IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOSEPH MICHAEL PHILLIPS, *Plaintiff,* v. COLLIN COUNTY COMMUNITY COLLEGE DISTRICT *et al.*, *Defendants.*	Civil Action No.: 4:22-cv-184-ALM

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FACIAL CHALLENGES AND CLAIMS FOR DECLARATORY RELIEF

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Under Fed. R. Civ. P. 56 and Local Rules CV-7 and CV-56(b), Plaintiff Dr. Michael Phillips files this opposition to Defendants' Motion for Summary Judgment on his facial challenges and claims for declaratory relief. (Dkt. #59, Defs.' Mot. for Summ. J.)

INTRODUCTION

Professors do not lose their First Amendment right to speak about public issues when they work for a public college. Yet, Collin College has used its Code of Ethics and Employee Expression Policy to punish Dr. Michael Phillips, a history professor, for speech on matters of public concern about mass shootings, race relations, COVID-19, and the history of masking during pandemics. The College also used those policies to retaliate against other professors for speech on matters of public concern. Despite these undisputed facts, Defendants now assert in their summary judgment motion that Dr. Phillips cannot prevail on his facial challenges to the College's Code of Ethics and Employee Expression Policy as a matter of law. But Defendants cannot escape Supreme Court precedent and their failure to justify imposing a prior restraint on Dr. Phillips's protected speech.

The Court should deny Defendants' motion for summary judgment on Dr. Phillips's facial challenges and claims for declaratory relief, and, instead, grant summary judgment for Dr. Phillips on his facial claims under the *NTEU*, overbreadth, and vagueness doctrines because Defendants misconstrue the facts and applicable law. (Dkt. #58, Pl.'s Mot. for Summ. J.)

Based upon the undisputed material facts, it is clear that Collin College's policies: (1) regulate employees' speech on matters of public concern without directly

alleviating a real harm; (2) suppress substantially more protected speech than necessary to achieve their goals; and (3) make it impossible for employees to know what speech might lead to discipline. No reasonable jury could find otherwise.

RESPONSE TO STATEMENT OF ISSUES

Defendants' First Statement of Issue: As a matter of law, Plaintiff cannot prevail on his facial vagueness challenge to the College's Code of Professional Ethics.

Plaintiff's Response: Dr. Phillips should prevail on his facial vagueness challenge as a matter of law because the College's Code of Ethics and Employee Expression Policy are impossible for an employee to understand, leaving them ripe for arbitrary enforcement by administrators who also can't understand them.

Defendants' Second Statement of Issue: As a matter of law, Plaintiff cannot prevail on his facial overbreadth challenge to the College's Code of Professional Ethics.

Plaintiff's Response: Dr. Phillips should prevail on his facial overbreadth challenge as a matter of law because Collin College's Code of Ethics and Employee Expression Policy broadly regulate protected faculty speech on matters of public concern and do so for no good reason.

Defendants' Third Statement of Issue: As a matter of law, Plaintiff cannot prevail on his challenge to alleged prior restraints on faculty speech.

Plaintiff's Response: Dr. Phillips should prevail on his challenge to the College's prior restraints on faculty speech as a matter of law because there is no dispute that the College's Code of Ethics and Employee Expression Policy forces

employees to bring *any* complaints about the College—even on matters of public concern—to administrators before sharing them publicly.

Defendants' Fourth Statement of Issue: As a matter of law, Plaintiff cannot prevail on his two requests for unnecessary, redundant declaratory judgments

Plaintiff's Response: Dr. Phillips is entitled to declaratory relief as a matter of law because the Fifth Circuit has left no doubt that requests for declaratory relief are meaningful to redress a plaintiff's constitutional injuries, not duplicative.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendants omit key undisputed facts from their motion.

Dr. Phillips Challenges the Code of Ethics Provision Forcing Employees to Bring Concerns About the College to the College.

Defendants assert that Dr. Phillips is challenging only the portions of the College's Code of Ethics requiring employees to "act in public affairs in such a manner as to bring credit to the College District" and "treat all persons with dignity and respect." (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 3.2.) But they omit that Dr. Phillips is also challenging the portion of the Code restraining employees from criticizing the College's policies publicly before first bringing their concerns to college administrators by requiring employees "observe the stated policies and procedures of the College District, reserving the right to *seek revision in a judicious and appropriate manner*." (Dkt. #59, Defs.' Mot. for Summ. J., Ex. 1) (emphasis added).

Dr. Phillips testified that he did not understand the terms "dignity" and "respect" as those words are interpreted by Defendants. (Deposition of Michael Phillips (attached as Exhibit A, "Ex. A, Phillips Dep.") 139:23–140:5.) Collin College

used the Code of Ethics to discipline Dr. Phillips for posting about COVID-19 and the college's masking policies on social media, and for discussing masking during a class lecture. (Dkt. # 58, Pl.'s Mot. for Summ. J. 12–14.)

Dr. Phillips Challenges the Employee Expression Policy Provision Which Forces Employees to Bring "Differences of Opinion" About the College to the College.

Defendants also incorrectly assert that Dr. Phillips is challenging only the portion of the Employee Expression Policy requiring employees to always "strive for accuracy, exercise appropriate restraint, exhibit tolerance for differing opinions, and indicate clearly that they are not an official spokesperson for the College District" when speaking *on* "*matters of public concern*." (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 3.3) (emphasis added). Defendants omit that Dr. Phillips is challenging the policy's prior restraint that "faculty members who have differences of opinion with existing or proposed policies or procedures will express these views through the standing committee structure of the College District or their supervising administrators." (Dkt. # 58, Pl.'s Mot. for Summ. J. 25) Like the Code of Ethics, this portion of the Employee Expression Policy requires employees to bring any concerns first to the College's "standing committee structure" before speaking about them publicly.

The College provides no definition to employees about what it means to "exercise appropriate restraint." (*Id.*) Collin College used the Employee Expression Policy to discipline Dr. Phillips for writing an open letter about Confederate monuments in the *Dallas Morning News* and for posting about COVID-19 and the College's masking policies on social media. (Dkt. # 58, Pl.'s Mot. for Summ. J. 9, 12–13.)

Although Dr. Matkin's Email Directive Is No Longer in Place, Defendants Cited It as a Basis for Terminating Dr. Phillips.

Dr. Phillips acknowledges that Dr. Matkin's 2019 email directive is no longer in effect. (Dkt. #59, Defs.' Mot. for Summ. J., Ex. 6.) Nevertheless, there is no dispute that College administrators cited it as an example of Dr. Phillips failing to go through appropriate channels to comment on a matter of public concern and used it as one of the reasons to terminate Dr. Phillips, as described below.

On August 3, 2019, a former Collin College student opened fire in a Walmart in El Paso, Texas, targeting Mexican patrons. (Dkt. #58-3, Phillips Decl. ¶ 5.) In response, Defendant Matkin mandated that staff must send "all press inquiries" to his office. *(Id.* ¶ 5; Deposition of Kristen Streater (attached as Exhibit B, "Ex. B, Streater Dep.") 19:18-20, Ex. 2.) Following the tragedy, a *Washington Post* reporter contacted Dr. Phillips for an interview about his area of expertise—race relations in the Dallas area—to provide context for a story about the El Paso gunman. (Dkt. #58-3, Phillips Decl. ¶ 6.)

Then-Associate Dean Streater approached Dr. Phillips about the interview, who told Streater that he asked the reporter not to identify him as a professor at the College. (Ex. B, Streater Dep. 19:6-17.) Although Streater believed Dr. Phillips, she issued him an Employee Coaching Form for disobeying President Matkin's directive. (Dkt. #58-3, Phillips Decl. ¶ 5.)

College administrators used Dr. Phillips's interview with the *Washington Post* to justify later punishments under the challenged policies and his termination. Associate Dean O'Quin cited Dr. Phillips's Employee Coaching Form for the 2019

Washington Post interview in her August 2021 Employee Discipline Form as an example of Dr. Phillips "not bring[ing] questions about a directive, about COVID protocols, about things related to college policy and procedure and directives that he disagreed with." (Ex. B, Streater Dep. 67:17–68:13.) Defendant Matkin also cited Dr. Phillips's interview with the *Washington Post* in the "Memo to File" documenting his reasons for not giving Dr. Phillips a new contract, terminating his employment relationship. (Dep. of Neil Matkin (attached as Exhibit C, "Ex. C, Matkin Dep.") 233:12-234:3, Ex. 48.) Referencing the interview, Matkin wrote that "Dr. Phillips has demonstrated to supervisors that he ignores their directives to follow institutional policies and processes and allow those processes to fully work to address his workplace concern." (*Id.* Ex. 48.) Matkin also wrote that "Dr. Phillips has not sought revision of . . . disagreements or concerns of procedures in a judicious and appropriate manner as expressly required by Board policy DH(LOCAL) and DH(EXHIBIT)." (*Id.*)

LEGAL ARGUMENT

Defendants are not entitled to summary judgment on Dr. Phillips's facial challenges and claims for declaratory relief. "When both parties move for summary judgment, each party must carry its own burden as the movant for its motion and as the nonmovant in response to the other party's motion." *Stuntz v. Ashland Elastomers, LLC*, No. 1:14-CV-00173-MAC, 2019 WL 1212450, at *3 (E.D. Tex. Feb. 22, 2019) (citing *Wells Real Est. Inv. Trust II, Inc. v. Chardon/Hato Rey P'ship, S.E.*, 615 F.3d 45, 51 (1st Cir. 2010)). The normal summary judgment standard is not altered for cross-motions. They are still determined independently, with all inferences still construed for the nonmovant. *Id.* (citing *Brown v. Perez*, 835 F.3d

1223, 1230 n.3 (10th Cir. 2016); *Murphy Expl. & Prod. Co. v. Oryx Energy Co.*, 101 F.3d 670, 673 (Fed. Cir. 1996)).

Under this standard, Dr. Phillips, not the College, is entitled to summary judgment.[1] First, Defendants assert that *Moore v. City of Kilgore* controls Dr. Phillips's prior restraint claim. 877 F.2d 364, 390 (5th Cir. 1989). They are wrong. The Supreme Court's decision in *United States v. National Treasury Employees Union (NTEU)* controls, and Defendants' policies fail under the proper *NTEU* analysis because the policies do not directly alleviate a real harm. 513 U.S. 454 (1995); (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.22.) Second, Defendants' overbreadth argument rests on the false premise that academic freedom grants institutions of higher education the ability to punish employee speech on matters of public concern. If anything, academic freedom refutes Defendants' overbreadth argument. Third, Defendants' argument that its policies are not unconstitutionally vague relies on a distinguishable case involving a university policy that—unlike the policy here—defines its key terms. Finally, the Declaratory Judgment Act's text and Fifth Circuit precedent negate Defendants' claim that Dr. Phillips's declaratory relief claims are duplicative because he also seeks statutory relief under Section 1983.

[1] Dr. Phillips fully incorporates his legal arguments in support of his own motion for partial summary judgment as if set forth in full here. (Dkt. #58, Pl.'s Mot. for Summ. J. 18–35.)

I. Dr. Phillips Is Entitled to Summary Judgment on His *NTEU* Claim Because the Challenged Policies Restrict Employee Speech Without Alleviating a Real Harm.

This Court has already rejected Defendants' invitation to ignore *NTEU* and dismiss Dr. Phillips's prior restraint claim. (*Compare* Dkt. #23, Defs.' Mot. to Dismiss ¶ 3.7, *with* Dkt. #59, Defs.' Mot. for Summ. J ¶ 4.22.) Defendants now argue that a Fifth Circuit case from 1989—one Defendants cite for the first time—is controlling precedent. (Dkt. #59, Defs.' Mot. for Summ. J ¶ 4.22.) It is not, because it conflicts with the Supreme Court's later decision in *NTEU*. Applying the correct *NTEU* standard, Dr. Phillips is entitled to summary judgment on his prior restraint challenge to the Code of Ethics and Employee Expression Policy.

A. Contrary to defendants' contentions, *NTEU* controls.

NTEU, not *Moore*, controls here. Under *NTEU*, Collin College must "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[2] *NTEU*, 513 U.S. at 468 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968)). To meet this "heavy" burden, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms

[2] In denying Defendants' Motion to Dismiss, the Court held that Defendants' argument "does not comport with well-established caselaw on the matter." *Phillips v. Collin Cmty. Coll. Dist.*, No. 4:22-CV-184, 2022 WL 4477698, at *4 (E.D. Tex. Sept. 26, 2022) (citing *NTEU*, 513 U.S. at 457).

in a direct and material way." *NTEU*, 513 U.S. at 475 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994).

Moore involved a firefighter disciplined for speaking to the press about fire department staff and budget issues. *Moore*, 877 F.2d at 390. The Fifth Circuit held that the fire department's policy prohibiting employees from speaking to the press was unconstitutional as applied to the plaintiff, but the court did not even "entertain" the facial constitutionality of the policy. *Id.* As the court explained, the defendants' "rule was applied unconstitutionally in this case. We need not go further to decide its facial constitutionality." *Id.* at 392. Even though the Fifth Circuit stated in dicta that the policy at issue was not a prior restraint, there is little doubt that that *Moore* conflicts with *NTEU*. Indeed, Judge Sentelle of the D.C. Circuit recognized in his dissenting opinion in the *NTEU* case that the majority's holding, upheld by the Supreme Court, conflicted with *Moore*. *Nat'l Treasury Emps. Union v. United States*, 990 F.2d 1271, 1285 (D.C. Cir. 1993) (Sentelle, J., dissenting).

District courts across the country have concluded that *NTEU* overrides *Moore*. In one case reminiscent of President Matkin's directive to not speak to press after the 2019 El Paso shooting, a fire department invoked *Moore* in an attempt to require all fire department employees to clear media inquiries with the chief and any complaints about the department with the union. *Int'l Ass'n of Firefighters Loc. 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734, 741 (E.D. Mich. 2003). The district court rejected that argument and granted summary judgment to the plaintiff, reasoning that "[a]lthough *Moore* does seem to support [defendants'] position, it was

decided prior to *NTEU* and therefore did not have that precedent to follow; to the extent that *Moore* conflicts with *NTEU,* this Court must follow *NTEU* and apply the more exacting standard." *Id.* In a similar lawsuit challenging a fire department's policy requiring all grievances with the department proceed "through a prescribed procedure through the chain of command," the district court denied defendants' summary judgment on a prior restraint claims, noting that "[t]he Fifth Circuit *Moore* case relied on by the Defendants, however, predates [*NTEU*]." *Davis v. Phenix City*, No. 3:06CV544-WHA, 2008 WL 401349, at *9 (M.D. Ala. Feb. 12, 2008). Because *Moore* is inconsistent with *NTEU, NTEU* governs Dr. Phillips's challenge to the College's policies broadly restricting employee speech on matters of public concern.

Defendants also cite to *Harris v. Noxubee County*, 350 F. Supp. 3d 592, 597 (S.D. Miss. 2018), *aff'd*, 776 F. App'x 868 (5th Cir. 2019) for the proposition that "the Fifth Circuit has not extended [a heavy] presumption of invalidity to policies regulating employee speech." (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.22). That is wrong. In *Hoover v. Morales*, the Fifth Circuit relied on *NTEU*'s prior restraint analysis to uphold a preliminary injunction restraining enforcement of two Texas A&M policies restricting employees from serving as experts in cases opposing the State in litigation. 164 F.3d 221, 223 (5th Cir. 1998). The Fifth Circuit explicitly invoked *NTEU*, noting that "[t]he State bears the burden of justifying these restrictions, and when it enacts a 'wholesale deterrent to a broad category of expression by a massive number of potential speakers', the burden of justification is

indeed heavy." *Hoover*, 164 F.3d at 226 (quoting *NTEU*, 513 U.S. at 466–67). In short, Defendants cannot escape the *NTEU* standard.

B. The challenged policies broadly restrict employee speech without alleviating a real harm.

Applying the Supreme Court's *NTEU* standard, Defendants' arguments fail, and it is Dr. Phillips who is entitled to summary judgment. Dr. Phillips has argued in his motion for partial summary judgment that the Court should grant summary judgment in his favor because "(1) Collin College maintained a policy that broadly restrained employees from speaking on matters of public concern as private citizens, and (2) the rights of employees to engage in protected speech and their potential audience to receive their speech outweighs Collin College's interest in regulating that speech." (Dkt. #58, Pl.'s Mot. for Summ. J. 20.) Without simply restating those arguments, Dr. Phillips will show that Defendants have failed to argue, much less prove, that the Code of Ethics and Employee Expression Policy directly alleviate a real harm.

1. The code of ethics does not directly alleviate any real harm.

Defendants have failed to argue that the Code of Ethics alleviates any harm in a direct and material way in their section on prior restraint. (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.33.) Contrary to Defendants' assertion, the Code is a "prior restraint" under *NTEU* because it is "an official policy to prohibit speech before it happens." *Brady v. Tamburini*, 518 F. Supp. 3d 570, 581 (D.R.I. 2021) (granting plaintiff's motion for summary judgment where policy required police officers to get permission from the department before speaking publicly about "police related matters").

In their overbreadth section, Defendants assert that the Code is necessary to protect "the College's reputation and efficiency" as an employer. (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.11.) However, courts regularly reject government employers' asserted need for "efficiency" when there is no evidence to support that the speech at issue actually disrupted operations. For example, in *Brady*, a police department failed to show "how curtailing *all speech* related to the police department detracts from their goals of maintaining accuracy, control, confidentiality, and efficiency in the conduct of officers." 518 F. Supp. 3d at 583. Similarly, in *Liverman v. City of Petersburg*, the Fourth Circuit rejected the government's justification based on mere speculation that employee comments "discredit[ing]" the police department might lead to division or rancor. 844 F.3d 400, 408 (4th Cir. 2016) (invalidating under *NTEU* a policy barring officers from posting anything "that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees").

Here, the College failed to identify any actual harm that has been caused by employee speech publicly critical of the College, and the *NTEU* test does not allow "speculative ills . . . to justify . . . sweeping restrictions on [employees'] freedom to debate matters of public concern." *∂*, 844 F.3d at 408–09. Defendants' failure to meet its burden is understandable because there is simply no evidence to show that employees publicly criticizing the College impacts its operations. In short, in the *NTEU* balancing test, "Defendants have [once again] offered the Court no argument

nor pointed to evidence that would tilt the balance in their favor." *Jones v. Matkin*, No. 4:21-CV-00733, 2022 WL 3686532, at *7 (E.D. Tex. Aug. 25, 2022).

Defendants attempt to skirt the issue by arguing that Dr. Phillips is only challenging the portion of the Code of Ethics requiring faculty to "act in public affairs in such a manner as to bring credit to the College District." But Dr. Phillips is also challenging the Code's mandate that employees "observe the stated policies and procedures of the College District, reserving the right to seek revision in a judicious and appropriate manner." (*Compare* Dkt. #58, Pl.'s Mot. for Summ. J. 22–24, *with* Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.33.) Collin College administrators have made it clear that "the Code of Ethics require employees to first bring *any concern* about the College to their supervisor or a standing committee." (Dkt. #58, Pl.'s Mot. for Summ. J. 22–24.) What Collin College has not made clear, however, is *what harm is directly alleviated* by requiring employees have to bring their concerns through appropriate channels.

2. The employee expression policy does not directly alleviate a real harm.

Defendants also fail to clearly explain what actual harm the Employee Expression Policy actually alleviates in a direct and material way. Defendants appear to claim a need for the policy to "define parameters of academic freedom." (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.31.)

Defendants' invocation of academic freedom is illogical because the College still fails to present any evidence to show that the policy alleviates any harm in a direct and material way. *NTEU*, 513 U.S. at 475. Instead, it asserts that it is owed

"deference" to define what academic freedom means. Notably, the Employee Expression Policy also states that it applies when professors are *speaking as private citizens*. Thus, the College's conception of academic freedom would mean that it is somehow exempt from decades of precedent establishing that an employee's private speech on matters of public concern may not be regulated by the government. If anything, the College's conception *harms* academic freedom by stripping away faculty's expressive rights.

In *Garcetti v. Ceballos*, the Supreme Court held that employee speech is protected if employees speak as citizens on matters of public concern, but not as employees pursuant to their job duties. 547 U.S. 410, 421 (2006). However, the Court acknowledged that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests . . . ." *Id.* at 425. That was no surprise. Decades before *Garcetti*, the Supreme Court recognized the unique position occupied by public university professors, stressing that academic freedom is "a special concern of the First Amendment" that requires judicial protection. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Recognizing the concerns implicated by academic freedom, the Fifth Circuit has held that public university professors may not be disciplined for speech on matters of public concern pursuant to their academic job duties. *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019). The Fifth Circuit is not alone, as the Fourth, Sixth, and Ninth Circuits have also held that the *Garcetti* framework does

not apply to speech related to scholarship or teaching in higher education. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011); *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021); *Demers v. Austin*, 746 F.3d 402, 411–12 (9th Cir. 2014). Those circuits' narrow view of *Garcetti*—tracking the Supreme Court's esteem for academic freedom—makes clear that academic freedom protects public professors from discipline when they are speaking on matters of public concern *pursuant to their job duties as a professor or as a private citizen*.

Defendants' conception of academic freedom as something for which the College itself deserves "deference" conflicts with not only *Buchanan* but also *Garcetti* because it would allow the College to control the speech of faculty as private citizens under the guise of enforcing "academic freedom." More to the point, Defendants fail to show how the Employee Expression Policy alleviates a real harm to the College in a direct and material way—the proper inquiry under *NTEU*.

Defendants also incorrectly state that Dr. Phillips is only challenging the portion of the policy requiring employees to "strive for accuracy, exercise appropriate restraint, exhibit tolerance for differing opinions, and indicate clearly that they are not an official spokesperson for the College District." (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.29.) Dr. Phillips is also challenging the mandate that "faculty members who have differences of opinion with existing or proposed policies or procedures will express these views through the standing committee structure of the College District or their supervising administrators." (Dkt. #58, Pl.'s Mot. for Summ. J 25–27.) As demonstrated above, these restrictions are considered prior restraints under *NTEU*

because they are an official policy of the College mandating "appropriate restraint" by employees speaking as private citizens and strictly limiting employees from freely speaking to the public about their "differences of opinion" with the College. *Brady*, 518 F. Supp. 3d at 581. Thus, Dr. Phillips, not the College, is entitled to summary judgment on his *NTEU* claim to the Employee Expression Policy.

II. Dr. Phillips Is Entitled to Summary Judgment on His Overbreadth Claim Because the Challenged Policies Restrict More Speech Than Necessary to Achieve Their Goals.

Defendants wrongly conclude that the Code of Ethics and Employee Expression Policy can survive an overbreadth challenge because they are necessary to protect the College's reputation and efficiency. (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.11.) As argued above, Defendants claim that the policies are necessary to protect the College's reputation and efficiency are based completely on speculation. Moreover, Defendants fail to identify an analogous case supporting their argument against overbreadth, highlighting why the Court should deny their motion, and instead grant Dr. Phillips summary judgment. "A statute is facially invalid if it prohibits a substantial amount of protected speech. Such facial challenges can succeed only when this overbreadth is substantial in relation to the statute's legitimate reach." *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 762 (5th Cir. 2008) (citation omitted). The College has not identified evidence to justify the broad restrictions on speech when judged in relation to their respective purposes.

In fact, Dr. Phillips has shown undisputed evidence showing the College has extended its policies to punish protected speech. To that end, Defendants' reliance on *Hiers v. Board of Regents of the University of North Texas System* is misplaced

because that plaintiff failed to plead any facts "showing how substantial the overbreadth might be in relation to its legitimate application[.]" No. 4:20-CV-321-SDJ, 2022 WL 748502, at *19 (E.D. Tex. Mar. 11, 2022). Here, Dr. Phillips has brought the Court actual evidence of the College using its Code of Ethics and Employee Expression Policy to punish Dr. Phillips and other faculty. (Dkt. #58, Pl.'s Mot. for Summ. J. pp. 18–35.)

A. The code of ethics prohibits a substantial amount of protected speech for no good reason.

Collin College's Code of Ethics is overbroad because it has been used to discipline Dr. Phillips and other professors for speech on matters of public concern without justification. (*See* Dkt. #58, Pl.'s Mot. for Summ. J. 28–30.)

Hiers, and the *Arnett v. Kennedy* decision it relies on, are distinguishable and do not support ruling against Dr. Phillips's overbreadth claim as a matter of law. Unlike the plaintiff in *Hiers* who failed to plead any facts "showing how substantial the overbreadth might be in relation to its legitimate application[,]" Dr. Phillips has shown that the College used the Code of Ethics to discipline Dr. Phillips for a Twitter post about the College's masking policy even though the College agrees it was a matter of public concern. (Deposition 30(b)(6) Designee Mary Barnes-Tilley (attached as Exhibit D, "Ex. D, Barnes-Tilley 30(b)(6) Dep.") 62:7-10.) Associate Dean O'Quin also cited Phillips's interview with the *Washington Post* and Facebook posts about COVID in 2020 as examples of Dr. Phillips "not bringing questions about a directive, about COVID protocols, about things related to college policy and procedure and

directives that he disagreed with." (Ex. B, Streater Dep. 67:17–68:14.)[3] The College also used the Code of Ethics to get rid of Audra Heaslip and Suzanne Jones for criticizing the College's response to COVID.[4] Defendants offer no evidence disputing these facts.

These instances of the College enforcing the policy to punish protected speech distinguish these facts from *Arnett*. *Arnett v. Kennedy*, 416 U.S. 134, 162 (1974). In *Arnett*, the Supreme Court based its overbreadth analysis almost solely on its finding that the statute at issue *excluded constitutionally protected speech* as a basis for enforcement. *Id.* ("We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad.") Unlike the statute in *Arnett* that excluded protected speech as a basis for punishment, the record is replete with instances of the College actually using the Code of Ethics to punish Dr. Phillips and other faculty members for constitutionally protected speech.

Defendants also attempt to justify the sheer volume of speech subsumed by the Code of Ethics by citing to *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984), a Seventh Circuit case involving a university's code of ethics. (Dkt. #59, Defs.' Mot.

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[3] The College admits that both the removal of Confederate monuments and COVID are matters of public concern. (Dkt #58-12, Collin College Answer to Req. for Admis. Nos. 2, 10.)

[4] "A facial challenge is not limited to the facts of a plaintiff's particular case; in the First Amendment context, a restriction on speech is deemed facially unconstitutional if it punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Brady*, 518 F. Supp. 3d at 581 (internal quotation omitted).

for Summ. J. ¶ 4.10.) But *Korf* is not a First Amendment case, let alone an overbreadth challenge. It has no relevance to Dr. Phillip's overbreadth challenge. In fact, the portion of *Korf* that Defendants cite relates to the plaintiff's substantive due process claim and is simply a statement of the AAUP Statement of Professional Ethics. *Id.* at 1228. Far from concluding these provisions were not overbroad, the Seventh Circuit only found that "[i]t is patently clear that [the plaintiff's] conduct was also inconsistent with this provision of the AAUP Statement." *Id.*

Defendants further argue that the terms "dignity" and "respect" are generally understood because they appear in ethical codes ranging from the "Rules of Civility" of a 16-year-old George Washington to the *Code of Conduct for United States Judges*. But simply identifying similar language between professional codes and the College's policies is meaningless because there is no professional-speech carveout to the First Amendment that would allow the College free reign to broadly regulate employee speech. For instance, the Supreme Court recently held in *National Institute of Family and Life Advocates v. Becerra* that the speech of professionals is not entitled to less First Amendment protection, specifically noting that the government may not impose "content-based restrictions" on professional speech. 138 S. Ct. 2361, 2372 (2018).

Even before *Becerra*, the Fifth Circuit struck down a regulation on professional speech. In *Serafine v. Branaman*, the Fifth Circuit ruled that the Texas State Board of Examiners of Psychologists violated the First Amendment when it ordered a political candidate to stop using the title "psychologist" in her campaign. 810 F.3d 354, 369 (5th Cir. 2016). The statute used as justification by the Board, the

Psychologists' Licensing Act, is a "content-based restriction on speech" that is "subject to 'exacting scrutiny' and must be 'narrowly tailored to serve an overriding state interest.'" *Id.* At 361 (citing Tex. Occ. Code Ann. § 501.003(b)(1)). The Fifth Circuit also invalidated as overbroad a section of the PLA that prohibits "providing 'psychological services to individuals, groups, organizations, or the public,'" Tex. Occ. Code Ann. § 501.003(b)(2), finding that "[b]y limiting the ability of individuals to dispense personal advice about mental or emotional problems based on knowledge gleaned in a graduate class in practically any context, [the PLA] chills and prohibits protected speech." *Id.* at 369–70. Like the professional code in *Serafine*, the various professional codes cited by Defendants are content-based restrictions on speech that lack narrow tailoring.

Even if the College were permitted to use professional codes as content-based restrictions on Dr. Phillips's speech (which *Becerra* and *Serafine* prohibit), Dr. Phillips is not the party who has violated accepted professional standards. On April 24, 2023, the AAUP published its investigative report concerning the terminations of Dr. Phillips, Lora Burnett, and Suzanne Jones. (Exhibit 1 of Decl. of Michael Phillips of May 15, 2023 (attached as Exhibit E, "Ex. E, Phillips Decl.").) In the report, the AAUP concluded that the "stated grounds for the Collin College administration's actions in these cases entailed egregious violations of the subject faculty members' academic freedom in extramural and intramural speech." (*Id.* at 27.) "In the case of Professor Phillips, the administration's stated reason for its action against him violated his academic freedom in teaching." (*Id.*)

Simply put, the First Amendment does not permit Collin College to use the "code of conduct" to construct a "*structure* for regulating" speech. (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.13.)

B. The employee expression policy prohibits a substantial amount of protected speech for no good reason.

Defendants make no specific arguments on Dr. Phillips's challenge to the overbreadth of the Employee Expression Policy and "it is not this Court's role to make arguments on behalf of the university officials." *Hiers*, 2022 WL 748502 at *11. In his motion for summary judgment, Dr. Phillips shows that the Employee Expression Policy forces any criticism by employees through the "standing committee structure of the College District or their supervising administrators" and punished Dr. Phillips and other faculty for protected speech. (Dkt. #58, Pl.'s Mot. for Summ. J. 25–28.)

III. Dr. Phillips Is Entitled to Summary Judgment on His Vagueness Claim Because the Challenged Policies Are Too Vague for a Reasonable Employee to Follow.

Defendants are also not entitled to summary judgment on Plaintiff's vagueness claims. As Dr. Phillips shows in his cross motion, no reasonable jury could find that the policies "'(1) reach[] a substantial amount of constitutionally protected conduct; and (2) 'fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or 'authorizes or even encourages arbitrary and discriminatory enforcement.'" (Dkt. #58, Pl.'s Mot. for Summ. J. p. 30.)

Defendants rely on *Hiers*, quoting wholesale from Judge Jordan's opinion finding a misconduct policy was not unconstitutionally vague. No. 4:20-CV-321-SDJ, 2022 WL 748502, at *21 (E.D. Tex. Mar. 11, 2022). There, the court reasoned that

"[t]he definition of 'misconduct' and the policy's examples of prescribed [sic] conduct, taken together, are sufficiently clear that an ordinary faculty member would have a reasonable opportunity to know what conduct would put them at risk of discipline or discharge." *Id.* at *21. But, the Code of Ethics and Employee Expression Policy are distinguishable because they are vaguer than those examined by the court in *Hiers*.

A. No reasonable employee could understand the code of ethics.

Notably, the Code of Ethics is so vague the Collin College administrators tasked with applying it are unable to come up with a consistent meaning that would prevent arbitrary enforcement, and they certainly cannot communicate a consistent meaning to their employees. For example, Associate Dean O'Quin admitted she doesn't "think there's a clear-cut definition that [she] would have given to [her] faculty for dignity and respect." (Deposition of Chaelle O'Quin (attached as Exhibit F, "Ex. F, O'Quin Dep.") 13:11-20.) And one administrator testifying on behalf of the College could muster only that "dignity" is "treating others with respect," which in turn is "just honoring an individual." (Ex. D, Barnes-Tilley 30(b)(6) Dep. 67:16-20.)

Unlike the misconduct policy reviewed in *Hiers*, that defined the key term "misconduct," the Code of Ethics lacks definitions of key terms like dignity and respect. Moreover, the Code of Ethics also lacks examples of "disrespectful" and "undignified" behavior, whereas *Hiers* gave examples of what behavior counted as "misconduct."

Finally, the vagueness of Collin College's policies is exacerbated by the fact that a single decisionmaker has the ability to interpret the terms. A single administrator can define the Core Value of respect (also found in the Code of Ethics)

to allow for the punishment of employees who publicly criticize the College because that's what the vague term means to her. (Ex. B, Streater Dep. 36:12-21.) This encourages "arbitrary and discriminatory enforcement." *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 761 (5th Cir. 2010). Without any defined standards, Collin College faculty have no way of knowing what speech may land them in trouble, as an administrator may initiate discipline based on their subjective feelings—including for something they "felt . . . was disrespectful." (Ex. F, O'Quin Dep. 77:10.) Accordingly, the College's Code of Ethics is unconstitutionally vague and this Court should deny Defendants' Motion for Summary Judgment.

B. No reasonable employee can understand the employee expression policy.

Though not addressed specifically in Defendants' argument, Dr. Phillips also challenges Collin College's Employee Expression Policy as unconstitutionally vague. The Employee Expression Policy fails to define what it means for faculty members to exercise "appropriate restraint" when speaking as a private citizen. (Ex. C, Matkin Dep. 52:3-11, Ex. 5.) This led President Matkin to admit that he "could see that someone else might" find the policies vague, (Ex. C, Matkin Dep. 59:17-19), and that "[t]here may be different interpretations" of what terms like "appropriate restraint" mean. (Ex. C, Matkin Dep. 59:3-11.) Even the College's own administrators disagree about and don't fully understand what its employment policies proscribe. (Dkt. #58, Pl.'s Mot. for Summ. J. p. 32.)

As noted above, this vagueness is exacerbated by the fact that a single administrator is tasked with applying the College's policies to their employees. One

dean's conception of "appropriate restraint" may be vastly different than another dean's. Accordingly, the College's Code of Ethics is unconstitutionally vague and this Court should deny Defendants' Motion for Summary Judgment.

IV. Declaratory Relief Is a Different Remedy That Dr. Phillips Is Entitled to Pursue.

Both the Declaratory Judgment Act's text and Fifth Circuit precedent negate Defendants' claim that Dr. Phillips's declaratory relief claims are duplicative because he also seeks statutory relief under Section 1983. (Dkt. #59, Defs.' Mot. for Summ. J. ¶ 4.38.) Before dismissing a declaratory judgment claim, a court must address[] and balance[] the purposes of the Declaratory Judgment Act." *Saint Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590 (5th Cir. 1994). And the Declaratory Judgment Act emphasizes courts "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

That Dr. Phillips's claims for declaratory judgment and injunctive relief share common facts does not render his declaratory judgment claims duplicative. "A party may pursue both injunctive and declaratory relief, and '[a] court may grant declaratory relief even though it chooses not to issue an injunction or mandamus.'" *Robinson v. Hunt County*, 921 F.3d 440, 450 (5th Cir. 2019) (quoting *Powell v. McCormack*, 395 U.S. 486, 499 (1969)). Defendants rely on cases in the commercial context based on breach of contract claims, such as *American Equipment Co., Inc. v. Turner Bros. Crane & Rigging*, LLC, 2014 WL 3543720 (S.D. Tex. Jul. 14, 2014) and *Elepreneurs Holdings, LLC v. Benson*, 2021 WL 5140769 (E.D. Tex. Nov. 4, 2021)

(Mazzant, J.). Those cases are unlike Dr. Phillips's claims here, where a declaration that defendants violated his constitutional rights is meaningful relief in and of itself. Indeed, the claims found duplicative in *Elepreneurs* were counterclaims for declaratory relief that were a "mirror-image of Plaintiffs' breach of contract claim." 2021 WL 5140769 at *4. Dr. Phillips's claims for declaratory relief here are not just mirroring claims shot back at another party, but are instead a request for alternate relief as "expressly designed" by the Declaratory Judgment Act. *Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985).

In *Robinson*, the Fifth Circuit reversed the district court's dismissal of the plaintiff's declaratory judgment claims as redundant. There, the plaintiff alleged the Hunt County Sherriff's office violated her First Amendment rights by deleting and censoring protected speech on its Facebook page. 921 F.3d at 445. She sought, among other things, declaratory judgment that the administration of the Facebook page violated the First and Fourteenth Amendments. The Fifth Circuit held that "[t]o the extent the district court determined that Robinson's declaratory judgment claims are redundant of her claims for injunctive relief, this conclusion is inconsistent with the purposes of the Declaratory Judgment Act and therefore an abuse of discretion." *Id.* at 450. The Fifth Circuit was unmoved by the county's reliance on multiple breach of contract cases, holding "[t]he constitutional claims at issue in this case are dissimilar from a breach of contract action." *Id.* at 450–51.

Like *Robinson*, this is not a breach of contract action. Instead, Dr. Phillips, like the plaintiff in *Robinson*, is seeking to vindicate his First and Fourteenth Amendment

rights. As noted above, the Fifth Circuit specifically distinguished claims for declaratory relief for constitutional claims like Dr. Phillips's from those sought in contractual disputes. *Id.* at 450–51. Declaratory relief for Dr. Phillips would not be redundant and this Court should deny Defendants' motion for summary judgment seeking to dismiss those claims.

CONCLUSION

Professors do not lose their First Amendment right to speak about public issues when they work for a public college. The College violated the First Amendment when it ended Dr. Phillips's employment because he dared to share his views outside of the College's approved channels. This Court should deny Defendants' Motion for Summary Judgment on Plaintiff's Declaratory Judgment Claims. (Dkt. #59.)

Dated: May 16, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Plaintiff's counsel confirms that a true and correct copy of the foregoing was served via the Court's electronic filing system on this day, May 16, 2023. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated below and parties may access this filing through the Court's electronic filing system.

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