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

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The Circuit Court erroneously dismissed Appellants' Complaint, finding that the Plaintiffs lack standing and their claims are unripe and nonjusticiable. Generally, a motion for judgment on the pleadings is reviewed for abuse of discretion. *See Rhodes v. Kroger Co.*, 2019 Ark. 174, 575 S.W.3d 387. However, when the issue on appeal is a question of law, review is de novo. *Monsanto Co. v. Arkansas State Plant Bd.,* 2021 Ark. 103, 5, 622 S.W.3d 166, 170 (2021); *Calhoun v. Area Agency on Aging of Se. Ark.*, 2021 Ark. 56, 618 S.W.3d 137 (2021). Thus, since both justiciability and standing raise questions of law, review in this case is de novo. *Thurston v. Safe Surgery Arkansas,* 2021 Ark. 55, 11, 619 S.W.3d 1, 9 (2021) (justiciability). *McLane Southern, Inc. v. Arkansas Tobacco Control Bd*., 2010 Ark. 498, 375 S.W.3d 628 (standing); *Nelson v. Arkansas Rural Med. Practice Loan & Scholarship Bd*., 2011 Ark. 491, 11, 385 S.W.3d 762, 769 (2011) (standing).

I. Basic Principles Of Standing Law Establish That Appellants Have Standing.

Contrary to the Board's assertion, "[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). 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 changes to Board Policy 405.1 both increased ambiguity and fundamentally weakened Appellants' tenure rights. The Revised Policy defines "cause" for termination as: "[C]onduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the University, **or that otherwise serves as the basis for disciplinary action**." **(RP 40)** (Emphasis added). The new definition of "cause" in the Revised Policy also offers the following *new*, *broad*, and *vague* "grounds" for termination that were not set forth in the original policy and which reflect much less problematic conduct than the grounds for dismissal in the Original Policy:

> (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*;**

(RP 40-41) (emphasis added). These changes put the lie to the Board's repeated statements that its actions merely provide "greater clarity to faculty members and administrators." (Appellee Br. 14).

When the amendments to the list of dismissal grounds are combined with the new general language in the Revised Policy – **"or that otherwise serves as the basis for disciplinary action"** –there can be no question that the Revised Policy makes both *quantitative* and *qualitative* changes to the definition of "cause" that exponentially expand the grounds for termination. This plainly constitutes a modification of faculty contracts without their consent, in violation of Appellants' rights under the contracts clause, contract law, and the free communication provision of the Arkansas Constitution.[1] The unilateral change and attempted retroactive application of the "cause" standard *is* the injury alleged by Plaintiffs and it has already occurred.

[1] The Board claims that language in the Revised Policy forbidding termination or discipline that violates principles of academic freedom or freedom of speech limits the scope of the cause provision. Brief at 16-17. But even if the generic language referenced does impose some limits, the cause standard in the Revised Policy still makes it dramatically easier to fire or discipline a faculty member than the Original Policy.

This reasoning is bolstered by the fact that Appellants are tenured professors within the University of Arkansas system, who possess tenure. Tenure is a constitutionally protected property interest. Thus, the unilateral modification and retroactive application of the Revised Policy interfered with property interest in violation of Plaintiffs' rights under the contracts clause. *See Arkansas Dept. of Human Servs. v. Walter*, 315 Ark. 204, 210, 866 S.W.2d 823, 825 (1993) (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.").

II. The Board's Standing Cases Are All Distinguishable And Other Authorities Establish That Appellants Possess Standing.

In *McLane*, 2010 Ark. 498, at 2, 375 S.W.3d at 631, abrogated by *Myers v. Yamato Kogyo Co., Ltd*., 2020 Ark. 135, 597 S.W.3d 613 (2020), a wholesaler of tobacco products requested advisory opinions from the Arkansas Tobacco Control Board regarding whether McLane could provide free inventory devices to retailers. *Id*. Unsatisfied with the "vague" advisory opinions provided by the Tobacco Board, McLane appealed the decision to the courts. *Id*. This Court held McLane could not seek a declaratory judgment that an agency opinion was void for vagueness because the opinion itself was advisory, and, following the opinion, McLane decided not to offer the product at issue. *Id.* McLane is irrelevant because the changes to Board Policy 405.1 were not advisory; they were concrete contract modifications, which

harmed Appellants the day the Revised Tenure policy was adopted without their consent.

In *Baptist Health System v. Rutledge,* 2016 Ark. 121, 4, 488 S.W.3d 507, 510, private hospitals challenged a statute regarding hospital peer review which was burdensome to the hospitals and their staff. The causes of action revolved around federal preemption by a federal statute and the Due Process Clause of the Federal Constitution. *Baptist* is distinguishable because the case concerned neither a unilateral contract modification nor free-speech limitations, which are judged by different standards from the right to choose an attorney.

The Board repeatedly cites *Monsanto Co. v. Arkansas State Plant Bd.*, for the contention that Appellants' harm is "merely possible" and, therefore, insufficient to confer standing. 2021 Ark. 103, at 10, 622 S.W.3d at 172. In *Monsanto*, a pesticide company brought suit against the State Plant Board for injunctive and declaratory relief, challenging Board regulations that limited pesticide use. *Id.,* at 1, 622 SW 3d at 166. The Court determined that Monsanto had standing, but the claims were not justiciable because Monsanto failed to establish that the Regulation injured, or threatened to injure, its interests. *Id.* at 10, 622 S.W.3d at 172. Notably, counsel for Monsanto conceded that the company was successful in obtaining approval for the relevant product's use in Arkansas. The claims at issue in the case at bar are different because they involve a contractual agreement between the Board and tenured

professors, which the Board has *already* changed to the detriment of the professors. Once again, the unilateral modification *is* the central injury at issue. By contrast, the regulatory change in *Monsanto* literally had no impact on the company.

Jegley, *supra*., which was discussed in the opening brief (Appellant Br. 20), and *Magruder v. Arkansas Game and Fish Commission*, 287 Ark. 343, 698 S.W.2d 299 (1985) are considerably more instructive than the Board's authorities. In *Magruder*, a licensed fisherman who frequently fished at Lake Maumelle brought suit to challenge the constitutionality of a regulation providing that black bass under fifteen inches long could not be taken from the Lake. *Id*. The circuit court dismissed the lawsuit, finding that only Little Rock Municipal Water Works, which owned Lake Maumelle, had standing to challenge the regulation. *Id.* at 344, 698 S.W.2d at 299. This Court reversed, holding that the Plaintiff had standing because "if the commission's regulation is to be enforced it will have an effect on persons who fish Lake Maumelle regardless of who owns the lake." *Id*. at 344, 698 S.W.2d at 300. The Court reiterated well-settled Arkansas law that "[o]ne whose rights are thus affected by a statute has a standing to challenge it on constitutional grounds." *Id*. *Magruder* is directly on point and establishes that Appellants here need not establish current or clearly anticipated enforcement of Revised Board Policy 405.1 for standing to exist.

As Appellants explained in their opening brief (Appellant Br. 21-23), *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 687 F.3d 1076, 1081 (8th Cir. 2012), is both directly on point and persuasive authority. The Board contends that *Maytag* is distinguishable because "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." (Appellee Br. 30). This conclusion, however, critically misstates the relevancy of *Maytag*. The claims in *Maytag* were based on a *possible future* change to the employer-employee contract. If a possible future change to a contract is sufficient to create standing under the heightened requirements in Federal Court – as it was in *Maytag* – then as a matter of logic, the Board's *unilateral* and *actual* change of Appellants contracts and retroactive application is sufficient to confer standing on Appellants here.

The Board also relies heavily on the unpublished Second Circuit opinion *Jungels v. New York* from 2002. 50 Fed. Appx. 43, 2002 WL 314278981 (2d Cir. 2002). The plaintiffs-professors in that case challenged the collective bargaining agreement which their Union entered on their behalf and alleged the State's ability to contract out jobs and services under the agreement disparately impacted employees over the age of 40, depriving them of their property interests in their

tenured jobs. *Id*. The *Jungels* plaintiffs asserted that this violated their Due Process rights. *Jungles* does not support the Board's position.

First, *Jungles* concerned federal law. But as explained above, Arkansas standing law is different from the principles that govern in federal court**.** This makes *Jungles* irrelevant.

Second, *Jungels* is critically different from the facts here in multiple respects. First, the Second Circuit found that "it is impossible to anticipate whether an affected employee would lose tenure benefits" due to the collective bargaining agreement. *Id*. at 44. In the case at bar, by contrast, faculty have already lost tenure benefits; their tenure rights were significantly reduced when the Board unilaterally modified their employment contracts. Second, the Second Circuit emphasized that the relevant collective bargaining agreement provisions "do not say anything about tenure." *Id.* at 45. Here, the Revised Policy was altered to greatly expand the grounds for terminating a tenured faculty member for cause. That is indisputably a change to *tenure*. Third, the tenure rights in *Jungles*, were "not altered by any unilateral action of the state" because the union representing plaintiffs endorsed the collective bargaining agreement. *Id.* In the present case, however, amendments to Board Policy 405.1 were unilaterally imposed by the Board.

In sum, the Board's authorities universally fail to support its claim that Plaintiffs lack standing because no one has been terminated or otherwise disciplined under the Revised Policy.

III. The Board's Standing Argument Is Undermined By Its Adopting Of Inconsistent Positions.

The Board has asserted that because Appellants continued to work at the University, they have accepted the Revised Policy as their contract. The Board's precise language on this point is: "Faculty members who choose to continue their employment for another term, rather than pursing employment elsewhere, manifest their assent to the new terms." **(RP 117)** That would be truly convenient if it in any way resembled the law.

To start with, accepting contractual benefits to which one is entitled (e.g., a job at the University) cannot constitute acceptance of a new agreement or modification. Otherwise, one side could simply impose consent to a contractual modification on other the side as has been done by the Board in this case.

In addition, if the Board were correct, then to dispute the Board's unilateral modification of their contract, faculty would have to quit. The folly of such a claim is obvious. One need not abrogate a contract – under fear that failure to do so would hypocritically be asserted by the other party as implicit consent to the disputed modification – in order to claim that the other party has breached it.

Finally, it flies in the face of reason and common sense for the Board to argue Plaintiffs are not injured for purposes of standing by the modification of their contract rights while *also* arguing that Plaintiffs' claims are barred because they have *already* consented to and accepted the change. The Board simply cannot have it both ways.

IV. The Changes To The Tenure Policy Violate Fundamental Principles Of Free Speech.

Appellants also clearly allege sufficient facts to show standing regarding their First Amendment claims. 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). 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, reasonable self-censorship is adequate to demonstrate standing, and multiple Eighth Circuit authorities recognize this principle. *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).

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 Free Speech Clause of The Arkansas Constitution.

V. The Board's Collateral Estoppel Argument Is Fatally Flawed.

The Board's collateral estoppel argument fails for two reasons. First, it is hornbook law that the preclusion doctrines of res judicata and collateral estoppel do not apply when the court rendering the initial judgment lacked subject matter jurisdiction. *Patton v. Johnson*, 915 F.3d 827, 834 (1st Cir. 2019); *Johnston v. Arbitrium Handels AG*, 198 F.3d 342, 350 (2d Cir. 1999); *Macdermid, Inc. v. Leonetti*, 183 A.3d 611, 623 n.8 (Conn. 2018); Wright & Miller, 18 Fed. Prac. & Proc. § 4402 (3d ed.). Arkansas follows this well-established rule. *First Commercial Bank, N.A. v. Walker*, 333 Ark. 100, 108, 969 S.W.2d 146, 150 (1999) ("For res judicata to apply, the claim must have been adjudicated on the merits; this requirement presupposes that the court in which the claim was litigated properly had jurisdiction over those proceedings."); *Crockett & Brown, P.A. v. Wilson*, 314 Ark.

578, 582-83, 864 S.W.2d 244, 246 (1993) ("For *res judicata* to apply, a claim must have been litigated on its merits. This presupposes that the court in which a claim is litigated has jurisdiction of those proceedings. This is identical to the requirement of a "valid judgment" for the doctrine of collateral estoppel."). Under the Eleventh Amendment, the federal district court did not have jurisdiction over Appellants' state law claims brought in this lawsuit.[2]

Second, as the Board's own authority recognizes, collateral estoppel applies only when the issues litigated in the first and second cases are identical. *Matthews v. State*, 2015 Ark. App. 692, at 8, 477 S.W.3d 539, 543-44. But as we have explained repeatedly, standing is judged by different standards under Arkansas and federal law. Thus, the issues here are plainly not identical.[3]

[2] Note that the Eleventh Amendment is the rare context where lack of subject jurisdiction can be waived. *Fryberger v. Univ. Ark.*, 889 F.3d 471, 473 (8th Cir. 2018). Appellants requested that the Board waive the Eleventh Amendment, but the Board refused to do so. That should constitute waiver of the collateral estoppel argument. Indeed, the Board disingenuously claims that "the professors chose federal court as their preferred forum." Brief at 48. We tried. But the Board's refusal to waive Eleventh Amendment immunity required that Appellants pursue the state law claims in Arkansas courts. It is the *Board* that chose to pursue this litigation in two forums.

[3] The Board's unclear brief might be read to argue that Appellants have waived the issue of collateral estoppel. But that is plainly false. The Board raised collateral estoppel in a supplemental motion to dismiss that was never addressed by the circuit court in any form.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 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:

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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 2,855 words in this reply brief's argument.

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
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