IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SALVATORE FRISELLA,	§	
PAUL PATRICK DAY, and	§	
HOWARD JEFFREY HUGHES	§	
	§	
Plaintiffs	§	
	§	
v.	§	CIVIL ACTION NO. 3:24-cv-469-D
	§	
DALLAS COLLEGE,	§	
	§	
Defendant.	§	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT

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Salvatore Frisella ("Frisella"), Paul Patrick Day ("Day"), and Howard Jeffrey Hughes ("Hughes) (collectively "Plaintiffs"), respond as follows to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Brief in Support [Doc. 20] (Defendant's "Motion").

I. OVERVIEW – ONLY THE PLAINTIFFS OFFER A PLAUSIBLE EXPLANATION OF DEFENDANT'S ACTIONS

This lawsuit challenges policy changes made by the Dallas College Board of Trustees. The Plaintiffs, all faculty at Dallas College, allege that such changes were intended to end the protections afforded Dallas College faculty by the previous policies. In its Motion, Dallas College denies that the policy changes adversely affected Plaintiffs, but it utterly fails to provide any alternative explanation for the Dallas College policy changes.

Plaintiffs have specifically alleged facts regarding the board's intent and the advice the board received from its counsel, which Defendant does not contest. Plaintiffs have alleged a consistent and plausible connection between the board's desire to eliminate what it acknowledged to be the faculty's right to rolling three-year contracts, and the resulting policy changes. Moreover, the effect of the policy changes is self-evident in the removal of specific language which previously provided due process protections to Plaintiffs, with Dallas College bearing the burden to show "good cause" before ending Plaintiffs' employment, even at the end of a term contract.

A. The loss of Plaintiffs' property interest in continued employment - changes to DMAB(LOCAL) and DMAA(LOCAL)

Regarding their lost due process protection, Plaintiffs allege the two critical policy changes at pages 9 and 11 of their First Amended Complaint. Defendant's Motion, in addition to entirely avoiding any alternative explanation for what Dallas College was up to in changing these policies, also ignores these allegations, blithely insisting that Plaintiffs lost nothing as a result of the policy changes. To the contrary, Plaintiffs have alleged:

> **DMAB(LOCAL) – Changed to remove faculty's right to due process in case of nonrenewal**
>
> 3.18 Two specific policies which were changed were DMAB(LOCAL) and DCA(LOCAL).[4] On February 28, 2022, the first policy enacting such change was implemented, DMAB(LOCAL). A true and correct copy of the new policy is attached hereto as Exhibit B and incorporated herein by this reference. Notably, DMAB(LOCAL), until February 28, 2022, included the following language:
>
> > A faculty member whose current employment with the College District has continued uninterrupted for the previous six years or more at the time he or she receives notice of intention to recommend nonrenewal shall be afforded the procedural rights in DMAA(LOCAL) even though he or she may be on a one-year contract at the time of such notice.[5]
>
> A true and correct copy of the former DMAB(LOCAL) policy in effect until February 2022 is attached hereto as Exhibit C and incorporated herein for all purposes. The same protections were guaranteed to any faculty member on a three-year contract. *Id.*
>
> [4] In totality, changes to multiple LOCAL policies secured the removal of the rolling three-year contract: DD, DLA, DCA, DMAA, and DMAB.
>
> [5] DMAA(LOCAL) provides for due process of law in termination of faculty members mid-contract. A true and correct copy of such policy before the elimitation [sic] of tenure is attached hereto as Exhibit D and incorporated herein by this reference. The reference to "nonrenewal of faculty members on three year contracts" was removed from the policy in 2023

First Amended Complaint [Doc. 15] ("*FAC*") at 9.[1] Plaintiffs' allegations continue:

> **DMAA(LOCAL) – Changed to reflect the new DMAB(LOCAL), removing the due process guaranty for nonrenewal of faculty on three-year contracts.**
>
> 3.22 Dallas College, in policy DMAA(LOCAL), provided detailed due process procedures for faculty members who were terminated during the term of their contract, suspended without pay, "or for nonrenewal of faculty members on three-year contracts." Exhibit D, at 1, subheading "Due Process Procedures." Under such policy, a non-renewed faculty member on a three-year contract, had a right to a hearing and full procedural due process, at which the burden of proof was on the administrator, not the faculty member. "The burden of proof shall be upon the college president to show facts, by a preponderance of the evidence, that support the termination or nonrenewal." Exhibit D, at 3, ¶ 4.e.

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[1] The referenced exhibits are at the following pages of [Doc.15]: Exhibit B, page 29 of 58; Exhibit C, page 31 of 58; Exhibit D, page 33 of 58.

> 3.23 Beginning in 2023, DMAA(LOCAL) no longer provides those due process protections to faculty in the case of nonrenewal. Faculty on three-year contracts are no longer protected against nonrenewal without cause. Their right to due process has been eliminated, and instead, they are left with the option to "present a grievance on an issue related to their nonrenewal." DMAB(LOCAL) Exhibit B. There is no longer any hearing at all other than a conference with the director of human resources. The administration needs no reason, and bears no burden of proof, under these new policies. Any vestige of the due process afforded Plaintiffs by the policies in place when they entered into their 2021-2024 contracts has been removed.

FAC at 11.[2]

B. Dallas College refuses to admit this change eliminated Plaintiffs' rights

This due process guarantee is never addressed in Defendant's *Motion*. Under the previous policies, which were in place when Plaintiffs began their 2021-2024 contracts, no faculty member on a three-year contract, (or even on a shorter-term contract, if the faculty member had been at Dallas College for six years) could be non-renewed except upon *good cause*. This is explained at length in Plaintiff's pleading, as set forth above, and supported by the copies of the policies attached thereto. Faculty were not simply protected from termination during the terms of their contracts, they were protected from non-renewal.

Dallas College's only answer is to insist that its policies still protect Plaintiffs from being terminated without cause during their contract term (*Motion* at 7), and that faculty can file a grievance if they are non-renewed. *Motion* at 8.

This dissimulation permeates Defendant's Motion. In opposition to Plaintiffs' § 1983 claim for denial of due process, Defendant argues that Plaintiffs had no property interest in continued employment: "Dallas College has not eliminated ***any*** protected property interests that Plaintiffs previously enjoyed" *Id.* (emphasis in original). In opposition to Plaintiffs' First Amendment claim,

[2] Exhibit D to the *First Amended Complaint* is found at [Doc.15] page 33 of 58.

Defendant argues that Plaintiffs never had any guaranteed rights that were revoked by the policy changes. *Id.* at 12-14. In opposition to Plaintiff's breach of contract claim, Defendant argues that its Board did not revoke any automatic or guaranteed renewal of contracts, because "no such guarantee ever existed." *Id.* at 18. Finally, in opposition to Plaintiffs' claim under the Texas Open Meetings Act ("TOMA"), Defendant argues that Plaintiffs would not gain anything if the former policies were restored. *Motion* at 24-25.

Each of Plaintiffs' four causes of action, as pled in the *First Amended Complaint*, state claims upon which relief can be granted. Plaintiffs' allegations, properly taken as true, are facially plausible, in contrast to Defendant's arguments, which fly in the face of written policies.

II. STANDARD OF REVIEW

"A motion to dismiss under Rule 12(b)(6) is 'viewed with disfavor and is rarely granted.'" *Priester v. Lowndes County*, 354 F.3d 414, 418 (5th Cir. 2004) (quoting *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)). At the motion to dismiss stage, the court does not evaluate the plaintiff's likelihood of success. It only determines whether the plaintiff has stated a claim upon which relief can be granted. *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 (5th Cir. 1977). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 563 (2007). "The complaint is liberally construed in the plaintiff's favor, and all well-pleaded facts in the complaint are taken as true." *Id.*; *see also Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232, 244 (5th Cir. 2009) (reiterating that the court "must accept as true the well-pleaded factual allegations in the complaint during the pleadings stage" and "must also draw all reasonable inferences in the plaintiff's favor"); *cf. Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual

allegations."). Moreover, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556.

"[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff[s] will fail to find evidentiary support for [their] allegations or prove [their] claim to the satisfaction of the factfinder." *See Twombly*, 550 U.S. at 563 n.8. A claim is facially plausible when the plaintiff pleads facts that allow the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Thus, "[t]he determining issue is not whether the plaintiff[s] will ultimately prevail on the merits, but whether [they] [are] entitled to offer evidence to support [their] claim." *Priester*, 354 F.3d at 418; "Therefore, th[e] court will not dismiss a plaintiff's claim, 'unless the plaintiff[s] will not be entitled to relief under any set of facts or any possible theory that [they] could prove consistent with the allegations in [their] complaint.'" *Id*. at 418-419 (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)).

III. ARGUMENT AND AUTHORITY

A. DUE PROCESS – Plaintiffs' Claim for violation of the 14th Amendment, brought pursuant to 42 U.S.C. § 1983

Plaintiffs have brought two Constitutional causes of action pursuant to 42 U.S.C. § 1983. *FAC* at 12-17. Section 1983 applies to the actions of the Dallas College Board of Trustees, as the final policymaker of a state actor, Dallas College. *See* Tex. Educ. Code § 130.082. Defendant does not challenge the applicability of §1983 to the actions of the Board.

1. Plaintiffs have stated a claim for violation of the 14th Amendment, based on Defendant's deprivation of their property interest without due process.

Plaintiffs' first Constitutional claim is based on deprivation of their property interest in their ongoing employment, without due process. Whether such property interest is called "tenure" or not, Plaintiffs have alleged in detail the written policies which protected their ongoing employment. As set forth above, at the bare minimum, Dallas College had written policies, adopted by its publicly elected board members, under which Plaintiffs could not be terminated *or non-renewed* without broad due process protections. *See* section I.A, *supra*; and *FAC* at 9-11.

In addition to these black-letter provisions, Plaintiffs have pled several reasons for their "legitimate claim of entitlement" to the property interest in their continuing employment, which interest has now been taken away. *FAC* at 3-4. Plaintiffs' allegations establish their protected property interest, and that governmental action resulted in a deprivation of that interest. *See Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010). Plaintiffs have alleged multiple grounds under which they had a "legitimate claim of entitlement," "defined by existing rules or understandings that stem from an independent source." *Bd. of Regents v. Roth*, 408 U.S. 564, 577; 92 S. Ct. 2701 (1972). The plaintiff in *Roth* could point to no "University rule or policy that secured his interest in re-employment or that created any legitimate claim to it." *Id.* at 578. Plaintiffs, of course, have pointed to college policies that explicitly secured their continued employment.

In addition, the entire Dallas College community – faculty, administrators, Board, in-house counsel – acknowledged the three-year rolling contract system. *FAC* at ¶ 3.8, 3.10, 3.12, 3.14-3.17, Exhibit A (Doc. 15, pp 26 of 58, and 27 of 58), 4.11-4.12; 4.17-4.18 Exhibit H (Doc. 15, page 53 of 58). While Defendant's Motion repeatedly denies that Plaintiffs ever had any rights to continued employment, "rolling three-year contracts," "automatic renewal," or any other term denoting the very tenure-like set-up at Dallas College, Defendant's Board members understood such rights to

exist, acknowledged such rights in public meetings, and intentionally took steps to eliminate such rights. Plaintiffs have alleged such facts in all of the paragraphs cited above, but two exhibits place the issue beyond doubt. First, the slide presented by one of Defendant's in-house counsel to the Board, and her description of the effect of the then-existing written policies:

> As set forth above, these contracts were described by Board members, administrators, and counsel for Dallas College, in 2021 and 2022 meetings, as three-year rolling contracts, as automatic three-year contracts, and as vested property interests. In October 2021, associate general counsel Tricia Horatio explained to the Board's Education Workforce Committee that the concept of a rolling contract constitutes "quasi-tenure," creates a situation in which a vested property right in the contract term is virtually perpetual, and requires a due process hearing prior to non-renewal. She spoke of retirement or death as the only end-point for employment of a professor on a rolling three-year contract.[7] A true and correct copy of her slide, using the term "quasi-tenure," and showing that the protected property right had been established at Dallas College at least since 1987, is as follows:

The Dallas College Rolling 3-year Policy

Dallas College Board Policy DCA (LOCAL) contains language which provides "At any time after the completion of the first year of a three-year contract, if a faculty member has an "effective" performance rating, he or she may be offered a successor three-year contract at the discretion of the Board."

This language has been in Policy for as long as our archival records exist (since ***1987***) and anecdotally has been said to have existed since ***1965***.

The concept of a rolling contract constitutes "quasi tenure"; creates a situation in which a vested property right in the contract term is ***virtually perpetual***; and requires termination of the contract only through a ***due process hearing***.

Education Workforce Committee

[7] https://dcccd.new.swagit.com/videos/141190 at 11:58 - 14:00

FAC at 17-18. And second, the description in the Board's agenda for February 9, 2023, stating that certain amendments to policies were approved "as part of the removal of the automatic three-year contract for faculty." Ex. H to *FAC* [Doc. 15, page 53 of 59].

Even without the clear policies limiting Dallas College's ability to non-renew faculty, Plaintiffs' pleading supports a property interest in continuing employment because they have "allege[d] the existence of rules ***and understandings,*** promulgated and fostered by state officials, that may justify [their] legitimate claim of entitlement to continued employment absent 'sufficient cause.'" *Perry v. Sindermann*, 408 U.S. 593, 602-603, 92 S. Ct. 2694 (1972) (emphasis added). As such, Plaintiffs "must be given an opportunity to prove the legitimacy of [their] claim of such entitlement in light of the policies and practices of the institution." *Id.* at 943 (internal citation omitted).

Plaintiffs have specifically alleged that this property interest in continued employment was taken away without due process. *FAC*, ¶ 4.5. The practice of issuing new three-year contracts each year was discontinued, not only without due process, but before the new policies even went into effect. *Id*. at ¶ 4.7. "Plaintiffs were never given notice, a meaningful opportunity to be heard, or any other form of due process" when they were deprived of their rights under their 2021-2024 contracts, including the previous policies." *Id*. at ¶ 4.8. Plaintiffs have adequately pled claims for deprivation of their property rights without due process, through the actions of a state actor, and Defendant's Motion should thereby be denied with respect to Plaintiffs' due process claim.

2. Defendant's arguments do not overcome Plaintiffs' allegations

Defendant argues (a) that Plaintiffs had no guarantee of three-year rolling contracts; (b-1) that the current policies still provide some protections during the term of Plaintiffs' contracts; (b-

2) that the language of Plaintiffs' signed contracts did not provide for continued employment; and (c) the Texas Education Code does not require Dallas College to give Plaintiffs tenure. Accordingly, Defendant argues, Plaintiffs have no viable due process claim.

Plaintiffs agree with most of these statements, but none of them support dismissal. To begin with, Plaintiff does not cite the definition of tenure under the Texas Education Code in order to force Defendant to comply with it. Instead, Plaintiffs argue that the very definition of tenure adopted by the Texas legislature reflects Plaintiffs' rights under the former Dallas College policies,

> "Tenure" means the entitlement of a faculty member of an institution of higher education to continue in the faculty member's academic position unless dismissed by the institution for good cause in accordance with the policies and procedures adopted by the institution under Subsection (c-1).

Tex. Educ. Code § 51.942(a)(4), *FAC* at 3.

Next, the stripped-down policy protecting Plaintiffs from termination without cause during the term of their contracts, while it certainly exists, is at the heart of Plaintiffs' complaint. This new version of DMAA(LOCAL), as compared to the previous version, demonstrates Dallas College's radical reduction of Plaintiffs' rights.

Defendant then focuses on portions of Plaintiffs' contracts, and portions of Dallas College policies, which warn that issuance of three-year renewal contracts is discretionary. *Motion* at 7-9. By reading DCA(LOCAL) in a vacuum, Defendant argues that Plaintiffs had no expectation of continued employment (*Motion* p 5-6). However, DCA(LOCAL) is the very policy Ms. Horatio was explaining in the slide acknowledging the faculty's "vested property right in the contract term is virtually perpetual." *FAC* at 17-18. As we have explained, other policies clearly and unequivocally granted such continued employment, absent a showing of cause by Dallas College. *See* Section I.A above, discussing the changes to DMAB(LOCAL) and DMAA(LOCAL).

Defendant's only reference to DMAA is to admit that its full protections do not apply, "because nonrenewal decisions do not implicate a property interest in the contractual term of employment." *Motion* at 8. The point is that DMAA *previously did apply to non-renewal decisions,* and thereby provided Plaintiffs and other Dallas College faculty a property interest in continuing employment. This has been taken away.

Defendant claims that Plaintiffs have no ability to challenge the change in their status from having protected ongoing employment to being on term contracts. But the cases they have no bearing here – where a public employer has made policy changes to take away property interests without due process. Defendant simply cites contract cases against private employers, where there was no due process challenge involved (*Kellermann v. Avaya, Inc.*, 530 F.Appx. 384, 389 (5th Cir. 2013), or where the plaintiff was an at-will employee. (*Drake v. Wilson N. Jones Med. Ctr.*, 259 S.W.3d 386, 390 (Tex.App. – Dallas 2008, pet. denied)).

B. FIRST AMENDMENT – Plaintiffs' Claim for violation of the 1st Amendment, brought pursuant to 42 U.S.C. § 1983

Plaintiffs' second Constitutional claim is based on actions taken by Dallas College's Board in response to Dallas College faculty's exercise of their rights under the First Amendment. The Board infringed Plaintiffs' liberty interest in academic freedom, freedom of assembly, and right to petition for redress of grievances, by changing its policies regarding faculty employment and performance reviews. *FAC* at 14-15. Certain faculty – including Plaintiffs – were perceived as "reflexively antagonistic toward Dallas College leadership and the Board." *FAC* at ¶ 3.17. In retaliation, and in order to chill further dissent, the Board took the actions which Plaintiffs have challenged.

Defendant's Motion makes two basic arguments: (1) the now familiar argument that the revised Dallas College policies did not revoke any protected rights; plus lack of causal connection

between the Plaintiffs' exercise of First Amendment rights and the Board's actions; and (2) Plaintiffs' activities did not qualify as protected activity, that is, speech regarding a matter of public concern. *Motion* at 12-15.

1. The new policies revoked Plaintiffs' rights, and Plaintiffs have sufficiently pled causation.

As set forth above in Section I.A, at pp. 1-3, Plaintiffs have pled specific policy changes which adversely affected them. In addition, Plaintiffs have alleged specific facts, including correspondence attached as Exhibit A to their amended complaint, regarding the backlash against their formation of an AAUP chapter to protect academic freedom and principles of shared governance, the challenge by such chapter to the Board's adoption of a One College policy, and the vote of no confidence in the Chancellor. *FAC* at 14-16, and Exhibit A [Doc. 15 page 26-27 of 59]. The Board's public animosity toward faculty is specifically quoted in ¶¶ 14.11-14.12, including note 6. These allegations – of the Plaintiffs' exercise of First Amendment rights, the correspondence linking threatened Board actions to outspoken faculty, and the Board's own comments regarding faculty, not only suffice as causation facts, they further specifically support the arguments below.

2. Plaintiffs conduct is protected speech on a matter of public concern—as pled in their Amended Complaint—and is deserving of 1st Amendment protection.

Defendant's Motion argues that Plaintiffs' speech is not protected by the 1st Amendment since the activities Plaintiffs engaged in were in their capacity as employees, rather than a citizen, and thus "did not involve matters of public concern," *Motion* at 14-15. Yet, Defendant's argument is misplaced—which in large part is due to the Defendant's reliance on outdated case law discussing the distinction between protected speech as a citizen and unprotected speech as an

employee.[3] *Motion* at 14. Plaintiffs' activities—as pled in Plaintiffs' Amended Complaint—are protected by the 1st Amendment because (1) Plaintiffs activities were performed in their capacity as citizens and (2) because the content, form, and context of their speech addressed matters of public concern.

The Supreme Court has unequivocally rejected the notion that public employees forfeit their right to freedom of speech by virtue of their public employment. *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968). Furthermore, the Supreme Court's precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment. *Lane v. Franks*, 573 U.S. 228, 240 (2014). Thus, there is significant value in encouraging, rather than inhibiting, speech by public employees. For "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Lane*, 573 U.S. at 236; *see also Pickering*, 391 U.S. at 572 (the Supreme Court observed that "[t]eachers are . . . the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.")

The inquiry into whether the employee's speech is constitutionally protected involves three considerations. First, it must be determined whether the employee's speech is pursuant to his or her official duties. *Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008). If so, then the speech is not protected by the First Amendment. *Id.* Second, if the speech is not pursuant to official duties, then it must be determined whether the speech is on a matter of public concern. *Id.* Third, if the

[3] All of Defendant's cited case law discussing the distinction between employee and citizen speech are cases that were decided prior to *Garcetti*, which set out the new framework in determining this distinction.

speech is on a matter of public concern, the *Pickering* test must be applied to balance the employee's interest in expressing such a concern with the employer's interest in promoting the efficiency of the public services it performs through its employees. *Id.* Whether a statement is made as an employee or as a citizen, and whether a statement addresses a matter of public concern is a question of law that must be resolved by the court. *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 736 (5th Cir. 2015). Defendant's Motion discusses only the first two considerations: (i) whether the Plaintiffs spoke as employees or citizens, and (ii) whether the speech is on a matter of public concern. [Dkt. 20, pp.14-15]. Accordingly, Plaintiffs' response addresses both of these issues below.

(i) Plaintiffs' Amended Complaint appropriately pleads Plaintiffs' speech as citizens.

Plaintiffs have alleged that they spoke outside of their official duties as professors, and thus, spoke as citizens—warranting 1st Amendment protection. In *Garcetti v. Ceballos*, the Supreme Court established that government employees do not speak as citizens when they make statements pursuant to their official duties. 547 U.S. 410, 421 (2006). Furthermore, activities undertaken in the course of performing one's job are activities pursuant to official duties and not entitled to First Amendment protection. *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008). Fifth Circuit precedent "focuse[s] on 'the scope of [] ordinary job responsibilities' as the critical factor for whether speech was made as an employee or a citizen." *McCarty v. Teal*, No. 1:22-CV-170-H, 2023 U.S. Dist. LEXIS 172604 *at 16 (N.D. Tex. 2023) (September 27, 2023).

When a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job. *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008); *See Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007). If, however, a public employee takes his job concerns to persons outside the workplace in

addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen. *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (citing *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006)).

The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. *Id*. Thus, so long as the public employee's speech is not within his or her ordinary job responsibilities, and is not the subject of an internal report up the chain of command, it is immaterial to consider whether the public employee's speech is "related to or concern[ed] information learned during [his or her] employment." *Gibson v. Kilpatrick*, 838 F.3d 476, 482 (5th Cir. 2016). Thus, in this circuit, courts have typically granted First Amendment protection to employee speech outside the scope of the employee's ordinary job responsibilities, where the employee's concerns are taken outside of the workplace. *See Gibson v. Kilpatrick*, 838 F.3d 476, 482 (5th Cir. 2016); *Jones v. Matkin*, 623 F. Supp. 3d 774, 784-85 (E.D. Tex. 2022) (professor spoke as a citizen and not as an employee in social media posts related to her employer's pandemic-reopening plan; doing so "took her 'job concerns to persons outside the workplace.'").

Plaintiffs have pled facts demonstrating that they spoke as citizens, because their speech was outside the scope of their job duties to Dallas College, and their concerns were expressed to individuals outside of their workplace. The Plaintiffs' protected speech and conduct, which led the Board to enact punitive policies, included attempts to form a faculty senate, criticism of the Chancellor, and action by their AAUP chapter to send formal letters sent to the Dallas College Board of Trustees, critical of policies and actions by the Board and administration under the new "One College" policy. *FAC* at ¶ 4.10.

Defendant argues that these activities were taken in Plaintiffs' "capacity as an employee." *Motion* at 15. However, the Defendant's contention is simply incorrect. Nothing indicates that Plaintiffs' job duties included this speech or conduct. The communications by the AAUP were directed to the Dallas College Board of Trustees, the elected officials making decisions about many millions of taxpayer dollars, and affecting thousands of students. These were not complaints to Plaintiffs' supervisors or anyone in their chain of command about working conditions. *FAC* at ¶ 4.10. As such, Plaintiffs' activities, expressing their concerns about the direction of Dallas College, were made to individuals outside of their workplace.

(ii) Plaintiffs' speech was on a matter of public concern.

The Fifth Circuit looks to the content, form, and context of the speech, as revealed by the whole record, in determining whether the plaintiffs' speech addresses a matter of public concern. *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 221 (5th Cir. 1999). *See Gonzalez v. Benavides*, 774 F.2d 1295, 1300-01 (5th Cir. 1985) (declining to "exclude the possibility that an issue of private concern to an employee may also be an issue of public concern."); *See also Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988) ("Dismissing [the plaintiff's] speech as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out."). Thus, an employee's speech may contain an element of personal interest and yet still qualify as speech on a matter of public concern. *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 222 (5th Cir. 1999).

Under the foregoing precedent, the content, form, and context of Plaintiffs' speech indicate that they spoke on matters of public concern. The <u>content</u> of the speech weighs in favor of public concern because the AAUP letters discussed the faculty's concern regarding the execution and implementation of the new "One College" policy by the Board and administration—which

involved public funds on a huge scale. The letters to the Board served to warn taxpayers of the possibility that their tax dollars were being grossly misused, from the viewpoint of the Plaintiffs. As in *Pickering*, Dallas College professors—including Plaintiffs—are members of a community likely to have "informed and definite opinions as to how funds allotted to the operation of the schools should be spent." 391 U. S., at 572. The Plaintiffs, using their experience and expertise, recognized the mismanagement—and sounded the alarm over wasted public funds. No reading of the Plaintiffs' allegations suggests that their purpose was to magnify a personal dispute between themselves and Dallas College. *See Harris*, 168 F.3d at 222 (Court held that there was no evidence that the Plaintiffs' speech merely concerned an employment related squabble with their supervisor.). As such, the content of Plaintiffs' speech weighs in favor of public concern.

The <u>form</u> of the speech suggests it is of public concern because the letters were submitted " . . . [to a] place where one might make a complaint of public concern." *McCarty v. Teal*, No. 1:22-CV-170-H, 2023 U.S. Dist. LEXIS 172604 *at 23 (N.D. Tex. 2023) (September 27, 2023). Sending letters to the Board is "a place where one might make a complaint of public concern," because Plaintiffs' were issuing their concerns to the elected officials on the Board who ultimately have the authority to address Plaintiffs' concerns. Thus, the form of Plaintiffs' speech—letters sent directly to the Board—constitutes a "place where one might make a complaint of public concern," and thus, indicates that the speech is of public concern.

Finally, the <u>context</u> of the letters indicates that Plaintiffs spoke on a matter of public concern. AAUP wrote to speak on behalf of faculty as a whole, not for specific professors. Here, Plaintiffs Day and Frisella participated in actions intended to improve Dallas College by creating a faculty senate, working to strengthen academic freedoms, conducting a vote of no confidence in

the Chancellor, and making the Board of Trustees aware of faculty concerns over spending decisions and implementation of the new "One College" policy. *FAC* at 14-15, ¶ 4.10.

Accordingly, Plaintiffs have plausibly alleged their First Amendment claim. Nevertheless, Defendant argues that Plaintiff Hughes, not having participated in the activity described in the *FAC*, "undeniably fails to expressly 'specify the protected speech he claims to have engaged in or assert that he spoke out on a matter of legitimate public concern.'" *Motion* at 15. This point misreads the purpose of the First Amendment.

Dallas College recognizes the right of its faculty to academic freedom. *FAC* ¶ 4.9; tenure (under whatever name) functions to protect academic freedom, by removing fear of retaliation if the faculty expresses unpopular opinions. *Id.*, ¶ 4.10; and Defendant's policy changes were enacted to deprive faculty of tenure; to create a chilling effect against any faculty who would otherwise express contrary opinions; and to create a mechanism for the administration to rid itself of faculty who might organize to oppose actions by the Board and Chancellor. *Id.*

Thus, Plaintiff Hughes had the right to academic freedom—as recognized by Dallas College policies—and the three-year rolling contracts (including the continuing employment under DMAA and DMAB) protected academic freedom.[4] Once the three-year rolling contracts were removed, Hughes' academic freedom was diminished, and the protections previously afforded him if he spoke out against the Board and administration were gone. Hence, the retribution enacted by the Board against faculty not only punished Plaintiffs Frisella and Day for their exercise of First Amendment rights, it served its intended chilling effect against any faculty who would otherwise express opinions contrary to the Board and administration. Although Hughes did not engage in

[4] Generally, public institutions of higher learning bear the responsibility of protecting academic freedom. *See* Texas Education Code § 51.354.

protected speech, the retaliation that occurred as a result of Day's and Frisella's protected speech, impacts Hughes directly.

C. BREACH OF CONTRACT

Plaintiffs' breach of contract claim is based on Dallas College's failure to issue them three-year contracts for 2022-2025, after the first year of their 2021-2024 contracts. *FAC* at 17, ¶ 4.17. Dallas College's policy and practice of three-year rolling contracts for eligible faculty was not simply to renew contracts at the end of their term, but to issue new three-year contracts every year. For decades leading up to 2022, Dallas College faculty (and specifically Plaintiffs) were always in the first year of a three-year contract. *Id.* at 4, ¶ 3.4-3.5

Plaintiffs have unarguably been in contractual relationships with Defendant at all relevant times. Plaintiffs allege that the policies of Dallas College also formed part of their contracts, *Id*. at 17, ¶4.16, and that in violating such policies, Dallas College committed an actionable breach of contract. Defendant argues that Plaintiffs have failed to state a claim because (1) Dallas College policies did not create contractual relationships. *Motion* at 16; (2) Dallas College policies never guaranteed three-year rolling contracts. *Id.* (3) Plaintiffs' allegations are extrinsic evidence which cannot be relied upon to vary the language of Dallas College policies and contracts. *Id.* at 18; and (4) Plaintiffs' employment contracts do not guarantee continued employment beyond each Plaintiffs' contract term. *Id.* at 20. We address each argument in turn.

Employment policies may create contractual rights in Texas.

In Texas, when an employee signs a contract related to their employment whereby the employee agrees to abide by the policies, rules, or regulations of the employer, such references to the policies "reflect[] an intent of the parties to incorporate the [policies] into the contract." *Wupper v. Baylor College of Med.*, No. A14-84-324-CV, 1984 Tex. App. LEXIS 6777 at *2-3 (Tex. App.—

Houston [14th Dist.] Dec. 6, 1984, no writ) (mem. op., not designated for publication) (citing *Clutts v. Southern Methodist Univ.*, 626 S.W.2d 334, 336 (Tex. App.—Tyler 1981, writ ref'd n.r.e). Copies of Plaintiffs' contracts are included in Defendant's appendix, and all require adherence to applicable College policies. (e.g., [Doc. 6-2, page 2 of 4]).

The Fifth Circuit recognizes that Texas law permits employment policies to alter the nature even of at-will employment, and create enforceable contractual rights, where the policy specifically and expressly limits the employer's ability to terminate the employee. *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 862 (5th Cir. 1999).

As explained herein and in Plaintiff's First Amended Complaint, the Dallas College policies included "carefully developed employer representations upon which an employee may justifiably rely." *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 503 (Tex. 1998). *See also Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1198-99 (5th Cir. 1987) (court held that employer's policies altered employment relationship where it was shown that the company's supervisory personnel recognized the obligation under the company's policies to discharge only for cause).

(1) Plaintiffs have plausibly alleged that Dallas College policies created contractual rights to Plaintiffs granting them the right to continued employment through rolling three-year contracts.

Plaintiffs' Amended Complaint extensively sets forth how Plaintiffs and Dallas College (at every level) treated the Dallas College policies regarding faculty contracts *as part of the faculty contracts*. The Board acted on this understanding, that only by changing such policies could it end

the rights enjoyed by the faculty under the "rolling three-year policy"[5] or "automatic three-year contract for faculty."[6]

Dallas College policies—including DCA (LOCAL)—contained detailed procedures on how the rolling three-year contracts were issued to faculty, on faculty discipline, and on faculty nonrenewal. *FAC*, ¶¶ 3.1; 3.18-3.23; *See Aiello*, 818 F.2d at 1201. Furthermore, like in *Aiello*, Dallas College followed these procedures and notified Plaintiffs that they were entitled to them. *Id.* In particular, Dallas College followed the procedures set forth in the former version of DCA (LOCAL) by affording proven faculty, including Plaintiffs, a new three-year contract each year. *FAC,* ¶ 3.1. Accordingly, Plaintiffs have plausibly alleged that Dallas College policies and practices formed part of their contract terms, including Plaintiffs' right to continued employment through rolling three-year contracts, and non-renewal only for cause.

Somewhat surprisingly, Dallas College cites previous cases in which former employees, represented by Plaintiffs' counsel, alleged that "Dallas College polices constitute part of an employment contract." *Motion* at 17. None of those cases, however, were dismissed for failure to state a breach of contract claim. Three of the four cases went to the summary judgment stage with the breach of contract claim intact: *Robinson v. Dallas Cnty. Cmty. Coll. Dist*., No. 3:14-cv-4187-D[7], *Kelly v Dallas Cnty, Cmty. Coll. Dist*., No. 3:16-0871-C; and *Edrich v. Dallas Coll*., No. 3:21-cv-02963-E). The fourth case – the only one with a faculty member as a plaintiff – settled after

[5] *First Amended Complaint* at 18 (slide).

[6] *First Amended Complaint*, Ex. H, [Doc. 15, page 53 of 59].

[7] This court initially dismissed Robinson's breach of contract and whistleblower claims without prejudice, and after Robinson amended his pleading, Defendant sought to dismiss only the whistleblower claim. Robinson lost his breach of contract claim on summary judgment.

Dallas College's second motion to dismiss was denied. *Black v. Dallas Cnty. Cmty. Coll. Dist.*, No. 3:15-cv-3761-D.[8]

(2) Plaintiffs have alleged facts demonstrating that Dallas College policies and practices guaranteed three-year rolling contracts to Plaintiffs.

Plaintiffs have properly alleged facts that illustrate that Dallas College policies and practices did in fact guarantee Plaintiffs three-year rolling contracts. There was a reciprocal understanding between Dallas College faculty, the administration, and the Board that these rolling three-year contracts served as a form of tenure. *FAC*, ¶¶ 3.8, 3.10, 3.12. This understanding was put into action with the Board consistently issuing new three-year rolling contracts to full-time Dallas College faculty, including Plaintiffs, from the early 1970s up until 2022. *FAC*, ¶ 3.4. Defendant's representations—through consistent issuance of rolling three-year contracts and the administration's oral assurances that the rolling three-year contracts functioned as tenure—to Plaintiffs were definite, reasonable, and justifiably relied upon to constitute a contractual relationship that guaranteed Plaintiffs the right to continued employment. Thus, Defendant's conduct modified Plaintiffs' employment status from term employment to tenured employment.

Lastly, Defendant contends that Dallas College policies disavowed any promise of continuing employment, citing language in DCA(LOCAL) that nothing "shall give rise to an expectation of continued employment beyond the term of the contract or a belief in de facto tenure. *Motion* at 18. Defendant points to this language and other disavowals included in the policies and the written contracts, as if general language making contract renewals optional automatically superseded the specific and extensive protections of ongoing employment contained in the

[8] Defendant correctly cites the language this Court used in describing Black's "allegation that DCCCD's policies were part of his employment contract and that DCCCD breached such contract," but forgets that the dismissal of such claim was without prejudice, and that when Black filed an amended claim for breach of contract, it was not dismissed. It was not even challenged under Rule 12(b)(6). *Black v. Dall. Cty. Cmty. Coll. Dist.*, Civil Action No. 3:15-CV-3761-D, 2017 U.S. Dist. LEXIS 12533, at *4, | 2017 WL 395695 (N.D. Tex. 2017).

previous versions of DMAA(LOCAL) and DMAB(LOCAL). On the contrary, according to the Fifth Circuit, "it is a truism in the law that such disavowals are not controlling." *Aiello*, 818 F.2d at 1200. Specifically, in *Aiello*, the disavowal in question stated that the defendant's regulations were "not intended to be, and do not constitute, a contractual arrangement or agreement between the company and its employees of any kind, . . . [and] that all employment is 'at will.'" *Id.* at 1198. Certainly, if disavowals within an employee's handbook regarding at-will employment are not dispositive, neither is the language of Dallas College policies claiming not to provide the employment protections which other policies expressly granted.

(3) Plaintiffs have sufficiently pled facts in their Amended Complaint that an ambiguity existed in Dallas College policies allowing extrinsic evidence to come in to resolve the ambiguity.

Defendant argues that Plaintiffs' reference to extrinsic evidence is improper because there were no ambiguities within the relevant policies discussed in Plaintiffs' Amended Complaint. *Motion* at 18-19. Considering the relevant Dallas College policies at issue and Dallas College's conduct in consistently issuing new rolling three-year contracts each year, there appears to be an ambiguity as to whether the Board's issuance of the rolling three-year contracts was required or discretionary. *FAC*, ¶¶ 3.4, 3.8, 3.10, 3.12, 3.18-3.24. Only now is Dallas College even denying that rolling three-year contracts were a fact of life at Dallas College, accepted as policy, and acknowledged to be binding by the Board and everyone else.

A contract is ambiguous when its meaning is uncertain and doubtful or when it is reasonably susceptible to more than one meaning. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "Only where a contract is ambiguous may a court consider the parties' interpretation and 'admit extraneous evidence to determine the true meaning of the instrument.'" *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 764-65 (Tex. 2018).

Here, it is uncertain whether the language in the earlier DCA (LOCAL) policy gave the Board discretion to issue rolling three-year contracts or required the Board to issue rolling three-year contracts—given the Board's practice of consistently issuing new three-year rolling contracts each year. *FAC* ¶¶ 3.4, 3.8, 3.10, 3.12, 3.18-3.24. If the policy's language about discretion is read together with the other written policies restricting non-renewal of faculty, the Board's conduct (and Plaintiffs' other allegations) resolve the conflict, or ambiguity.

(4) Plaintiffs' Amended Complaint has plausibly alleged an actionable breach because Dallas College policies and practices became a part of Plaintiffs' employment contracts—which guaranteed Plaintiffs continued employment.

As discussed in depth above, Dallas College policies and practices became a part of Plaintiffs' employment contracts and modified the employment relationship from term employment to tenured employment. Defendant argues that there is no actionable breach of contract because Plaintiffs' employment contract never guaranteed a right to continued employment beyond the term of Plaintiffs' employment contract. *Motion* at 20. That argument was refuted in Section I.A above. The policies guaranteed continued employment, which could not be terminated without a showing of good cause, and Dallas College took that protection away from Plaintiffs mid-contract.

Plaintiffs have alleged that they were still under the three-year contracts signed under the previous policies when Defendant's Board attempted to change Plaintiffs' rights under such contracts—without any due process or hearing. FAC, ¶ 3.3. Under the then-existing policies and long-standing practices of Dallas College, new three-year contracts would have been issued in May 2022, replacing the 2021-2024 contracts with 2022-2025 contracts. *Id.* ¶ 3.13.

Defendant's removal of the rolling three-year contract without due process, Defendant's non-issuance of the new rolling three-year contracts in May of 2022 and 2023, and Defendant's

issuance of non-rolling contracts to Plaintiffs constitute an actionable breach of Plaintiffs' employment contracts, which included the right to due process before non-renewal, a new three-year contract each year, and the protections of the previous policies. As such, Plaintiffs have plausibly alleged an actionable breach.

D. Texas Open Meetings Act ("TOMA")

Plaintiffs have alleged that Dallas College's administration and board violated the Texas Open Meetings Act ("TOMA"). The First Amended Complaint alleges specific facts plausibly stating a claim that members of the board, a governmental body, enacted changes to Dallas College policies through meetings which violated TOMA. *Amended Complaint* at 19-22, ¶¶ 4.20-4.28; 5.2.

Defendant's Motion gives two grounds for dismissing such cause of action, the first of which is addressed below. Defendant's second ground is that Plaintiffs lost nothing by the policy changes, and therefore restoring the former policies would not benefit them. *Motion* at 24-25. This ignores the Plaintiffs' loss of the policies providing a due process hearing, at which Dallas College bore the burden of proof, before they could be non-renewed. *See* Section I.A above, and *FAC* at pp. 9, 11, and exhibits referenced therein.

<u>Sufficient detail</u>

Defendant argues that Plaintiffs' TOMA allegations are too vague to meet federal pleading standards, or are not TOMA violations at all. *Motion* at 22. Defendant also argues that despite TOMA's four-year statute of limitations, and despite the statutory availability of injunctive relief to "reverse a violation," Plaintiffs cannot in equity seek injunctive relief, because they were insufficiently diligent. *Id.* at 23. This is a defense to Plaintiffs' TOMA claim, perhaps, but it is not grounds for dismissal at the Rule 12(b)(6) stage.

Despite the inherent challenge of alleging specific behavior when such behavior took place

in secret, Plaintiffs have described the facts, as they know them, which indicate TOMA violations, including lack of specificity in agendas for the Board's executive sessions, exclusion of certain Trustees from meetings at which actual deliberations happened, lack of minutes for executive sessions, and statements made in public which betray behind-the-scenes requests. *FAC* at 19-20, ¶¶ 4.22-4.24. Plaintiffs further alleged how Trustees avoided TOMA restrictions during 2021, and how decisions regarding the policies in question were made with no public deliberation. *FAC* at 20-21, ¶¶ 4.25-4.26.

The lack of disclosure of matters to be considered in special session is a TOMA violation in and of itself. *See Cox Enterprises v. Bd. of Tr. of Austin ISD*, 706 S.W.2d 956, 958-959 (Tex, 1986). Defendant cites *Liveable Arlington v. City of Arlington* for the proposition that TOMA does not require a meeting notice to state all potential consequences. No. 02-23-00288-CV, 2024 WL 2760415, at *10 (Tex.App. – Fort Worth, May 30, 2024, no pet. h.). But in that case, there had been fairly specific notice of the matter under consideration. The Dallas College Board agendas, during the relevant time period, never contained more about executive sessions than the boilerplate recitation of categories permissible for executive session. *FAC* at 19, ¶ 4.22. Plaintiff has plausibly alleged that policy changes which detrimentally affected Plaintiffs and all other Dallas College faculty were made in violation of TOMA. Plaintiffs' claim for relief under such statute should not be dismissed.

IV. CONCLUSION

Dallas College stripped Plaintiffs of protections to their ongoing employment and academic freedom, and did so without due process, and motivated by a desire to silence dissent. Plaintiffs have stated causes of action for deprivation of due process, violation of their First Amendment rights, breach of contract, and violations of TOMA. Defendant's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon all parties via the Court's electronic filing system on July 23, 2024.

/s/ Stefanie Klein
Stefanie Klein