended this policy, denominated as "Policy 405.1," twelve times. (RP162). The most recent versions have contained an express recognition of the Board's right to amend "any portion" of the policy "at any time in the future." (RP177); (RP195); (RP209); (RP226).

Policy 405.1's provision on "cause" for dismissal or other serious discipline has not remained static. From 1962 to 1989, the policy stated, without elaboration, that tenured and tenure-track faculty members could be dismissed for "adequate cause." (RP170); (RP179); (RP197). The Board eventually defined "cause" in the 1989 version, and it included a non-exhaustive list of examples. The policy 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." (RP211).

The March 2018 Revisions

The Board amended Policy 405.1 several more times from 1989 to 2001. (RP239). It most recently amended the policy on March 29, 2018.[1] (RP142). The revised policy states that "cause" is defined as "conduct that

[1] The professors erroneously contend that the revised policy did not become effective until July 1, 2019. Except for two provisions that are not relevant to this case, the changes became effective immediately.

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." The definition is followed by a list of examples that, like the previous version, are non-exhaustive. The examples address repeated periods of unsatisfactory performance, significant disruptions of the workplace, theft, discrimination, insubordination, plagiarism, exploitation, job abandonment, and other situations that are plainly grounds for serious disciplinary action (including termination) in any employment setting.

The grounds for dismissal are consistent with professional norms,[2] and they provide greater clarity to faculty members and administrators.

---

[2] As the American Association of University Professors has recognized, faculty members 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." (RP242). And the definitive treatise on the law of higher education recommends that universities include similar concepts in their dismissal policies. *See* William A. Kaplin and Barbara A. Lee, *The Law*

As a former dean of the UA 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." (RP244).

In addition to clarifying the University's conduct standards, the revised policy addresses performance expectations with greater particularity than the previous version. 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. (RP161). The section further states that, "[i]f, in the next annual

---

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.").

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 dismissal on twelve months' notice as provided for in this policy, and subject to the [extensive hearing procedures described in another section]." *Id.* The revised policy thus reinforces the notion, consistent with previous versions, that unsatisfactory performance should not be permitted to linger indefinitely.

Finally, the revised policy, like earlier versions, contains explicit protections for academic freedom and free expression. (RP153). 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 . . . ." *Id.* Subject to the provisions of Policy 405.1 and other applicable university policies, 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. (RP154). Moreover, "the threat of dismissal will not be 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. (RP154). *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 or federal law." *Id.* at 2. This unequivocal statement makes clear that, in the event of a conflict or ambiguous situation, the provision on "cause" yields to the revised policy's separate section on academic freedom, in addition to the First Amendment and Article II, Section 6, of the Arkansas Constitution.

The Professors' Federal and State Lawsuits

In May 2019, Philip Palade, J. Thomas Sullivan,[3] and Gregory Borse ("the professors") filed a class action for declaratory and injunctive relief in federal court, asserting claims under the Contracts Clause, Due Process Clause, the First Amendment, the Arkansas common law of contracts, and the Arkansas Constitution's Free Speech Clause. *See Palade v. Board of Trs. of Univ. of Ark.*, No. 4:19CV379-JM (E.D. Ark.). 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, the professors claimed that each faculty member's relationship with the university can only be governed by the policies that existed at

[3] Prof. Sullivan's retirement became effective on November 5, 2021. *See* Jaime Adame, "Tenure Policy Challenge Filed by UA System Professors Denied U.S. Supreme Court Review," *Arkansas Democrat-Gazette* (Oct. 4, 2021) (quoting Prof. Sullivan on his retirement). Therefore, his claims are moot.

the time that he or she accepted a tenure-track appointment as an entry-level professor.[4] The professors further alleged that the policy amendments have made them "cautious" about what they say.

The professors promptly dropped their state-law claims in recognition of the Eleventh Amendment's jurisdictional bar. Then, on March 16, 2020, the U.S. District Court for the Eastern District of Arkansas ("District Court") dismissed the professors' remaining claims under the justiciability doctrines of standing and ripeness. In addressing the free-speech claim, the District Court held 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." (RP387). Similarly, the District Court ruled that the professors'

[4] Prof. Sullivan's standing is further impacted by the fact that he accepted a tenure-track appointment in 1988 (RP9), which was during the time that the tenure policy referred to "adequate cause" with no elaboration or examples. The professors' theory presumably means that Prof. Sullivan's tenure rights have always been governed by the version of the policy that existed in 1988 rather than a subsequent version.

contract-related claims—which were based on "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 [previous] policy"—were "speculative." (RP386). 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." *Id.* Therefore, the District Court dismissed the professors' claims without prejudice to refiling. (RP389).

On appeal, a unanimous panel of the Eighth Circuit summarily affirmed. *See Palade v. Board of Trs. of the Univ. of Ark.*, 830 Fed. Appx. 171 (8th Cir. 2020) (RP392). The full court denied the professors' petition for rehearing *en banc*, and no judge dissented. (RP397). The professors then petitioned the U.S. Supreme Court for a writ of certiorari.

On June 2, 2020, while the appeal to the Eighth Circuit was just beginning, the professors filed the instant class action in the Pulaski County Circuit Court and reasserted the same state-law claims that they previously dropped. After the University filed an answer (R128) and a motion for judgment on the pleadings (RP79), the ordinary motion cycle

ensued. Thereafter, the state case sat dormant for many months while the proceedings in the Eighth Circuit unfolded.

The Pulaski County Circuit Court eventually convened a hearing on August 30, 2021, to hear arguments on the University's motion for judgment on the pleadings. In addition to revisiting the arguments in the briefs, the University's counsel reminded the Circuit Court that, soon after the Board adopted the revised policy, the professors were not "chilled" when they appeared on a cable television show for the purpose of criticizing the Board of Trustees before a national audience. (RT12); (RP139). The University's counsel also noted that Plaintiff Gregory Borse has posted hundreds of crude, partisan messages on his @GregoryBorse Twitter account, without incident, during the four years that the revised policy has been in effect. (RT11-RT12); (RT44-RT46). These undisputed facts highlighted the absence of allegations in the complaint showing that the revised policy has perceptibly injured the professors. (RT12).

On September 2, 2021, the Circuit Court granted Defendants' motion regarding the threshold issue of justiciability, and it declined to reach the merits. (RP408). Given the procedural posture of the case, the Circuit Court did not consider the professors' television appearance or

tweets. *Id.* As with the federal proceedings, the dismissal was without prejudice, meaning that the professors may file a new lawsuit if they ever face an actual or impending injury.

On October 4, 2021, the U.S. Supreme Court denied the professors' petition for a writ of certiorari at the first conference of the Term. (RP408). No Justice filed separate statement expressing disapproval of the decision.

The professors (one of whom is now retired) have appealed, asking this Court to part ways with the lower court and the federal judiciary on whether the justiciability requirements have been satisfied. For the reasons set forth below, this Court should affirm.

ARGUMENT

This Court reviews a lower court's entry of judgment on the pleadings for abuse of discretion. *Steinbuch v. University of Ark.*, 2019 Ark. 356, at 7-8, 589 S.W.3d 350, 356. Courts "take[] into account all pleadings when deciding a motion for judgment on the pleadings under Rule 12(c)." David Newbern *et al.*, 2 *Arkansas Civil Prac. & Proc.* § 14:11 (5th ed.). The facts alleged in the pleadings must be treated as true, but courts disregard "theories, speculation, [and] [legal] interpretation[s]." *Dockery*

v. Morgan, 2011 Ark. 94, at 6, 380 S.W.3d 377, 382. "[C]onclusory statements" and "bare allegations" are likewise ignored. *Banks v. Jones*, 2019 Ark. 204, at 4, 575 S.W.3d 111, 115.

I. The professors' claims are nonjusticiable.

A. The justiciability doctrines require an actual or impending injury, not a possible harm.

Arkansas courts are only available to litigants with a "case or controversy." *Cummings v. City of Fayetteville*, 294 Ark. 151, 155, 741 S.W.2d 638, 640 (1987); *see also Thomas v. Arkansas Bd. of Corr.*, 324 Ark. 6, 8, 918 S.W.2d 156, 158 (1996) ("There is simply no case or controversy involving the application of the [challenged law] to appellant."). After all, state courts "do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for future conduct." *Cancun Cyber Café & Business Center, Inc. v City of North Little Rock*, 2012 Ark. 154, at 7, 2012 WL 1223791.

The justiciability doctrines of standing and ripeness require an actual or impending injury as a prerequisite to filing suit. Standing is a "threshold issue," and the "general test" is whether the plaintiff "has suffered an adverse impact." *Anita G, LLC v. Centennial Bank*, 2019 Ark. App. 217, at 8, 575 S.W.3d 561, 568 (citing *Summit Mall Co. v. Lemond*,

355 Ark. 190, 132 S.W.3d 725 (2003)). Stated differently, a litigant "has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant," provided that "the questioned act has a prejudicial impact" on him. *Ross v. State*, 347 Ark. 334, 335, 64 S.W.3d 272, 273 (2002). This Court's injury-in-fact requirement thus resembles the federal justiciability standard under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), although the state-law version is a "defense to be asserted and an issue that may be addressed upon appeal" rather than an aspect of subject-matter jurisdiction that can be reviewed on an extraordinary writ. *Chubb Lloyds Ins. Co. v. Miller Co. Cir. Ct.*, 2010 Ark. 119, at 9-11, 361 S.W.3d 809, 814-15.

The Declaratory Judgment Act, Ark. Code Ann. § 16-111-104, contains no exception to the general rule. To the contrary, this Court has repeatedly held that a ripe, justiciable controversy is required in actions for declaratory judgments: "[D]eclaratory relief will lie where (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision." *Donovan v. Priest*, 326 Ark. 353, 359, 931 S.W.2d 119, 122 (1996). A plaintiff's appeal in a declaratory-

judgment action must be dismissed if the pleadings describe a harm that is "merely possible, speculative, contingent, or remote." *Monsanto Co. v. Arkansas State Plant Bd.*, 2021 Ark. 103, at 10, 622 S.W.3d 166, 172.

A few cases illustrate how this Court has construed these requirements. In *Jegley v. Picado*, the plaintiffs were gay and lesbian residents of Arkansas who challenged the constitutionality of the state's anti-sodomy law. 349 Ark. 600, 80 S.W.3d 332 (2002). This Court held that the plaintiffs satisfied the justiciability requirement for a pre-enforcement challenge because the plaintiffs claimed that they were engaging in conduct prohibited by the statute and, moreover, the State refused to disavow the possibility that it might enforce the statute in violation of the plaintiffs' alleged constitutional rights. *Id.* at 621-22, 80 S.W.3d at 342-43. In addition, the statute was being actively used against homosexuals in child-custody matters. *Id.*

By contrast, in *McLane Southern, Inc. v. Arkansas Tobacco Control Bd.*, a tobacco wholesaler contended that the Arkansas Tobacco Control Board's formal opinion on a regulatory matter—which concluded that giving free order-entry devices and inventory services to retailers was potentially unlawful—should be declared void for vagueness. 2010 Ark.

498, 375 S.W.3d 628. This Court held that the case was nonjusticiable because "there had been no indication that [the plaintiff] ever intended to provide free hand-held devices or free self-serving services, nor was there any evidence that [the plaintiff] would be penalized for doing so." *Id.* at 27-28, 375 S.W.3d at 646. The alleged injury from potential enforcement of the Board's legal interpretation was "hypothetical in nature," and any "prejudice" was "purely speculative." *Id.* The mere existence of an allegedly invalid legal opinion was insufficient to confer standing.

More recently, in *Baptist Health Systems v. Rutledge*, a group of hospitals alleged that an Arkansas law that imposed peer-review requirements was too vague and chilled their First Amendment right to consult an attorney of their choice.[5] 2016 Ark. 121, 488 S.W.3d 507. There was no dispute that, from the moment the law was enacted, the hospitals were subject to the law and forced to endure its burdens, including an alleged chilling effect on their right to select their preferred attorneys. But this Court held that there was no justiciable controversy after noting that,

[5] The hospitals' various claims are not clearly stated in the opinion. The briefs and addendums in CV-15-616 are available on CourtConnect.

unlike the plaintiffs in *Jegley*, the hospitals did not allege that they had violated the law or that they faced a credible threat of enforcement in violation of their constitutional rights. *Id.* at 4, 488 S.W.3d at 510.

B. The professors' contract-related claims are nonjusticiable.

The professors' contract-related claims are based on the possibility that, at some point in the future, the University might apply the revised policy to unspecified conduct that could not have been the subject of disciplinary action under the previous version. But the previous version's various features—including its broad definition of "cause," non-exhaustive list of examples, and highly general terminology[6]—conferred substantial discretion on administrators. And future disciplinary decisions under the revised policy will be constrained by the policy's separate section on academic freedom and the incorporated protections afforded by the First Amendment, state law, and the professors' right to continued

---

[6] Over seventy years ago, Justice Jackson lamented the "judicial conflict" that the term "moral turpitude" has caused and noted that the term "requires even judges to guess and permits them to differ." *Jordan v. De George*, 341 U.S. 223, 244-45 (1951) (Jackson, J., dissenting).

employment in the absence of a reason that is neither arbitrary nor trivial. *North Dakota State Univ. v. United States*, 255 F.3d 599, 605 (8th Cir. 2003) (stating that tenured professors enjoy a "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"); *cf. Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 245, 743 S.W.2d 380, 383 (1988) (noting that an employment agreement's "cause" provision means that a termination cannot be based on arbitrary reasons). For these reasons, it is difficult to conjure a scenario in which administrators apply the revised policy to conduct that could not have been the subject of disciplinary action prior to March 2018.

Further, any such scenario would be entirely hypothetical. Perhaps the conduct at issue in a future disciplinary proceeding would have been equally sanctionable under the previous version of the policy. As the District Court concluded, the professors' "allegations of the University's possible use of the Revised Policy to discipline or terminate faculty members for reasons not covered or beyond those allowed in the original policy are

speculative." (RP386). For all anyone knows, the revised policy's definition might never "be applied in the future in a manner different from the original definition . . . ." (RP386).

At least one other court has reached a similar conclusion in a case involving allegations that a university unlawfully diminished employees' tenure rights. The plaintiff in *Jungles v. New York*, 50 Fed. Appx. 43, 2002 WL 314278981 (2d Cir. 2002), was a tenured employee at a public university who challenged a clause in a collective bargaining agreement. The agreement's provision allowed the university to "contract out" for services, which the plaintiff perceived as undermining his property interest in a tenured position. The court held that the plaintiff's claim was nonjusticiable because the state "never . . . used or threatened to invoke [the provision] against any tenured [university] employee." *Id*. at *1.

Being "reasonably concerned" about "future economic security," the court explained, was insufficient to create a justiciable controversy. *Id.* at *2. The fact that the state employer "never invoked or even threatened to invoke" the disputed provision was "highly probative of the speculative nature" of the plaintiff's claim. *Id*. "The only injury-in-fact" that the plaintiff alleged was his "fear that class members [would] lose tenure" if the

provision were ever invoked, but this "vague fear" was "insufficient to support a speculative claim." *Id.* Likewise, in this case, the professors' vague fear that the revised policy might (but might not) be used to dissolve tenure under previously unreachable circumstances is speculative.

The professors' principal case, *Maytag Corp. v. International Union*, 687 F.3d 1076 (8th Cir. 2012), is readily distinguishable, and neither the District Court nor the Eighth Circuit found it relevant to the claims at issue here. 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 the Employee Retirement and Income Security Act. *Id.* at 1082-83. Whirlpool 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 disclosures required by law. No such impending harm exists in this case, however.

In summary, there are no allegations that the University has ever threatened to apply the revised policy's definition of "cause" in a way that might be viewed as materially inconsistent with the previous version. The professors can potentially seek redress if their circumstances change.

But a harm that is "merely possible" is insufficient to confer standing now. *Monsanto*, 2021 Ark. 103, at 8, 622 S.W.3d at 172.

C. The professors' free-speech claim is nonjusticiable.

1. There is no free-speech exception to the usual justiciability requirements.

The professors suggest that, even if their contract-related claims are barred at this time, their free-speech claim should be allowed to go forward under an allegedly permissive view of standing in overbreadth cases under the First Amendment. But courts have never held that the word "overbreadth" is a magic wand that overrides the basic requirement of an actual or impending injury to the plaintiff. In *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (Ark. 1998), for example, this Court ruled that the plaintiff's overbreadth challenge failed because a statute "cannot [be] challenge[d] . . . on the ground that it may conceivably be applied in hypothetical situations not before the court." *Id.* at 54, 972 S.W.2d at 245. "The mere fact that a legislative Act might operate unconstitutionally under some conceivable circumstances," the Court held, "is insufficient to render it wholly invalid." *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

Moreover, this Court's overbreadth cases have often looked to federal cases for guidance,[7] and federal decisions in this area have always required plaintiffs to demonstrate an injury in fact. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for example, the plaintiffs faced an impending injury: they confronted imminent sanctions after being charged with violating the challenged statute. The concept of third-party standing was not a substitute for the requirement of an injury to the plaintiff. *See also Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006) ("Under no circumstance, however, does the overbreadth doctrine relieve a plaintiff of its burden to show constitutional standing. [The plaintiff's] overbreadth challenge must therefore meet the requirements [of an actual or impending injury] set forth in *Lujan*."); *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 891 (9th Cir. 2007) ("Even when raising an overbreadth claim, however, we ask whether the plaintiff has suffered an injury in fact and can satisfactorily frame the issues on behalf

[7] *See, e.g.*, *Anderson v. Arkansas*, 2017 Ark. 357, 533 S.W.3d 64; *McDougal v. Arkansas*, 324 Ark. 354, 922 S.W.2d 323 (1996).

of these non-parties.") (collecting cases). Likewise, in this case, the professors must demonstrate an actual or imminent injury to themselves.

2. A credible threat of unconstitutional enforcement is a prerequisite to bringing a justiciable free-speech claim.

The issue, then, is what sort of allegations are sufficient to demonstrate an actual or impending injury in a free-speech case. Courts have routinely held that a plaintiff's mere allegations of "chilled" speech are insufficient. For instance, *Baptist Health* involved a claim of chilled speech under the First Amendment, and this Court held that there was not a justiciable controversy because there was no credible risk that the challenged law would be unconstitutionally enforced against the hospitals. 2016 Ark. 121, at 4, 488 S.W.3d at 507. No government agency threatened to enforce the peer-review law in violation of the hospitals' constitutional rights, and the hospitals did not allege that they had ever engaged in prohibited conduct. *Id.*

Likewise, the U.S. Supreme Court has never held that a plaintiff's claim of a "chilling effect" is sufficient to demonstrate an injury in fact. 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 78. 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 the regulations." *Id.* at 91. The existence of a law with an alleged chilling effect was insufficient to confer standing.

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 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 [have been] said to exist." *Id.* But the intervenors did not "claim that they [had] ever been threatened with prosecu-

tion, that a prosecution [was] likely, or even that a prosecution [was] 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 Supreme Court held in *Laird v. Tatum*, 408 U.S. 1 (1972), that the plaintiffs failed to present a justiciable controversy when they complained of a "chilling effect" on their First Amendment rights due to the 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 12. 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.* at 11. In other words, the plaintiffs in these other cases experienced concrete injuries that went beyond a claim of self-censorship.

In *Babbitt v. United Farm Workers Nat'l Union*—a case that this Court cited as persuasive authority in *Jegley*—the Supreme Court distilled its jurisprudence into a three-part test. 442 U.S. 289 (1979). The *Babbitt* Court held that, "[w]hen 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 clearly 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.*

In conclusion, "[a]ll of the Supreme Court cases employing the concept of 'chilling effect' involve situation 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.). Then-Judge Scalia's observation applies with equal force to the Supreme Court's more recent jurisprudence, which continues to require "contemporary enforcement" or a "substantial" likelihood of future enforcement rather than mere allegations of a chilling effect. *California v. Texas*, 593 U.S. ___,

141, S.Ct. 2104, 2114 (2021).[8] This Court's decisions in *Baptist Health* and *McLane* reflect a similar view.

3. The professors have failed to allege facts that demonstrate a credible threat of unconstitutional enforcement.

The professors have not alleged a justiciable controversy under the U.S. Supreme Court's persuasive decision in *Babbitt* or this Court's re-

[8] The professors are wrong in contending (Br. at 24) that the Eighth Circuit allows First Amendment plaintiffs to demonstrate standing based solely on allegations of self-censorship. If their argument were correct, the Eighth Circuit would have reversed the District Court's different understanding in the parallel federal case. And their own case stands for the opposite proposition. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 627, 630 (8th Cir. 2011) (stating that "self-censorship based on mere allegations of a subjective chill resulting from a statute is not enough to support standing" and holding that the *Babbitt* factors were satisfied, in part, because the plaintiffs' speech "triggered threats and the filing of one complaint under [the challenged law]").

cent decisions in *McLane* and *Baptist Health*. As the District Court concluded, "Plaintiffs' allegations of possible, but not threatened, enforcement of the Revised Policy in a manner that might but might not violate [constitutional] law is insufficient to establish injury in fact." (RP387). The allegations in the professors' similar state-court complaint are equally deficient.

a. Under the first *Babbitt* prong, the complaint contains no allegations regarding a plaintiff's specific plans to make statements that might be protected by the Arkansas Constitution's Free Speech Clause. Not all speech is protected, of course. There are limits to free expression in educational settings and at public workplaces. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that conduct that "materially disrupts classwork or involves substantial disorder or intrusion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech"); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (concluding that the balancing test that governs public employees' free-speech rights must reflect "full consideration of the gov-

ernment's interest in the effective and efficient fulfillment of its responsibilities to the public");[9] *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) ("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.).

Here, the professors' allegation that they have been "cautious" about their speech (RP23) does not mention any actual statements that

[9] The expressive rights of professors at public universities are governed by the *Connick* standard. *See, e.g.*, *Schilcher v. University of Ark. Bd. of Trs.*, 387 F.3d 959 (8th Cir. 2004); *de Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002); *Gumbhir v. Curators of the University of Missouri*, 157 F.3d 1141 (8th Cir. 1998).

they would like to make but have refrained from making. The other allegations are similarly cryptic about what kind of statements have gone unsaid. There is no way to determine, based on the complaint's vague and conclusory allegations, whether the professors' intended speech is arguably protected under the foregoing free-speech cases.

b. Under the second *Babbitt* prong, the professors have not plausibly alleged that their protected speech (whatever it might be) is prohibited by the revised policy. The revised tenure policy permits a wide range of expression. For example, the policy's section on academic freedom prohibits censorship in work-related endeavors, and it also protects outside speech "as a citizen." (RP154). 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 policy on academic freedom will be permitted. This provision 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).[10] Whatever the nature of the professors' intended speech, they have not shown the requisite intention to say or do something that the policy prohibits.

c. Finally, the professors have failed to allege that they face a credible threat of unconstitutional enforcement under the third prong of the *Babbitt* test. The professors 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

[10] 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."

not even alleged that an administrator has discouraged them from pursuing unorthodox areas of research or expressing controversial views on matters of public concern—including on cable television and social media.

At most, the professors have imagined scenarios in which administrators could use the revised policy to concoct pretextual reasons for retaliating against faculty members who speak out on unspecified matters. (RP17). But courts do not "assume the worst about those in the academic community," and a claimed "injury to academic freedom" premised on possible acts of retaliation is "speculative." *University 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 referring to the list of examples of "cause,"[11] and there is no basis for predicting administrators will take a

[11] The University has consistently interpreted the phrase "otherwise serves as a basis for dismissal" as referring to the balance of the remaining paragraph, which consists of twelve examples of cause. The phrase cannot reasonably be construed as a catch-all provision that encompasses any conceivable conduct, for it would have made no sense for the Board

strained, expansive view of the revised policy's other clauses while disregarding its unequivocal protection of free expression. Standing cannot rest on such a "highly attenuated chain of possibilities," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-11 (2013), or rest upon a harm that is "merely possible," *Monsanto*, 2021 Ark. 103, at 10, 622 S.W.3d at 172.

II. The professors are precluded from relitigating the federal judiciary's conclusion that they have not suffered an injury in fact and do not face an imminent threat of future harm.

This Court affirms if the lower court reached the right result, albeit for the wrong reason. *Marshall v. State*, 2017 Ark. 208, at 5, 521 S.W.3d 456, 459. Here, the Circuit Court's decision that the professors failed to present a justiciable claim can be affirmed because the doctrine of collateral estoppel bars relitigation of issues that underpin the justiciability analysis. *See Graham v. Cawthorn*, 2013 Ark. 160, at 10, 427 S.W.3d 34,

---

to have gone to the trouble of listing the examples under such an expansive interpretation. This "narrowing construction" constrains the policy's scope. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 585 U.S. 383, 397 (1988) (holding that a statute must be upheld in response to a challenge under the First Amendment if it is susceptible to a "narrowing construction").

43 (noting that a federal court judgment "may preclude relitigation of issues in state court"); *Matthews v. State*, 2015 Ark. App. 692, at 8-9, 477 S.W.3d 539, 543-44 (holding that a federal order of dismissal on the issue of standing precluded the plaintiff from relitigating a similar issue in state court). The relevant issues have already been litigated in the federal courts, so it was unnecessary for the Circuit Court to make a fresh determination of whether the professors "failed to demonstrate actual or imminent injury or harm." (RP400).

Collateral estoppel, also known as issue preclusion, "bars relitigation of issues of law or fact previously litigated, provided that the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question and that issue was essential to the judgment." *Craven v. Fulton Sanitation Serv., Inc.*, 361 Ark. 390, 394, 206 S.W.3d 842, 844 (2005). The essential elements are readily satisfied in this case. *See Powell v. Lane*, 375 Ark. 178, 185, 289 S.W.3d 440, 444 (2000) (listing the four elements). *First*, the issues sought to be precluded—whether the professors have sustained an actual injury or face an impending injury—are the same in both forums. *Second*, the issue of injury was actually litigated in federal court. "In the context of collateral

estoppel, 'actually litigated' means that the issue was raised in pleadings, or otherwise, that the defendant had a full and fair opportunity to be heard, and that a decision was rendered on the issue." *Powell*, 375 Ark. at 186, 289 S.W.3d at 445. In this case, the injury-in-fact issue was litigated all the way to the U.S. Supreme Court. *Third*, the issue was determined by a valid and final judgment. (RP389). *Fourth*, the federal courts' determination that the professors do not face an actual or imminent injury was essential to the judgment. Indeed, this finding was at the heart of the District Court's opinion.

The professors may argue that, because the District Court's dismissal was jurisdictional and made without prejudice, it can have no preclusive effect on a state-court proceeding. This argument is both waived and erroneous. The argument is waived because the professors failed to address the University's argument on collateral estoppel in the lower court,[12] and it is axiomatic that this Court "will not consider an argument

[12] The University raised estoppel as a defense in its timely answer, and it developed the argument in a supplement to its motion for judgment on the pleadings on August 4, 2021. (RP140); (RP374). The supplemental

raised for the first time on appeal" and is "bound by the scope and nature of the arguments made [before the trial court]." *Mayes v. State*, 351 Ark. 26, 29, 89 S.W.3d 926, 928 (2002). The argument is wrong because "[p]rinciples of collateral estoppel clearly apply to standing determinations." *Cutler v. Hayes*, 818 F.2d 879, 889 (D.C. Cir. 1987); *see also Matthews*, 2015 Ark. App. 692, at 8-9, 477 S.W.3d at 543-44.

The argument that a federal dismissal without prejudice can have no effect on a proceeding in state court tends to conflate the various doctrines. As the Eighth Circuit has noted, although "dismissal of a case without prejudice does not result in *claim* preclusion (to use more venerable terminology, it creates no res judicata bar)," an "*issue* actually decided in a non-merits dismissal is given preclusive effect in a subsequent action between the same parties (in the older terminology, the first adjudication creates a collateral estoppel)." *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 110, 1112 (8th Cir. 1999); *see also Goldsmith v. Mayor and City*

---

submission was timely under Rule 6(c) of the Arkansas Rules of Civil Procedure because it was filed more than twenty days before the hearing on August 30, 2021.

Council of Baltimore, 987 F.2d 1064, 1069 (4th Cir. 1993) ("[A] jurisdictional dismissal that does not constitute a judgment on the merits so as to completely bar further transactionally-related claims still operates to bar relitigation of issues actually decided by that former judgment.").

The crux of the matter is that the professors chose federal court as their preferred forum, and they pressed forward with that first-filed lawsuit while allowing the state-court proceedings to go ten months without any docket activity. Having lost in federal court at every level, they are precluded from relitigating identical issues of justiciability in state court.

III. The professors have not stated facts that overcome sovereign immunity, but beyond that, their merits-related issues are not available for appellate review.

Even if the professors have presented justiciable claims (and they have not), they have failed to state facts upon which relief can be granted under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. This defect means that the complaint is barred by sovereign immunity, because "[a] plaintiff must still comply with [the Court's] fact-pleading rules when alleging an exception to sovereign immunity." *Arkansas Dep't of Health v. Solomon*, 2022 Ark. 43, at 6, 2022 WL 587323. Further, the professors

have attempted to present merits-related issues that have not been addressed by the Circuit Court due to its threshold ruling that the claims are nonjusticiable. Such issues are not properly before this Court and should not be considered as part of this appeal.

Many of the professors' merits-based arguments rest upon factual claims that are belied by their own exhibits. On page 46 of their brief, for example, the professors highlighted an administrator's "red-line" comments without acknowledging that the administrator directed his comments at an *earlier* draft of the revised policy. *Compare* (RP328) (comment on earlier draft), *with* (RP153) (final version with changed language); *see also* (RP366). The draft would not have expressly protected speech during service-related activities, whereas the final version fixed this "limiting" and potentially "controversial" problem. The revised policy also contains a provision, which the professors have wholly ignored in their passage about community engagement, that protects faculty members' right to engage in outside speech "as a citizen." (RP154).

The professors' claims are also based on specious legal arguments. For instance, in their discussion of the free-speech claim, the professors failed to mention *Arnett* or any other case that supplies the relevant

standard. In their view, a self-serving allegation of "chilled speech" is apparently sufficient to establish standing *and* liability. But the law is different. In *Arnett*, the Court upheld a policy that allowed tenured federal employees to be dismissed for "such cause as will promote the efficiency of the service," even though the standard was "intended to authorize dismissal for speech as well as other conduct." 416 U.S. at 148-62. And in *Garrett v. Matthews*, 625 F.2d 658 (5th Cir. 1980), the court applied *Arnett* in rejecting a tenured professor's vagueness challenge to the University of Alabama's use of the undefined term "adequate cause" as the dismissal standard. *See also Keen v. Penson*, 970 F.2d 252, 259 (7th Cir. 1992) ("A university need not adopt a quasi-criminal code before it can discipline its professors or other employees, and should not be expected to foresee every particular type of unprofessional behavior on the part of its professors."). These persuasive precedents foreclose the professors' free-speech claims here.

As for the common law of contracts, it is well settled that "a court cannot make a contract for the parties but can only construe and enforce the contract that they have made." *Bank of Ozarks, Inc. v. Walker*, 2014 Ark. 223, at 5, 434 S.W.3d 357, 360. Employment with the University of

Arkansas (including for tenured faculty) is by appointment, which is always subject to the applicable policies of the Board, the University of Arkansas System, and the respective campus, division, or unit. And the relevant versions of Policy 405.1 have always contained a provision that expressly reserves the Board's right to amend the tenure policy at any time. Thus, to the extent that contract-law principles apply, this clause is an enforceable part of the parties' bargain. *See, e.g.*, *Rehor v. Case Western Reserve University*, 331 N.E.2d 416, 422 (Ohio 1975) (holding that a university's board had the power to lower a mandatory retirement age because the bylaws provided that the board reserved the right to change "all aspects of tenure"); *Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co.*, 102 Ark. 79, 143 S.W. 582-83 (1912) (holding that a contractual reservation of the "right to change any part of [the] contract" was enforceable because it conferred a right to "alter or to make different" various details in the agreement rather than a "right to terminate the contract altogether").

The professors' Contracts Clause claim is equally problematic. For one thing, the revised policy is not a "law" that can be challenged under

Article II, Section 17, of the Arkansas Constitution; rather, it is a personnel policy that governs the University's internal operations. *See Taylor v. City of Gadsen*, 767 F.3d 1124, 1133 (11th Cir. 2014) (holding that a municipal resolution, which increased employees' contribution rate to the city's pension, was not a "law" under the Contracts Clause). Moreover, the professors have not rejected the possibility that, if they are ever terminated in violation of their alleged contractual rights, they can pursue damages for wrongful discharge in the appropriate forum. This fact dooms their claim under the Contracts Clause, which guards against transforming every potential contract action into a constitutional claim. *See, e.g.*, *TM Park Ave. Associates v. Pataki*, 214 F.3d 344 (2d Cir. 2000) (holding that a breach of a contract by a government entity does not impair the obligation of the breached contract so long as the government action does not foreclose a damages or specific-performance remedy); *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996) (noting that the Contracts Clause requires courts to distinguish "between a measure that leaves the promise with a remedy in damages for breach of contract and one that extinguishes the remedy").

The professors also cannot demonstrate that they "had reasonable expectations" that the tenure policy "would never be amended." *Watters v. Board of Sch. Directors of the City of Scranton*, No. 3:18-CV-2117, 2019 WL 3987808, *15 (M.D. Pa. Aug. 22, 2019). To our knowledge, *Watters* is the *only* Contracts Clause case in which a court has addressed the confluence of three facts that are also critical here: a government entity's express right to amend a tenure policy's dismissal standard, a history of exercising that right, and a non-exhaustive list of grounds for termination. Rather than addressing *Watters*, the professors have instead devoted more than a dozen pages of their brief to a discussion of cases that involved dissimilar facts.

Much more could be said on these and related points. (RP79); (RP338). But there is no need for an extended discussion here because the issues raised in Sections II.B., II.C., and II.D. of the professors' brief are not proper subjects of this appeal. Indeed, the professors' Points on Appeal section (Br. at 4) does not even raise these issues. The Circuit Court declined to address merits-based issues after finding that the professors' claims were nonjusticiable, and this Court has repeatedly "made it clear that it will not review a matter on which the circuit court has not

ruled" or "presume a ruling from the circuit court's silence." *Ground Zero Constr. Inc. v. Walnut Creek, LLC*, 2012 Ark. 243, at 7-8, 417 S.W.3d 579, 583; *see also Temco Constr., LLC v. Gann*, 2013 Ark. 202, at 13, 427 S.W.3d 651, 660. Therefore, this Court should reject the professors' attempt to appeal merits-based issues that have never been addressed by the lower court.

REQUEST FOR RELIEF

The Circuit Court's judgment of dismissal without prejudice should be affirmed.

Respectfully submitted,

UNIVERSITY OF ARKANSAS SYSTEM
OFFICE OF THE GENERAL COUNSEL

/s/ *David A. Curran*
David A. Curran (2003031)
Associate General Counsel
University of Arkansas System
2404 North University Ave.
Little Rock, AR 72207-3608
Telephone: (501) 686-2536 (direct)
Fax: (501) 686-2517
dcurran@uasys.edu

Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I, David A. Curran, hereby certify that, on March 8, 2022, I filed an electronic version of the foregoing Appellees' Brief by using the e-flex filing system, which shall send electronic notice to all participants. *See* Arkansas Supreme Court Administrative Order 21, § 7(a). In addition, service has been perfected by first class U.S. Mail to the following:

Hon. Mackie Pierce, Circuit Judge
PULASKI COUNTY CIRCUIT COURT
401 West Markham, Room 360
Little Rock, AR 72201

/s/ *David A. Curran*
David A. Curran

CERTIFICATE OF COMPLIANCE

I certify that the Appellees' Brief complies with (1) Administrative Order No. 19's requirement concerning confidential information; (2) Administrative Order No. 21's requirement concerning hyperlinks to external papers or websites; and (3) the word-count limitations identified in Rule 4-2(b) of the Rules of the Arkansas Supreme Court and Court of Appeals. Specifically, the applicable sections of the brief (*i.e.*, jurisdictional statement, statement of the case and the facts, argument, and request for relief) consist of 8,212 words, which is less than the 8,600 words allowed.

/s/ David A. Curran
David A. Curran