CV-21-624

IN THE SUPREME COURT OF ARKANSAS

PHILIP PALADE, ET AL. **APPELLANTS**

v.

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

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS THE HONORABLE MACKIE M. PIERCE, CIRCUIT JUDGE PULASKI COUNTY CIRCUIT COURT CASE NO. 60CV-20-3218

APPELLANTS' BRIEF OF PHILIP PALADE, GREGORY BORSE, AND J. THOMAS SULLIVAN

Joseph W. Price, II (2007168)
Brittany S. Ford (218102)
QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Little Rock, AR 72201
Telephone: (501) 379-1700
Facsimile: (501) 379-1701
jprice@qgtlaw.com
bford@qgtlaw.com

Attorneys for Appellants Philip Palade, Gregory Borse, and J. Thomas Sullivan

TABLE OF CONTENTS

Page

POINTS ON APPEAL

1. Did the Circuit Court err when it determined Appellants lacked standing?

Chubb Lloyds Ins. Co. v. Miller Cty. Circuit Court, Third Div., 2010 Ark. 119, 9, 361 S.W.3d 809, 815 (2010)

Summit Mall Company, LLC, v. Lemond, 355 Ark. 190, 132 S.W.3d 725 (2003)

Arkansas Beverage Retailers Ass'n, Inc. v. Moore, 369 Ark. 498, 506, 256 S.W.3d 488, 494 (2007)

McAlmont Suburban Sewer Imp. Dist. No. 242 v. McCain-Hwy. 161, LLC, 99 Ark. App. 431, 262 S.W.3d 185 (2007)

2. Did the Circuit Court err when it determined Appellants' claims were unripe and nonjusticiable?

Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 687 F.3d 1076 (8th Cir. 2012)

TABLE OF AUTHORITIES

Cases **Page**

Rules and Statutes

Books and Treatises

Miscellaneous

JURISDICTIONAL STATEMENT

This appeal arises from an order granting the Board of Trustees of the University of Arkansas's motion for judgment on the pleadings. On September 2, 2021, the circuit court entered the order granting the motion for judgment on the pleadings and dismissing Philip Palade, Gregory Borse, and J. Thomas Sullivan ("Appellants") Appellants' complaint without prejudice. **(RP 400-401).** On October 1, 2021, Appellants timely filed a notice of appeal. **(RP 402-404).**

This Court has jurisdiction under Rule 1-2(a)(3) and should decide this appeal because it involves the dismissal of a request for an injunction against public officials.

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

STATEMENT OF THE CASE AND THE FACTS

Faculty members for the University of Arkansas System are employees who hold a specified academic rank as defined by the Board of Trustees of the University of Arkansas (the "Board"). **(RP 10).** Members of the faculty are generally divided into three groups: tenured, tenure-track, and non-tenure track. **(RP 10).** A faculty member who strives to be tenured – which is the right to continuous appointment absent a for-cause violation of the tenure employment contract – may receive an appointment to a tenure-track position that requires fulfillment of a multi-year "probationary period" in which applicants must prove themselves to the administration as worthy of the full guarantees of a tenure contract. **(RP 10).**

As a tenure-track faculty member, the individual is required to complete significant research or other scholarship in the field of study in which the faculty member is appointed, teach with a high level of expertise, and engage in various forms of time-consuming service for the benefit of various constituencies. **(RP 10).** After the tenure-track faculty member has completed the probationary period of this afore-described, multi-year period, the individual is either awarded tenure or is terminated. **(RP 10).** Academics take on significant risk in investing overwhelming efforts to obtain the benefits of a tenure contract given the make-or-break nature of the endeavor.

Board Policy 405.1 governs faculty members' promotions, tenure, and annual reviews (hereinafter referred to as the "Original Policy"). The Original Policy has made up the key portions of existing faculty's employment contracts since October 2, 2001. **(RP 12-17).** The Board voted and enacted the revisions to the Original Policy on March 29, 2018 ("the Revised Policy"). **(RP 11).** The Revised Policy became effective on July 1, 2019. **(RP 11).**

The Revised Policy constitutes a unilateral alteration of the employment contracts of tenure-track and tenured faculty. By its terms, the Revised Policy purports to apply to *all* faculty employed by the University of Arkansas System, including those who obtained tenure or entered the tenure-track *prior to* the adoption of the Revised Policy. **(RP 11-12).** The most significant changes to the policy are to the definition of "cause." **(RP 263).** These changes *expand* the grounds upon which a faculty member may be terminated for "cause," including those who *already* hold a tenure contract containing the old definition. **(RP 12).**

"Cause" in the Original Policy is defined generally as: "[C]onduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University," and "examples of such conduct [to] include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty and moral turpitude[.]" **(RP 12-13).** Each of these three

examples from the Original Policy – the only examples listed therein – aptly reflects a serious problem with a faculty member's performance and thus the examples are limited in both in nature and scope. **(RP 12-14).**

In contrast, the Revised Policy drastically changes the definition of "cause" in several ways. First, the new the definition of "cause" for termination itself is greatly expanded, now reading: "[C]onduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the University, **or that otherwise serves as the basis for disciplinary action**." **(RP 13).** The additional language in the Revised Policy – **"or that otherwise serves as the basis for disciplinary action"** – exponentially expands the scope of the definition of "cause" for dismissal of a faculty member and modifies the faculty member's contract with the Board without the faculty member's consent. **(RP 13).**

Second, the new definition of "cause" in the Revised Policy also offers the following *new*, *broad*, and *vague* specific "grounds" for termination that were not part of the Original Policy at all: "(1) ***unsatisfactory performance … concerning annual reviews***; (2) professional dishonesty or plagiarism; (3) discrimination, including harassment or retaliation, prohibited by law or university policy; (4) ***unethical conduct related to fitness to engage in teaching, research, service/outreach and/or administration, or otherwise related to the faculty***

member's employment or public employment; (5) misuse of appointment or authority to exploit others; (6) theft or intentional misuse of property; (7) incompetence or a mental incapacity that prevents a faculty member from fulfilling his or her job responsibilities; (8) job abandonment; (9) ***a pattern of conduct that is detrimental to the productive and efficient operation of the instructional or work environment;*** (10) ***refusal to perform reasonable duties*****;** (11) threats or acts of violence or retaliatory conduct; or (12) violation of University policy, or state or federal law, substantially related to performance of faculty responsibilities or fitness to serve the University.' **(RP 13-14).** (emphasis added).

The Revised Policy makes both *quantitative* and *qualitative* material changes to the definition of "cause." **(RP 264).** It expands the *number* of grounds that can justify termination of a faculty member and adopts wholly new *types* of grounds for dismissal that essentially constitute whistle blowing. **(RP 264-265).** Indeed, the *grounds* for dismissal in the Revised Policy are limited only by the imagination of the administrator, setting a *far lower* standard for termination of a faculty member than in the Original Policy. By including new *types* of "grounds" for dismissal, the Revised Policy makes highly significant quantitative and qualitative changes to the definition of "cause" that provides the University of Arkansas System with greatly expanded authority to terminate tenure-track and even *tenured* faculty.

Furthermore, while both the Original Policy and the Revised Policy define "cause" as "conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her" duties and responsibilities to the University, the Revised Policy goes an additional giant step, adding that cause *also* includes conduct "that otherwise serves as a basis for disciplinary action." **(RP 13).** Thus, while the Original Policy had narrowly defined bases for termination, the Revised Policy's language permits termination for virtually any reason that can be imagined by an administrator. **(RP 12-14).** This significant alteration in the Revised Policy swallows the old "cause" definition in the Original Policy whole. **(RP 266).**

ARGUMENT

I. STANDARD OF REVIEW.

The Circuit Court erroneously dismissed Appellants' Complaint, finding that the Plaintiffs lack standing and their claims are unripe and nonjusticiable. The question of standing is a matter of law and is reviewed de novo. *McLane Southern, Inc. v. Arkansas Tobacco Control Bd.*, 2010 Ark. 498, 375 S.W.3d 628; *Nelson v. Arkansas Rural Med. Practice Loan & Scholarship Bd.*, 2011 Ark. 491, 11, 385 S.W.3d 762, 769 (2011). When reviewing the granting of judgment on the pleadings, the Court views the facts alleged in the complaint as true and in the light most favorable to the party seeking relief. *Monsanto Co. v. Arkansas State Plant Bd.*, 2021 Ark. 103, 5, 622 S.W.3d 166, 170 (2021). When this standard is applied to the matter at hand, the Court should reverse the Circuit Court's order dismissing this action for lack of standing and ripeness and remand the case back to the Circuit Court for further proceedings.

II. APPELLANTS HAVE STANDING AND THEIR CLAIMS ARE RIPE.

A. Appellants Meet The Standing Criteria.

Appellants sufficiently alleged in the Complaint a justiciable controversy and hold standing to bring this declaratory-judgment action for the Board's actions. At the trial court, the Board tried to confuse the standing requirements, but standing in

Arkansas is not the same as standing in federal court. Article III of the United States Constitution "confines the jurisdiction of the federal courts to actual Cases and Controversies, and ... the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Chubb Lloyds Ins. Co. v. Miller Cty. Circuit Court*, Third Div., 2010 Ark. 119, 9, 361 S.W.3d 809, 815 (2010) (quoting *Clinton v. City of New York*, 524 U.S. 417, 429–30, 118 S.Ct. 2091, 2098-2099, 141 L.Ed.2d 393 (1998)).

This Court contrasted the above federal court analysis to Arkansas standing and stated "Arkansas, however, has not followed the federal analysis and definition of 'justiciability' to include standing as a matter of subject-matter jurisdiction." *Chubb Lloyds Ins.,* 2010 Ark. 119. "[S]tanding in Arkansas courts is a question of state law," and "federal cases based on Article III of the U.S. Constitution are not controlling." *Id*. (citing David Newbern & John Watkins, 2 Arkansas Civil Practice and Procedure, § 7–3, at 159 (4th ed. 2006)); *see also Jegley v. Picado,* 349 Ark. 600, 80 S.W.3d 332 (2002).

To be a proper plaintiff in an action under Arkansas law, one must have an interest which has been adversely affected or rights which have been invaded. *Summit Mall Company, LLC, v. Lemond*, 355 Ark. 190, 132 S.W.3d 725 (2003). Stated differently, plaintiffs must show that the questioned act has a prejudicial

impact on them. *Arkansas Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. 498, 506, 256 S.W.3d 488, 494 (2007).

More specifically, the Declaratory Judgment Act confers standing on *any* person whose rights or legal relations are affected by a written contract to seek a declaration of those rights and legal relations. *McAlmont Suburban Sewer Imp. Dist. No. 242 v. McCain-Hwy. 161, LLC*, 99 Ark. App. 431, 262 S.W.3d 185 (2007). The Arkansas Declaratory Judgment Act contains a broad standing provision: "Any person interested under a…written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, …[or] contract…, may have determined any question of construction or validity arising under the instrument, statute, …[or] contract, and obtain a declaration of rights, status or other legal relations thereunder." Ark. Code Ann. § 16-111-102 (West). The Declaratory Judgment Act is remedial, and its purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, or other relations." Ark. Code Ann. § 16-111-102. The Court liberally construes the Declaratory Judgment Act. *McAlmont*, 99 Ark. App. 431, 434, 262 S.W.3d 185, 187 (2007). This Court has made clear that "a declaratory judgment action is especially appropriate in disputes between private citizens and public officials about the

meaning of the [C]onstitution or of statutes." *See, e.g., McGhee v. Ark. State Bd. of Collection Agencies,* 375 Ark. 52, 58, 289 S.W.3d 18, 23 (2008).

The following elements must be established to obtain declaratory relief:

> (1) [A] justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Dep't of Human Servs. v. Civitan Ctr., 2012 Ark. 40, 9, 386 S.W.3d 432, 437 (2012).

Appellants have readily met these elements. First, appellants contest the legal validity of the Board's unilateral modifications of Appellants' contract via adoption of the Revised Policy, along with the Board's admitted intention to retroactively apply the unilateral modifications against Appellants. That is clearly a controversy. Second, the parties are adverse because appellants assert that the Board has violated their rights via the unilateral modifications. Third, as discussed more fully below, the appellants, as tenured professors, have a legally protectable interest in their tenure contracts. Finally, this dispute is ripe for adjudication because the injury has already occurred: The Board has *already* modified the Appellants' contracts without their consent.

All the facts to support these standing elements were erroneously ignored by the Circuit Court. Paragraphs 30-41 of the Complaint describe in detail the unilateral

modifications the Board has made to Appellants' contracts without Appellants' consent or authorization **(RP 12-15)**, and paragraphs 47-51, 70-75, 81-89, and 94-98 of the Complaint explain how those unilateral modifications injure Appellants by striking at the heart of their contractual and constitutional tenure protections that the Board now half-heartedly asserts it is championing **(RP 16-17, 20-21, 22-24)**.

Contrary to the Circuit Court's holding, Appellants do not need to establish an imminent danger of enforcement, by a public or private mechanism, to satisfy the justiciability requirement. In *Jegley v. Picado,* for example, the State argued that the plaintiffs' claim was not justiciable because there was no credible threat of prosecution, since the State had not prosecuted anyone under the challenged criminal statute for more than fifty years. 349 Ark. at 618, 80 S.W.3d at 341. This Court rejected this argument, explaining that impending enforcement is not a prerequisite to standing:

> Though this court clearly requires the existence of a justiciable controversy prior to granting a declaratory judgment, we have heard challenges to the constitutionality of statutes and regulations by persons who did not allege that they had been penalized under the statutes or regulations. We have not always required prosecution or a specific threat of prosecution as a prerequisite for challenging a statute.

Id. Accordingly, Appellants need not establish current or clearly anticipated enforcement of Revised Board Policy 405.1 to establish standing.

i. Appellants Alleged Facts Sufficient To Establish Standing To Seek A Declaratory Judgment That The Board's Passage Of The Revised Policy Violates The Contracts Clause Of The Arkansas Constitution And Arkansas Contracts Law.

Appellants alleged facts that establish standing to request a declaratory judgment and injunction for the Board's violations of the Contracts Clause and Arkansas contract law. "A declaratory judgment action is to be liberally construed in resolving uncertainty in rights, status, and legal relations." *Wilmans v. Sears, Roebuck & Co.*, 355 Ark. 668, 672, 144 S.W.3d 245, 247 (2004).

Decisions of the federal circuit courts are not binding on this court, but the court may follow their rationale if it is persuasive. *Dickinson v. SunTrust Nat'l Mortgage Inc*., 2014 Ark. 513, 7, 451 S.W.3d 576, 581 (2014). A persuasive Eighth Circuit case, *Maytag*, provides a helpful analysis of a similar circumstance, while applying even more strict standing requirements. *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am*., 687 F.3d 1076, 1080 (8th Cir. 2012).

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

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

Maytag demonstrates how a declaratory judgment action can be used to resolve a current contract dispute, settling an actual controversy *before* it develops into a violation of the civil or criminal law, or a breach of a contractual duty. *Maytag*, 687 F.3d at 1081. If there is "a real, substantial, and existing controversy .... a party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute a breach." *Id. (quoting Keener Oil & Gas Co. v. Consol. Gas Utils. Corp.,*190 F.2d 985, 989 (10th Cir. 1951)).

Here, the Board has *already* acted; it has already unilaterally modified Appellants' employment contracts, altering Appellants' contractual rights for the duration of their relationship with the University of Arkansas System. If the claims the employer brought in *Maytag* were ripe in the face of the union's standing challenge, *when no action had been taken yet* by either the employer or union, then Appellants' claims *must* be ripe as a matter of law because the Board's action that has caused Appellants' injuries *has happened already* and is not dependent on anything else occurring. As in *Maytag*, the parties here have a bona fide dispute over whether the Board's unilateral modifications to Appellants' employment contracts violate the Contracts Clause and Arkansas contracts law. The entry of a declaratory judgment in this case would immediately resolve the parties' controversy. And, most importantly, a declaration would enable both the Board and Appellants to carry out their business while also ensuring that Appellants' contractual and Constitutional rights are protected. The Circuit Court committed reversible error when it determined Appellants lacked standing to bring a complaint for declaratory relief.

ii. Appellants Alleged Facts Sufficient To Establish Standing To Seek A Declaratory Judgment That The Board's Passage Of The Revised Policy Violates The Free Speech Clause Of The Arkansas Constitution And To Enjoin The Violation.

Appellants also clearly alleged sufficient facts to show standing regarding their First Amendment claims. The doctrine of overbreadth was designed as a "departure from traditional rules of standing," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), to enable persons who are themselves unharmed by the defect in a statute or other rule nevertheless "to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Id.* at 610. Therefore, an overbreadth claimant can have standing even when the party has not yet been threatened with any repercussions. Indeed, as the Board expressly admits in a lower court brief, reasonable self-censorship can be adequate to demonstrate standing, and multiple Eighth Circuit authorities recognize this principle. **(RP 276).** *See, e.g.*, *Missourians for Accountability v. Klahr*, 830 F.3d 789, 797 (8th Cir. 2016); *Care Comm. v. Arneson*, 638 F. 3d 621, 627 (8th Cir. 2011).

Appellants alleged that the Revised Policy is "wholly incapable of assuring fairness and regularity or dispelling the chilling effect that the threat of discretionary and indiscriminate dismissal or other forms of discipline casts over academic pursuits." **(RP 17).** Appellants alleged that the Revised Policy eviscerates Appellants' tenure protections to such an extent that they may now be "terminated,

disciplined, or otherwise harassed based on an administrator's or trustee's disapproval of the content of a faculty member's teaching, research, service, or even statements made completely outside of the campus setting." **(RP 17).** Appellants also alleged that the Revised Policy "has a serious impact on [Appellants'] right to speak freely at his or her respective academic institution[,]" explaining that Appellants "have already suffered from a chilling effect after the passage of the Revised Policy" and describing the self-censorship and caused by the Revised Policy. **(RP 23-24).** "The ability of a faculty member to speak openly and freely in the academic setting concerning politics, political decisions and the associated policy implications, and controversial issues, topics, and ideas without fear of termination is protected by the First Amendment." **(RP 23-24).**

The Board's attempt to minimize what it has done by relying on the language in the Revised Policy that says a faculty member's free speech rights are protected is difficult to take seriously given that such obligatory and generic language provides virtually no protection to Appellants in the light of the specific changes elsewhere in the Revised Policy. In sum, Appellants have alleged facts to establish standing that the Revised Policy infringes on and violates Appellants' free speech and academic freedom rights pursuant to the First Amendment.

B. Appellants Sufficiently Alleged A Violation Of The Contracts Clause.

Under the Arkansas Constitution, "[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed[.]" Ark. Const. Art. II, § 17. This provision prohibits the state and its instrumentalities from undermining contracts to which they are parties and contracts between private parties. Arkansas Courts look to federal cases for guidance when construing Article 2, Section 17. *Beaumont v. Faubus*, 239 Ark. 801, 805, 394 S.W.2d 478, 481 (1965). Contracts Clause analysis begins with a three-element test: (1) does a contractual relationship exist; (2) does the change in the law impair that contractual relationship; and if so, (3) is the impairment substantial? *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992). If each of these three component questions is answered affirmatively, the Court must then determine whether the impairment is nonetheless justified as "reasonable and necessary to serve an important public purpose." *U.S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 25 (1977). Under this accepted Contracts Clause analysis, the Board's adoption of the Revised Policy runs afoul of the Contracts Clause, and Appellants have alleged more than sufficient facts to state such a claim.

First, a contractual relationship exists between Appellants and the University of Arkansas System. **(RP 4-5, 20).** The first element of the Contracts Clause analysis is met.

The second and third elements – whether the change impairs the contractual relationship and whether the impairment is substantial – are best addressed together. Substantial impairment does not require a complete destruction of the contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power And Light Co.*, 459 U.S. 400, 411 (1983). The issue is whether the impairment disrupts reasonable contractual expectations. *Id*. at 413–16; *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 245 (1978). The Supreme Court's decisions under the Contracts Clause show that reliance interests are key to this inquiry. The analysis must "reflect the high value the Framers placed on the protection of private contracts." *Id.* at 245. Contracts "enable individuals to order their personal and business affairs," and once arranged, "those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Id*. The impairment/substantial impairment inquiry can be broken into two questions: (1) was the impaired term a "central undertaking" of the bargain such that it "substantially induced" professors to enter their contracts, *see City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965), and (2) was the change in law foreseeable, meaning that the risk of change was reflected in the original contract? *Energy Reserves*, 459 U.S. at 413–16.

To answer these questions, the Revised Policy unquestionably substantially impairs a "central undertaking" of the bargain that "substantially induced"

Appellants to enter into their contracts so as to violate the Contracts Clause. When Appellants were hired and then tenured by the University of Arkansas System, their tenure contracts, which included the then-existing Board rules, did not merely encompass the right to any termination for cause, irrespective of whether its contents were robust or nonexistent – as the Board baldly asserts. The right is not to the title of the Clause; the right is to the substance of the contract. Thus, the tenure contracts include the right to termination for cause ***as specified in the actual agreement.*** The Board's contention that it can change the definition of cause at its discretion is the equivalent to contending that the university has the right to change the benefit of the bargain of any contract it enters. This is not the law and has never been the law. And, in fact, the Board's contention is precisely what the Contracts Clause prohibits. *See Elliott v. Board of School Trustees of Madison Consolidated Schools*, 876 F.3d 926, 934-35 (7th Cir. 2017).

The Revised Policy critically undermines Appellants' contractual right to tenure – the right to continuous appointment that may only be terminated for cause *as defined by* Appellants' contracts at the time they were granted tenure. The cause standard is the very core of any tenure contract. The extraordinary amount of work that professors complete to achieve tenure demonstrates the unique qualities of their performance, and most, like Appellants, have built their entire careers relying on

their contractual tenure rights. And tenure is designed to protect academic freedom, particularly those not toting the party line of the administration. Accordingly, the Revised Policy strikes at the very heart of the bargain Appellants made with the University of Arkansas System when Appellants accepted their tenured positions. **(RP 10, 12, 15, 16, 14, 20).** It is difficult to imagine a clearer case of a substantial impairment satisfying the second and third elements of the opening Contracts Clause test.

Take, for instance, the situation in *Elliott*, which is similar to what the Board has attempted to do here. From 1927 to 2012, teachers' contracts in Indiana included job security when school districts needed to reduce their teaching staffs: as long as they were qualified for an available position, tenured teachers had a right to be retained over non-tenured teachers. *Id*. at 928. In 2012, Indiana passed a new law eliminating that job-security right and ordered school districts to base layoff choices on performance reviews without regard for tenure status. *Id*. That same year, Mr. Elliott, a teacher who earned tenure fourteen years before the new law had taken effect, was laid off while his school district retained non-tenured teachers in positions for which Elliott was qualified. *Id*. Mr. Elliott sued, claiming that the amendment violated the Contracts Clause when applied to him. The district court granted summary judgment in Mr. Elliott's favor, and the Seventh Circuit affirmed.

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

> The promise of job security, especially during layoffs, lies close to the core of teacher tenure. Having job security, even in tough economic times, was a central term to induce people to become teachers and seek tenure in Indiana. It is a term with significant value to teachers, who as a matter of economics have traded higher salaries for the protections that tenure offers over the course of a career. Teachers earn lower salaries than similarly educated professionals. They receive part of their compensation through other benefits, including better job security, which includes a reduced risk of termination during staff reductions. This lower risk has material value and was a primary consideration that teachers could rely upon when seeking tenured employment.

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

Like the elimination of the job-security provision in Mr. Elliott's case, the Revised Policy undermines the central undertaking and expectation found in Appellants' contracts at the time Appellants were awarded tenure. Cause is even more central to tenure than priority in job retention over the untenured. And the general "cause" standard under the new policy plainly has a much broader meaning than it did in the Original Policy because of the change in its express language *and* the expansive, non-exclusive list of "grounds" associated with that general phrase.

The Board attempts to reframe the Revised Policy as only providing "clarification" to the tenure rules. This position, however, is contradicted by the actual changes made in the Revised Policy, as well as the exhibits cited by the Board in its motion for judgment on the pleadings.[1] The Revised Policy exponentially expands the scope of the definition of "cause" by adding the clause "**or that otherwise serves as the basis for disciplinary action**" and by including new *types* of "grounds" such as "(1) unsatisfactory performance…concerning annual reviews;" "(4) unethical conduct related to fitness to engage in teaching, research, service/outreach and/or administration, or otherwise related to the faculty member's employment or public employment[;]" "(9) a pattern of conduct that is detrimental

[1] It is hard to take seriously the Board's argument that the Revised Policy only contains minor clarifications when there are materials the Board has provided in other venues that specifically state that the Revised Policy makes substantive changes. Moreover, one party does not get to "clarify" an agreed-upon contract. Like all material terms in a contract, both parties must agree.

to the productive and efficient operation of the instructional or work environment[;]" "(10) refusal to perform reasonable duties[;]" or "(12) violation[s] of University policy[.]" **(RP 12-15).** These changes are indisputably far more than mere clarifications. They go to the core of Appellants' contracts and are a fundamental re-working of the long-held and reasonable expectations Appellants have in their contracts. Accordingly, the answer to the first question in determining substantial impairment – (1) was the impaired term a "central undertaking" of the bargain such that it "substantially induced" Appellants to enter their contracts? – is indisputably yes.

These *unilateral* changes and the *retroactive* application of the changes also could not have been foreseen or anticipated by Appellants. *See Elliott*, 876 F.3d at 936. The United States Supreme Court has found that a change in a law was foreseeable in only two contexts. In the first, the Court pointed to the history of "extensive and intrusive" regulation in the affected industry. *Energy Reserves*, 459 U.S. at 413–16 (new price controls on natural gas did not disrupt the supplier's reasonable expectations when the industry was heavily regulated and supplier "knew its contractual rights were subject to alteration by state price regulation"). In the second, the Court reasoned that because the original law had only a temporary goal, the parties must have anticipated a future legislative change. *Simmons*, 379 U.S. at

516 (change in land-sale law did not impair contracts when goal of law shifted from settlement of Texas frontier to "efficient utilization of public lands"). Neither of those situations is remotely applicable here.

The situations in *Energy Reserves* and *Simmons* are also quite different in another way from teacher tenure and the admitted application of the Revised Policy to all faculty members retroactively. Although one can anticipate that any state law may change in the *future*, generally, "retroactive application to impair existing contract rights and reliance interests is another question." *See Elliott*, 876 F.3d at 936. Indeed, there is no "legislation" clause in the Constitution guaranteeing that laws cannot be changed. Of course, democracy dictates exactly the opposite; even a child knows this from Saturday morning educational cartoons on the legislative process.

In contrast, states and their instrumentalities, like the Board, are generally barred from undermining both preexisting contracts to which they are a party *and* preexisting contracts that are between private parties. *See Ark. Dept. of Human Services v. Walters*, 315 Ark. 204, 210, 866 S.W.2d 823, 825 (Ark. 1993) ("We have said that statutes can be construed to operate retroactively so long as they *do not disturb contractual or vested rights* or create new obligations. We have indicated that it would violate due process to disturb vested rights or contractual rights."

(Citations omitted; emphasis added)); *Talkington v. Turnbow*, 190 Ark. 1138, 83 S.W.2d 71, 73 (Ark. 1935) ("The Constitution inhibits the enactment of ex post facto laws but does not prohibit the passage of retroactive laws which *do not impair the obligation of contracts or vested rights accruing there under*." (Emphasis added)); 16B Am. Jur. 2d *Constitutional Law* § 763 ("However, a proper retroactive application of a statute requires a determination that the legislature clearly intended the statute to apply retroactively, and that retroactive application *does not impair vested contract rights* in violation of the Contracts Clause." (Emphasis added)); *See also United States v. Winstar Corp*., 518 U.S. 839, 886, 116 S. Ct. 2432, 2460, 135 L. Ed. 2d 964 (1996.

Retroactive application of the Revised Policy to all faculty members simply could not be foreseen by Appellants, just as with the legal change in *Elliot*. *Id*. Thus, the answer to the second substantial impairment question – (2) was the change in law foreseeable, meaning that the risk of change was reflected in the original contract? – is also indisputably no.

Since the three basic elements of the Contracts Clause analysis are met, the question now becomes whether the Board has established that the changes to the Revised Policy are "reasonable and necessary to serve an important public purpose." *U.S. Trust Co.*, 431 U.S. at 25–26. The Board suggests that this test is the same as

the rational-basis standard. That is wrong. Heightened scrutiny is the applicable standard, and respected authorities have interpreted this standard to constitute a form of strict scrutiny. *See, e.g.*, Erwin Chemerinsky, Constitutional Law: Principles and Policies 639 (3rd ed. 2006) ("Thus although the court did not articulate a level of scrutiny, its use of least restrictive alternative analysis and the word 'necessary' seems indicative of strict scrutiny."). That is because, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *U.S. Trust Co*. 431 U.S. at 26.

Applying the heightened scrutiny standard to the case before this Court, the Board and its Revised Policy fail to chin the bar. Although the Board attempts to throw multiple reasons at the wall to see what sticks, the Board fails because the Board's reasoning is contradictory. For instance, on the one hand, the Board contends that the Revised Policy only provides clarity to the Original Policy without significant changes; yet, on the second hand, the Board contends the changes are very important because the modifications further the mission of the University of Arkansas System. As a matter of logic, these contentions cannot both be true. And if the Revised Policy is only for "minor clarification," as the Board concedes, then there cannot be a legitimate argument that the Revised Policy was either necessary or serves an important government interest. In sum, the anodyne reasoning provided

by the Board – the revisions were necessary for the "changing landscape" of higher education and clarity – simply crumbles under even a cursory review of the revisions made to the Original Policy. **(RP 12).** And even if such generic statements could satisfy rational basis review (which they cannot), they certainly are insufficient given that heightened scrutiny applies here. The Board simply has offered no justification that the Revised Policy is reasonable and necessary to serve any important public purpose. **(RP 12, 16, 20-21).** As a result, the Revised Policy fails to satisfy heightened scrutiny and violates the Contracts Clause.

The case of *Saxe v. Board of Trustees of Metropolitan State College of Denver*, 179 P.3d 67 (Col. Ct. App. 2007), supports this conclusion and is directly on point. There, the Board of Trustees attempted to amend the college handbook, which was incorporated into faculty tenure contracts. The old handbook provided that when the school implemented a reduction in workforce, non-tenured faculty must be laid off before tenured faculty. The revised handbook eliminated this priority for tenured faculty. *Id.* at 71. The old handbook also obligated the college to make every reasonable effort to relocate tenured faculty within the institution rather than terminate them. The revised handbook eliminated the relocation right as well. *Id.* These changes were applied retroactively to faculty already protected by tenure. *Id.* at 74. Five professors at the school preemptively filed a lawsuit – just

like Appellants here – seeking to nullify these changes based on Colorado's constitutional Contracts Clause. Like the Board in this matter, the board in *Saxe* argued that it had statutory and contractual authority to make the changes to the handbook and the professors' tenure contracts. *Id.* at 71.

The Colorado Court of Appeals disagreed, finding that, if the priority and Relocation rights in the old handbook granted vested rights to the professors, then the college "did ***not*** have statutory *or contractual* authority to unilaterally modify those provisions." *Id.* at 74 (emphasis added). And that was so even though the handbook expressly provided that the board of trustees reserved the right to amend the handbook, just like the reservation of rights contained in the Original Policy and relied on by the Board here. *Id.* As the Colorado court explained, tenure is earned and provides job security, which allows for academic freedom against the overwhelming-single political tide at universities today, and the loss of that hard-earned job security strips tenure of its substance. Accordingly, the priority right and relocation right granted by the original faculty handbook in *Saxe* are core aspects of the faculty's tenure agreements. *Id.* at 76.

Moreover, the court of appeals observed that decisions from across the United States all support the conclusion that "an employer may not abrogate an employee's vested benefits." *Id.* at 74, 76. On remand, the trial court found that that the

professors' priority and relocation rights had in fact vested. *Saxe v. Board of Trustees of Metropolitan State College of Denver*, 2009 WL 3485976, at 1-3 (Col. Dist. Ct. Jun. 1, 2009). Thus, the retrospective changes to the priority and relocation rights in the revised handbook violated the Contracts Clause in Colorado's Constitution. *Id.* at 4. While priority and relocation rights are very important to tenure, as the *Saxe* court recognized, the "cause" standard here is the true heart of the concept of tenure. Thus, changes that undermine the protections of a "cause" provision adopted by the Board here are considerably more dramatic than the changes that warranted reversal in *Saxe*.

Saxe is highly persuasive authority that supports Appellants' position in all respects. Appellants' claim here falls under the Contracts Clause of the Arkansas Constitution. The claims in *Saxe* were brought under the Contracts Clause in the Colorado Constitution, and "Colorado's constitutional [Contracts Clause] is virtually identical to the Contracts Clause in the United States Constitution, and Colorado courts apply the same three-part inquiry for claims brought under both." *School Dist. No. 1 in City and Cty. Of Denver v. Masters*, 413 P.3d 723, 728 (Col. 2018) (internal quotation marks omitted). To reiterate, Appellants' claims here concern the standards governing dismissal for cause. As mentioned, those standards are even more central to the right to tenure than the priority and relocation standards

at issue in *Saxe*. Accordingly, if the Contracts Clause barred the contract modifications in *Saxe*, it must also bar the modifications the Board seeks to impose here.

Saxe is no aberration either. Indeed, authority exists that extends *Saxe's* reasoning to *untenured* faculty as well. *Zuelsdorf* is illustrative. There, a university policy manual, which was incorporated into faculty employment contracts, set a deadline for the school to provide untenured faculty with notice that their next year of employment would be their final year. After the deadline had passed in 1985-1986, the university altered the deadline to a later point in the calendar and attempted to apply the new deadline retroactively so it could remove untenured faculty a year early. *Zuelsdorf v. University of Alaska, Fairbanks*, 794 P.2d 932, 935, 61 Ed. Law Rep. 1121 (Alaska Sup. Ct.) (1990). The Alaska Supreme Court held that this violated the vested rights of a nontenured, assistant professor. *Id.* Critically, the court found that the university's express reservation of the right to unilaterally amend the policy manual—similar to the reservation in the Original Policy—could not override the nontenured professor's vested rights. *Id.* The court's language in the opinions is instructive: "When one party acquires vested rights under a contract, the other party may not amend the terms of the contract so as to unilaterally deprive

the first of its rights; such a change constitutes a modification of the agreement requiring mutual consent and consideration." *Id.*

It is worth reiterating that the Colorado Court of Appeals in *Saxe* and the Alaska Supreme Court in *Zuelsdorf* both emphasized that a university's reservation of the right to unilaterally amend its rules may *not* be exercised to undermine vested rights, consistent with long-established principles of contract law and constitutional law recognized nationwide. The quality of higher education is deserving of no less protection in Arkansas than it is in Colorado, Alaska, or elsewhere.

The unconstitutional acts of the Board are further demonstrated by the fact that tenure is a vested and constitutionally protected property interest. *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1972). In *Roth*, the United States Supreme Court ruled that "a public college professor dismissed from an office held under tenure provisions …. [has] interests in continued employment that are safeguarded by due process," and due process protection only attaches to liberty or property rights. (*Id*., citing *Slochower v. Bd of Higher Ed. Of City of New York*, 350 U.S. 551 (1956) and *Wieman v. Updegraff*, 344 U.S. 183 (1952)); *accord Harden v. Adams*, 760 F.2d 1158, 1167 (11th Cir. 1985) (holding that a tenured professor has a vested property interest in his employment); *Jasper School Dist. No. 1 of Newton County v. Cooper*, 2014 Ark. 390, 441 S.W.3d 11 (holding that principal's contract

created a protectable property interest in her job); *Stewart v. Fort Wayne Community Schools*, 564 N.E.2d 274, 280 (Ind. 1990) (holding that teacher with tenure has a vested property interest in her job, which the Constitution protects); *Williams v. Board of Supervisors et al.*, 272 So.3d 84, 89 (La. App. 2019) (holding that teacher tenure vests a property right interest in the teacher's employment).

The Eighth Circuit has also held that a tenured professor at a state institution has "a substantive due process right to be free from discharge for reasons that are 'arbitrary and capricious,' or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact." *N. Dakota State Univ. v. United States*, 255 F.3d 599, 605 (8th Cir. 2001). Here, the retroactive application to Appellants of the qualitatively and quantitatively expanded definition for termination for "cause," particularly by virtue of the Revised Policy's addition of limitless "grounds" for dismissal, violates Appellants' substantive due process rights. *See Arkansas Dept. of Human Servs.*, 315 Ark. at 210, 866 S.W.2d at 825 (holding "that statutes can be construed to operate retroactively so long as they do not disturb contractual or vested rights or create new obligations" and "that it would violate due process to disturb vested rights or contractual rights.").

Cases like *Saxe* and *Zuelsdorf* establish that a legislative enactment is not required – or, rather, that university policy changes are in effect legislative

enactments. The Board's action here is more than a mere repudiation of a contract because the revisions to Board Policy 405.1 alter tenure, which is a protected property interest and not merely a naked contractual entitlement. Finally, the authorities cited above all establish that tenure is a vested property interest.

In closing, Appellants stated a claim that the Revised Policy violates the Contracts Clause, by undermining Appellants' tenure rights in striking the Original Policy's restricted framework for termination for "cause" – *i.e.*, a narrow set of extreme examples that can serve as a basis to dismiss a tenured faculty member – and replacing that framework with nearly limitless administrative authority on the part of the Board and the University of Arkansas System's administrators to terminate or discipline Appellants. **(RP 16-17, 21).** The expansion of the list of "grounds" for termination for "cause" in the Revised Policy is a substantial impairment of Appellants' contracts – fundamentally altering Appellants' contractual relationship with the University of Arkansas System and enabling the University of Arkansas System to terminate faculty for almost any reason through the application of the overly-broad and ubiquitous so-called "grounds" for dismissal. **(RP 16-17, 20-21).** Appellants have stated a claim. The Revised Policy violated the Contracts Clause. The Circuit Court committed reversible error in dismissing Appellants claims.

C. Appellants Sufficiently Alleged A Violation Of Arkansas Contracts Law.

Under Arkansas law, both parties to a contract must consent to any changes to that contract. *See Bancorpsouth Bank v. Shields*, 2011 Ark. 503, 8, 385 S.W.3d 805, 809. Indeed, "[f]undamental principles of contract law require that the parties to a contract agree to any modification of that contract." *Id.* "Those parties must manifest assent to the modification of a contract and to the particular terms of such modification." *Id*. "[A] subsequent agreement that purports to modify or change an existing agreement must be supported by consideration other than the consideration involved in the existing agreement." *Worden v. Crow*, 2013 Ark. App. 234, 6, 427 S.W.3d 143, 147. "Where there is no new consideration presented for the bargained for item, the new agreement is void and of no effect for lack of mutuality of consideration." *Id*. at 6-7, 427 S.W.3d at 147-48. Here, the Revised Policy changes the contractual relationship that the Class members have with the Board by greatly expanding the authority of the Board to terminate or otherwise discipline the Class members for "cause" in comparison to the Original Policy. But the Appellants neither assented to these changes nor received any consideration.

D. The Vagueness And Overbreadth Of The Revised Policy Violates Appellants' Free Speech Rights.

Although the Board points to language in the Revised Policy to say it protects Appellants' rights, that is simply not the case and not for the Board to determine. The Board, through the Revised Policy, *limits and infringes* Appellants' First Amendment rights by protecting only those topics which the Board deems "related to scholarship," "the subject matter of their assigned teaching duties," and "employment related service." **(RP 49).** Appellants' First Amendment rights, however, extend well beyond what the Board deems appropriate within the constraints of assigned teachings and internal service. One of the central purposes of free speech, academic freedom, and tenure, overall, is to permit – even encourage – faculty members to actively engage in the community beyond the classroom. By newly limiting free speech and academic freedom specifically to only internal matters the Board deems appropriate, Appellants are now forced to consider the consequences of academic lectures and service that benefit society but may not fall within the Revised Policy's discretionary definition of protected activities.

The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Care Comm.*, 766 F.3d 774. "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson v. W. States Med.*

Ctr., 535 U.S. 357, 373, 122 S. Ct. 1497, 1507, 152 L. Ed. 2d 563 (2002). The Board has violated these principles with the Revised Policy.

The Revised Policy creates significant uncertainly for Appellants as to what speech will result in termination "for cause," in violation of Appellants' First Amendment rights. Appellants are now forced to navigate with great trepidation what they choose to say for fear of termination based on an overbroad term that could encompass all types of conduct. When a professor is left to guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone. *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 604, 87 S. Ct. 675, 684, 17 L. Ed. 2d 629 (1967). "The threat of sanctions may deter almost as potently as the actual application of sanctions." *Id.* (*quoting National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963)). The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. *Keyishian,* 385 U.S. 589 at 604.

Here, it is clear that the Revised Policy is having a chilling effect on Appellants because they are far more cautious in their words as a result of the overbroad definition of "cause." For instance, faculty purportedly may now be dismissed for "cause" under the Revised Policy for "(1) unsatisfactory

performance…concerning annual reviews;" "(4) unethical conduct related to fitness to engage in teaching, research, service/outreach and/or administration, or otherwise related to the faculty member's employment or public employment[;]" "(9) ***a pattern of conduct that is detrimental to the productive and efficient operation of the instructional or work environment***[;]" "(10) refusal to perform reasonable duties[;]" or "(12) violation[s] of University policy[.]" **(RP 12-15).** These overbroad, generically applicable reasons to terminate a faculty member are already causing faculty members to alter their conduct to avoid falling into one of these new categories, and comments made within the University of Arkansas System demonstrate their intent to limit free speech with the Revised Policy. In a red-line version of the Revised Policy, only revealed after being obtained through a FOIA request, a University of Arkansas System administration employee *admitted* exactly this, commenting on a provision of the new policy that eviscerated free speech protections for statements critical of the administration, the University stated that "this is *limiting* and may be controversial. But I understand the rationale." **(RP 328).** Appellant understands the rationale only too well also. The Board's own words confirm Appellants' claim.

The ability of a faculty member to speak openly and freely in the academic setting concerning politics, political decisions and the associated policy

implications, and controversial issues, topics, and ideas without fear of termination is the very idea of what is protected by the First Amendment. **(RP 24).**

The Complaint provides sufficient facts to state such a claim. Appellants have already suffered a chilling effect from the Revised Policy, including being cowed regarding what is discussed in and out of class. This chilling effect caused by the Revised Policy is a limitation on and violation of Appellants' First Amendment protections.

REQUEST FOR RELIEF

For the foregoing reasons, this Court should reverse the Circuit Court's dismissal of Appellants' Complaint for lack of standing and ripeness and remand the case back to the Circuit Court for further proceedings.

Respectfully submitted,

QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
Telephone: (501) 379-1700
Facsimile: (501) 379-1701
jprice@qgtlaw.com
bford@qgtlaw.com

By: /s/ Joseph W. Price, II
Joseph W. Price, II (2007168)
Brittany S. Ford (2018102)

Attorneys for Appellants Philip Palade, Gregory Borse, and J. Thomas Sullivan

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2022, I electronically filed the foregoing with the Clerk of Court using the AOC eFlex electronic filing system, which shall send notification of such filing to all counsel of record.

I further certify that I have served a copy of the foregoing, *via* electronic mail, on the following:

Honorable Mackie M. Pierce
Pulaski County Circuit Court
401 W. Markham St.
Suite 360
Little Rock, AR 72201-1427
vpoe@pulaskimail.net

David A. Curran
Associate General Counsel
University of Arkansas
Office of the General Counsel
2404 North University Avenue
Little Rock, Arkansas 72202-3608
dcurran@uasys.edu

Counsel for Appellees

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

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 AND WITH WORD-COUNT LIMITATIONS

Certification: I hereby certify that:

This brief complies with (1) Administrative Order No. 19's requirements concerning confidential information; (2) Administrative Order 21, Section 9, which states that briefs shall not contain hyperlinks to external papers or websites; and (3) the word-count limitations identified in Rule 4-2(d). Per Rule 4-2(d), there are 8,437 words in this brief's jurisdictional statement, statement of the case and facts, argument, and request for relief.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

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