NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-2303

CHERYL BOROWSKI,
Appellant

v.

KEAN UNIVERSITY, et. al.
Appellees

On Appeal from the United States District Court for the
District of New Jersey
(District Court No. 2:20-cv-05172)
District Court Judge: Honorable William J. Martini

Argued April 29, 2026

(Filed: November 12, 2026)

Before: CHAGARES, *Chief Judge*, ROTH, and RENDELL, *Circuit Judges*.

O P I N I O N*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

RENDELL, *Circuit Judge*.

Kean University investigated student complaints about adjunct professor Cheryl Borowski's classroom comments. After concluding Borowski violated the New Jersey State Policy Prohibiting Discrimination in the Workplace, Kean chose not to renew her contract. Borowski sued under 42 U.S.C. § 1983, the New Jersey Civil Rights Act, and common law. Borowski urges that Kean and related defendants subjected her to a facially unconstitutional policy and that she was denied her right to an administrative appeal. We will affirm the District Court's dismissal of Borowski's claims based on sovereign immunity, qualified immunity, and Borowski's lack of standing for the relief sought on her First Amendment claim.

I.

Kean University ("Kean") is a public university of the State of New Jersey. Kean hired Borowski to teach a business law class to undergraduates as an adjunct professor. Borowski taught this course for five years until March 2016, when she was removed from the classroom mid-semester following student complaints. The students' complaints accused Borowski of making inappropriate comments relating to gender, national origin, and ethnicity. Throughout Kean's ensuing investigation, Borowski denied the students' allegations, insisting that the students misunderstood her devil's advocate teaching method and mistook her pedagogic hypotheticals for her actual beliefs.

In August 2016, Kean informed Borowski that her contractual relationship with the University had concluded and she has no continuing position as an adjunct professor. Ultimately, Kean's investigation found Borowski violated the New Jersey State Policy

Prohibiting Discrimination in the Workplace (the "Policy"). Kean sent a letter informing Borowski of its "final determination" based on "a review of the testimony and the information provided by students in [her] class" that she violated the Policy. Suppl. App. 9.

As advised by Kean, Borowski appealed to the New Jersey Civil Service Commission (the "Commission"). The Commission called for a hearing before an Administrative Law Judge ("ALJ") to determine whether Borowski's comments violated the Policy. The ALJ conducted a three-day hearing in June 2018. On October 4, 2018, Kean requested to withdraw the matter because of new guidance from the Commission Director, Myers, that explained adjunct professors are not considered Civil Service employees and cannot appeal to the Commission. Myers also wrote to the ALJ, informing her that adjunct professors and professors "were statutorily removed from the provisions of Title 11A" and "since July 2018, the Commission has advised those employees serving in a position not subject to Title 11A that it does not have the jurisdiction to review any type of appeal." Suppl. App. 13. Accordingly, the ALJ dismissed Borowski's appeal. Suppl. App. 13. Borowski appealed the dismissal with the Commission, but the Commission, in a "final administrative action," affirmed the dismissal, providing "[a]ny further review should be pursued in a judicial forum." App. 201-203.

Borowski filed a complaint in federal court against Kean; Dawood Farahi (Kean President), Charles Williams (Kean Affirmative Action Program Director), Stephen Kubow (Kean Acting Associate Vice President), Kenneth Green (Kean Chief Labor Counsel), Faruque Chowdhury (Kean Director of Human Resources) (together, "Kean Defendants");

and Allison Christopher Myers (New Jersey Civil Service Commission Director) (together "Defendants"), all in their official and individual capacities. She brought claims alleging violations of her First Amendment rights and Fourteenth Amendment due process and equal protection rights, civil conspiracy violations, and parallel claims under New Jersey State Law.

Her complaint alleged that "she has applied for numerous other positions, including teaching positions, for which she was qualified, without success" following Kean's nonrenewal of her contract. App. 66. Borowski "believes that her failure to be hired for these positions is attributable to her having been abruptly terminated from her teaching position at Kean midway through the semester." App. 66.

The District Court dismissed Borowski's initial complaint based on Eleventh Amendment immunity, qualified immunity, and failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The District Court granted her leave to amend, and she revised her complaint to seek declaratory relief on her First Amendment claim, the only claim permissible in light of the District Court's previous ruling.

The District Court then granted Defendants' motion to dismiss because it concluded that Borowski lacked standing because she alleged only past injury and pled no facts to show that she was "likely to suffer future injury that can be redressed by declaratory relief." App. 16. The Court noted that it would not "speculate about possible future harm not alleged in the Amended Complaint."[1] *Id.*

[1] The District Court probably erred by dismissing her complaint with prejudice. *See Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 148 (3d Cir. 2024), *cert. denied*, 145 S. Ct.

Borowski then sought reconsideration of the District Court's order, contending that her allegations were sufficient regarding future harm, and sought permission to file a motion to amend once again. The District Court denied Borowski's motion for reconsideration, again reasoning that any such harm was speculative, but it ruled she could file a motion to amend, which she did.

The Court denied that motion. It assumed arguendo that Borowski had standing but denied her the right to file the proposed Second Amended Complaint, which sought injunctive relief and added two paragraphs alleging vague reputational harm, because it essentially mirrored the original complaint and failed on the merits, such that re-pleading would be futile.

Borowski appeals from all the District Court's orders, raising essentially three issues: (1) whether the District Court erred in its ruling on Eleventh Amendment immunity; (2) whether the District Court's rulings that the claims against Myers in her official and individual capacities were contrary to law; and (3) whether the District Court's ruling on the Policy's constitutionality was contrary to law.

Even assuming Borowski could show that the Policy is unconstitutional, she would be barred from proceeding against all Defendants in their official capacities, for all but declaratory and injunctive relief, if the District Court's ruling on sovereign immunity was

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169 (2024) (holding dismissals with prejudice for lack of standing are generally improper). But, because the statute of limitations on her claim has no doubt run, the issue is moot. *See Brennan v. Kulick*, 407 F.3d 603, 606 (3d Cir. 2005) ("[T]he dismissal of a complaint without prejudice after the statute of limitations has run forecloses the plaintiff's ability to remedy the deficiency underlying the dismissal and refile the complaint.").

correct. Similarly, Borowski would be barred from proceeding against Defendant Myers if dismissing the claim against her was correct. We will address these aspects of the District Court's ruling in turn.

II.[2]

A.

Borowski urges that the District Court erred in finding Kean and Kean Defendants are entitled to Eleventh Amendment immunity. This court reviews *de novo* issues of Eleventh Amendment immunity. *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 82 (3d Cir. 2016). The party seeking immunity bears the burden of production and persuasion. *Id.*

The Supreme Court interprets the Eleventh Amendment as barring suits against states and suits for damages against "arms of the State." *Id.* at 83. An arm of the state is an entity "so intertwined with the State that any suit against them renders the State the 'real substantial party in interest.'" *Id.* (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). This Court employs a fact-based, three-step balancing test to determine if an entity is an "arm of the state." *Id.* This determination requires that we balance an entity's funding, status under state law, and autonomy. *Fitchik v. N.J. Transit Rail Operations,* 873 F.2d 655, 659 (3d Cir. 1989) (en banc).

We have previously conducted the arm of the state analysis for Montclair State University ("MSU"), a state college authorized under the same statute as Kean at the time this case commenced, N.J. Stat. Ann. § 18:64-1, *et seq.* ("State Colleges Statute").

[2] This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Concluding MSU is an arm of the state, we found MSU's status under state law and degree of autonomy weighed in favor of immunity while the funding factor weighed against immunity. *Maliandi*, 845 F. 3d at 99.

The District Court performed an arm of the state analysis for Kean, utilizing conclusions from this Court in *Maliandi* and Kean's public financial documents. The District Court found the first factor, funding, weighed against immunity because New Jersey law does not oblige the State to pay all judgments entered against state colleges, Kean has sufficient alternative sources of funding, and New Jersey retains minimal constraint over those funds it allocates to Kean. But the District Court concluded the other two factors weighed in favor of immunity. As to Kean's status under state law, the District Court found Kean (1) may exercise the power of eminent domain; (2) is subject to administrative and procedural civil service laws; (3) retains employees who receive state benefits; (4) may not sue or be sued in its own name; and (5) is immune from state taxation. As to Kean's autonomy, the District Court followed the analysis in *Maliandi* to determine that New Jersey retains sufficient control over Kean through the influence of the Governor and Secretary of Higher Education. Thus, the District Court's analysis established Kean is entitled to sovereign immunity as an arm of the state, as are its officers in their official capacities.

We find no error in the reasoning and conclusion of the District Court.[3] Thus, we conclude that Kean and Kean Defendants are entitled to Eleventh Amendment immunity.

[3] We are unconvinced by Borowski's claim that, under the proper pleading standard, her allegations relating to the arm of the state analysis should have been taken as true at this

B.

Borowski claims Defendant Myers violated her Fourteenth Amendment due process and equal protection rights. These claims arise out of Myers's letter to the ALJ informing her that professors and adjunct professors could not appeal rulings to the Commission which led to the ALJ's dismissal of Borowski's Commission appeal. Borowski alleges "Myers made this assertion despite acknowledging that the very terms of the Policy indicate that the provisions of the Policy apply to all employees." Suppl. App. 13.

The District Court conducted an extensive analysis of Borowski's claims. It determined that Borowski's claims against Myers in her official capacity are barred by sovereign immunity and her claims against Myers in her individual capacity are barred by qualified immunity. We applaud the District Court's analysis and see no reason to repeat it here. We will not disturb the District Court's order regarding Borowski's claims against Myers.

C.

Borowski next urges the District Court erred in dismissing her First Amendment claim, but we must first consider whether Borowski has standing for this claim. We exercise *de novo* review over the District Court's dismissal of Borowski's First Amended Complaint for lack of standing. *Barclift*, 93 F. 4th at 141. We review the "district court's denial of

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stage. Borowski's legal conclusions relating to the arm of the state analysis are not entitled to the presumption of truth. *See Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 789 (3d Cir. 2016) (providing we must discount legal conclusions in our pleading analysis). Further, this Court is bound by our legal conclusions in *Maliandi* relating to its analysis of the State Colleges Statute.

leave to amend for abuse of discretion." *Potter v. Cozen & O'Connor*, 46 F.4th 148, 153 (3d Cir. 2022). Accepting Borowski's "well-pleaded factual allegations as true and draw[ing] all reasonable inferences" in her favor, we consider whether the complaint contains sufficient factual matter to establish standing. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017).

Article III of the United States Constitution limits "federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976). The standing doctrine "ensure[s] that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The plaintiff bears the burden of establishing Article III standing by showing she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* Establishing an injury in fact requires a plaintiff to show "she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). This appeal mainly concerns the first requirement—injury in fact.

"In determining whether appellants have standing, we must consider their specific allegations and the relief which they seek." *Goode v. City of Philadelphia*, 539 F.3d 311, 316 (3d Cir. 2008). We will, thus, consider Borowski's First Amended Complaint's request for declaratory relief and her proposed Second Amended Complaint's additional request for injunctive relief in turn.

1.

Borowski seeks declaratory relief that the Policy is unconstitutional. We must consider whether she alleges an actual or imminent, rather than abstract, injury. "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In other words, the plaintiff must show she "sustained or is immediately in danger of sustaining some direct injury" because of the challenged policy. *Id.* at 102. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). But past harm may serve as evidence of a "real and immediate threat of repeated injury" if the plaintiff is likely to be subject to that policy again. *Id.* at 496.

Borowski has not met her burden of showing an actual or imminent injury in fact to establish standing for declaratory relief. Borowski was subjected to the Policy while she was employed at Kean, but this exposure ended when Kean did not renew her contract. Her past exposure to the Policy is not enough to establish standing. Further, Borowski provides no allegations to show she is likely to be subjected to the Policy again.[4] Nor does the fact that she was once a State employee subject to the Policy make it more likely that she would

[4] We decline to apply the "capable of repetition yet evading review" exception, which is used only in exceptional situations, because Borowski does not show she will be subjected to the alleged illegal Policy again. *Lyons*, 461 U.S. at 109.

face this alleged harm again. Borowski also fails to sufficiently allege her past exposure is accompanied by continuing adverse effects.

2.

In her proposed Second Amended Complaint, Borowski seeks injunctive relief in the form of expungement of her employment record based on her alleged reputational harm. She avers that Kean's final determination "remains a permanent part of her employment record" and "stands as a black mark on her reputation." Suppl. App. 21. She believes that her failure to be hired for other teaching positions is "attributable to her having been abruptly terminated from her teaching position at Kean midway through the semester." Suppl. App. 36. We must consider whether Borowski's alleged reputational harm is a concrete injury-in-fact. While "traditional tangible harms, such as physical and monetary harms" are obviously concrete, "[v]arious intangible harms can also be concrete." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). "[I]ntangible harms can give rise to concrete injuries when they bear 'a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts,' such as 'reputational harms, disclosure of private information, and intrusion upon seclusion.' " *Barclift*, 93 F.4th at 142 (quoting *TransUnion*, 594 U.S. at 425).

While this Court does not require a strict elements-based comparison, the plaintiff must show the intangible injury is the same "kind of harm" as a comparator tort. *Id.* at 145 (holding the consumer did not suffer harm traditionally associated with public disclosure because the communication of personal information was limited). For example, to allege

the same kind of harm as the traditional tort of defamation, a plaintiff must allege dissemination. *TransUnion*, 594 U.S. at 434.

While Borowski's allegation of reputational harm based on her employment record seems to resemble defamation, she fails to show the information in her employment record has been shared in any way or is otherwise publicly accessible. Thus, her alleged injury is based on the existence of her employment record as a "black mark," rather than its dissemination. Suppl. App. 21. Because "there is no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury," she has not shown an actual injury. *TransUnion*, 594 U.S. at 434.

Borowski also fails to show standing for injunctive relief based on an imminent injury. Her allegations are limited to her having sought other positions "without success." Suppl. App. 36. She does not allege the prospect of future harm, let alone imminent harm. Since she has not averred facts to show Kean Defendants disseminated her employment record or will in the near future, Borowski's risk of injury is too speculative. Thus, Borowski has failed to establish standing for the injunctive relief sought in her proposed Second Amended Complaint.[5] Because Borowski has failed to show standing for injunctive or declaratory relief, her First Amendment claim cannot proceed.

[5] While her proposed Second Amended Complaint is not technically an existing pleading, Borowski has appealed the District Court's order denying her leave to file it, and we agree with its ruling albeit on different grounds.

III.

For these reasons, we will affirm the District Court's orders and its dismissal of Borowski's action.

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