

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

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Thomas B. Plunkett, III
Clerk

No. 25-40746

LIZETTE LUCIO, *Individually, as next friend M.A.L.*; MARC
ANTHONY LUCIO, *Individually, as next friend M.A.L.*,

Plaintiffs—Appellants,

versus

BROWNSVILLE INDEPENDENT SCHOOL DISTRICT; NORMA
LINDA GALLEGOS, *Former Principal and Current Human Resources
Director*; JESUS H. CHAVEZ, *Superintendent*; DENISE GARZA, *Board
Member*; DANIELA LOPEZ-VALDEZ, *Board Member*; OSCAR GARCIA,
BISD Chief of Police; ISRAEL TAPIA, *Officer*; PATRICK GABBERT,
Officer,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:24-CV-54

Before STEWART, HIGGINSON, and HO, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Coach and teacher Marc Lucio refused to shake the hands of several Brownsville Independent School District (BISD) board members and employees during a meeting he was invited to attend to celebrate the successes of a team he coached. He claims his actions were motivated both

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by his personal dislike for the BISD board members and employees—stemming from their handling of a prior incident involving his son—as well as his desire not to appear to endorse them politically. Mr. Lucio alleges that, as a result of the handshake incident, the district retaliated against him by transferring him to a position at another school.

Mr. Lucio and his wife, Lizette Lucio, individually and on behalf of their minor son M.A.L. (collectively, Plaintiffs), filed suit against the BISD as well as numerous BISD employees and board members (collectively, the Defendants), alleging that the Defendants violated their First, Fourth, and Fifth Amendment rights as well as rights secured by the Texas Constitution and seeking declaratory and injunctive relief. Plaintiffs now challenge the district court’s dismissal of some of their claims.

For the reasons that follow, we AFFIRM.

I

A

Plaintiffs’ amended complaint alleges the following with respect to two independent events.

i

The first event began on May 12, 2022, when a female student at Brownsville Veterans Memorial High School accused M.A.L. of filming and circulating an inappropriate video of her to other students at school. Plaintiffs allege that later that day, Lucio was accused of “telling [the female student] not to report M.A.L.’s action or he would ““tell her parents.’”

As a result of the incident, Plaintiffs allege that the Defendants then seized a phone belonging to Lucio—and used by M.A.L.—“without a warrant or probable cause”; that defendant Linda Gallegos, former school principal, ordered a “perp walk” by a police officer, security guards, and

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other administrators in view of students and teachers; and that the Defendants ordered Lucio not to return to work. Plaintiffs allege that, as a result of this incident, M.A.L. “was subjected to detention and illegal interrogation” from 12:45 pm to 4:00 p.m. on May 12.

The Plaintiffs further allege that on August 4, 2022, BISD sent a “letter of sanction” to Lucio, accusing him of violating school policy when he allegedly threatened the female student. Lucio appealed the sanction and filed a Freedom of Information Act request to obtain evidence relating to the incident, but he alleges he “was rejected at each step of the process,” and the incident “put a permanent mark on his records” and “adversely impact[ed] his career as a teacher.” Lizette Lucio alleges the incident harmed her reputation and future prospects for a career in law enforcement. M.A.L. alleges the “detention and illegal interrogation . . . labeled him as [a] sex offender,” and the district “forced him to move schools” on the pretext that he did not reside in the district, negatively affecting his college prospects and athletic career.

ii

The second event took place over a year later when Lucio’s Texas Public Safety Association (TPSA) team attended a state-wide competition to compete in various events relating to law enforcement, such as report writing, building search, anthropology, foot pursuit, and forensics. Lucio had founded the school’s club and personally coached one of the teams at the competition. After the students successfully placed in several events, the BISD invited the students, along with “several sponsors, including Lucio,” to a board meeting on May 15, 2023, to congratulate them on their achievements. The complaint characterizes this “regularly scheduled” board meeting as a “purely political event.”

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The complaint alleges that at the meeting, the students went down a line “and shook the hands of a row of school board members” and BISD employees. But as Lucio proceeded through the line, he chose to not shake the hands of several individuals: Miguel Salinas, a BISD attorney; Eddie Garcia, BISD board member; Defendants Daniela Lopez-Valdez and Denise Garza, BISD board members; Jessica Gonzalez, BISD board president; and Rene Gutierrez, the former district superintendent.¹ Instead of shaking hands, but “wish[ing] to show he was acting courteously” and not wanting to be photographed “in a way that falsely represented his beliefs,” Lucio told each individual with whom he did not shake hands, “Thank you. God bless you.” Lucio did shake the hands of three other board members and the other employees in the line.

The complaint alleges that Lucio had dual motives in refusing to shake certain individuals’ hands. For example, as to Miguel Salinas, Lucio chose not to shake his hand because “he felt Salinas had been rude,” and as to other board members, he felt they had acted “in an arbitrary manner” during the 2022 incident involving M.A.L. by refusing to review and produce evidence related to the event. Plaintiffs also allege that Lucio refused to shake the hands of several individuals for “political reasons.”² The complaint avers that Lucio believed the individuals were “not fit for [their] job[s],” that he intended to vote against them, and that he did not want “a false image of an endorsement.”

¹ Mr. Salinas, Mr. Garcia, and Ms. Gonzalez are not named as defendants. Mr. Gutierrez is also not a defendant, but current superintendent Jesus Chavez is named in the operative complaint. Plaintiffs allege that Chavez “persevered in supporting Gutierrez’s wrongful conduct.”

² Plaintiffs include additional allegations, not relevant here, as to why Lucio did not shake the hands of unnamed board member Eddie Garcia and superintendent Rene Gutierrez.

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Lucio received a “Notice of Warning” for his refusal to shake the board members’ hands. The notice cited Lucio for violation of school policy requiring every employee to relate “to colleagues and supervisors with respect, courtesy, and in a professional manner.” Plaintiffs allege Lucio’s actions at the meeting were “used as a teaching tool to discuss unruly employees using a thinly veiled reference to his case.” Plaintiffs also claim that the district retaliated against Lucio and forced him to transfer schools, interrupting his development of sports and law enforcement programs at the school, and hindering his career.

B

Plaintiffs filed suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the Defendants in their individual capacity as well as the BISD under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).³ First, Plaintiffs claimed that the Defendants violated their rights under the Fourth and Fifth Amendments and Article I, § 9 of the Texas Constitution when Defendants “detain[ed], interrogat[ed], and search[ed] Marc Lucio and M.A.L.” pursuant to school policy in violation of Texas law. Second, Plaintiffs allege that the Defendants violated Lucio’s First Amendment rights and rights under Article I, § 8 of the Texas Constitution “by retaliating against [him] for [his] refusal to shake certain politician[s]’ hands.”

³ Plaintiffs’ operative complaint named only BISD board members Denise Garza and Daniela Lopez-Valdez as defendants in this lawsuit. Because Plaintiffs do not explicitly appeal the dismissal of their *Monell* claim, we need not consider the factual allegations against the unnamed Defendants in evaluating Plaintiffs’ claims.

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Defendants moved to dismiss some of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court granted the motion.⁴

The district court determined that Plaintiffs failed to allege any Fifth Amendment violation arising out of the 2022 incident because they failed to plead that M.A.L. was forced to serve as a witness against himself in a criminal case. The district court also dismissed the First Amendment claim, reasoning that Lucio acted "during his official duties in the course and scope of his employment," not as a private citizen, when he refused to shake BISD board members and employees' hands. Furthermore, the court found that Lucio's actions, at best, "involved matters of public concern only insubstantially or in a weak and attenuated sense," but primarily "concerned a purely personal matter," the handling of the incident involving M.A.L. Finally, the district court dismissed the claim under Article I, § 8 of the Texas Constitution because Plaintiffs failed to adequately plead that § 8 provided greater protections than the First Amendment, and the claim failed for the same reasons as the First Amendment claim.⁵

⁴ Defendants' motion to dismiss asked for dismissal of Plaintiffs' First and Fifth Amendment claims and claims based on Article I, § 8 of the Texas Constitution, which the district court granted. Plaintiffs immediately appealed the dismissal order. We dismissed that first appeal for lack of jurisdiction. *See Lucio v. Brownsville ISD*, No. 24-40754, 2025 WL 1393868 (5th Cir. May 14, 2025). Plaintiffs later voluntarily dismissed their Fourth Amendment claims and claims arising under Article I, § 9 of the Texas Constitution, and the district court issued a final judgment prior to this appeal.

⁵ Defendants moved to dismiss Plaintiffs' *Monell* claim against the BISD, arguing that Plaintiffs failed to plead any policy, pattern, custom, or practice that was the moving force behind any constitutional violations. Finding that Plaintiffs failed to plead either a First or Fifth Amendment claim against the Defendants, the district court implicitly dismissed Plaintiffs' *Monell* claim against the BISD. On appeal, Plaintiffs do not address the district court's dismissal of their *Monell* claim. Regardless, "the viability of [Plaintiffs'] *Monell* claims against the [BISD] depends on the existence of an underlying constitutional

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II

We review an appeal of a dismissal pursuant to Rule 12(b)(6) *de novo*. *Merriott v. City of Bossier City*, 179 F.4th 393, 402 (5th Cir. 2026). “[W]e take all factual allegations as true and construe the facts in the light most favorable to the plaintiff.” *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017). “To survive a motion to dismiss, a complaint must contain sufficient factual matter which, when taken as true, states a claim to relief that is plausible on its face.” *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019). Detailed factual allegations are not required, but the alleged facts “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

III

Plaintiffs appeal only the district court’s dismissal of their First and Fifth Amendment claims as well as their claim under Article 1, § 8 of the Texas Constitution. We address each claim in turn.

A

Plaintiffs’ Fifth Amendment claim arises out of the 2022 incident involving M.A.L., where the Defendants allegedly coercively interrogated him in an attempt at obtaining a confession.⁶ Plaintiffs challenge the district

violation” *Thompson v. McGehee*, __F.4th__, No. 25-10196, 2026 WL 2069890, at *3 (5th Cir. July 17, 2026).

⁶ We address only the Fifth Amendment claim relating to the alleged interrogation of M.A.L. Plaintiffs refer to the Fourteenth Amendment once in their amended complaint, stating that an involuntary confession violates the due process clause. We have recognized that under *Chavez v. Martinez*, 538 U.S. 760 (2003), “coercive questioning by a law enforcement officer may support a § 1983 substantive due process ‘shocks the conscience’ claim even when the suspect’s statements are not used at trial.” *Edmonds v. Oktibbeha Cnty.*, 675 F.3d 911, 916 (5th Cir. 2012) (footnote omitted). Plaintiffs do not allege sufficient

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court's dismissal on the ground that it improperly applied *Chavez v. Martinez*, 538 U.S. 760 (2003), in dismissing the Fifth Amendment claim. Plaintiffs further argue that, regardless of *Chavez*, BISD policy and its treatment of M.A.L. "fl[ies] in the face of Texas Family Code Section 51.095" and the general constitutional protection of children. Defendants argue that the Fifth Amendment is not violated by mere compulsion of a statement without its corresponding use in a criminal proceeding.

The Fifth Amendment provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself." U.S. CONST. amend. V (emphasis added). Accordingly, in *Chavez*, the Supreme Court held that "the mere use of compulsive questioning" did not violate the Constitution. 538 U.S. at 767. There, the Court explained that the plaintiff could not allege a violation of the Fifth Amendment without showing he was prosecuted for a crime and "compelled to be a witness against himself in a criminal case." 538 U.S. at 766. The Court explicitly excluded "the entire criminal investigatory process," including interrogations, from the definition of "criminal case." *Id.* We have applied *Chavez* to limit the scope of Fifth Amendment claims brought under § 1983 to those who allege that an involuntary confession was used against them at trial. *See Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005) ("The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at trial* . . .") (emphasis in original).

Plaintiffs have failed to allege a plausible violation of the Fifth Amendment based on BISD's interrogation of M.A.L. Similarly, there is no Fifth Amendment violation pleaded by Lucio. The facts as pleaded in

facts to support a Fourteenth Amendment claim, nor do they adequately plead a Fourteenth Amendment Claim.

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Plaintiffs' amended complaint, taken as true, reveal that M.A.L. "was subject to detention in the office from 12:45 [p.m.] to 4 [p.m.] that labeled him as [a] sex offender" to other students and caused him to move schools, that the school policy for police interrogation was inadequate and ignored provisions of the Texas Family Code, that in its treatment of M.A.L., the school acted in a lawless manner, and that, as to Lucio, a human resources official "insisted that he admit to false statements that would have incriminated him and his son M.A.L., which he refused." As the district court recognized, these allegations fall short of alleging that Defendants elicited a confession or statement and used it against either M.A.L. or Lucio in a criminal case. Because *Chavez* requires a criminal case to allege a Fifth Amendment violation via § 1983. Plaintiffs' Fifth Amendment claim was properly dismissed.⁷

B

Next, Plaintiffs challenge the district court's dismissal of Lucio's First Amendment retaliation claim. They argue that Lucio's refusal to shake the hands of BISD board members and employees was protected speech, and the Defendants retaliated against him for exercising his First Amendment rights. Defendants counter that Lucio spoke as a public employee about a personal grievance, which is not protected speech under the First Amendment.

To properly state a claim for First Amendment retaliation, a plaintiff "(1) must suffer an adverse employment decision; (2) the speech must

⁷ Plaintiffs argue on appeal, as they did in opposition to the motion to dismiss below, that M.A.L. was prosecuted for a charge related to the video incident wherein M.A.L. moved to suppress the statement and that court dismissed the charges. These facts are outside the pleadings and will not be considered. Nonetheless, the district court recognized that this only demonstrates that "M.A.L. obtained the relief that the Fifth Amendment provides," which is the exclusion of any statement that could be used against him.

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involve a matter of public concern; (3) his interest in commenting on matters of public concern must outweigh the Defendants' interest in promoting efficiency; and (4) the plaintiff's speech must have motivated the Defendants' action." *Lowery v. Mills*, 157 F.4th 729, 741 (5th Cir. 2025) (internal quotations omitted) (quoting *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000)).

In the public employment context, "in addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). Thus, we further evaluate free speech claims asserted by public employees under a two-step inquiry, often referred to as the *Pickering-Garcetti* framework. *Id.* at 528; *Pickering v. Board of Ed. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

First, we assess "whether the employee spoke as a citizen on a matter of public concern." *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 307 (5th Cir. 2020) (quoting *Garcetti*, 547 U.S. at 418 (internal citation omitted)). More clearly stated, the first step requires a finding that "the speech be (1) made as a citizen and (2) on a matter of public concern." *Id.* (citing *Gibson v. Kilpatrick*, 773 F.3d 661, 667 (5th Cir. 2014)). If either prong of the first step is not met, that ends the inquiry. *Powers*, 951 F.3d at 307. Otherwise, the court next considers the reasoning behind the adverse employment action "by balancing the interest in allowing the speech against the interest in penalizing it." *Gibson*, 773 F.3d at 666–67; *Kennedy*, 597 U.S. at 528 (explaining the second step requires a "delicate balancing of the competing interests surrounding the speech and its consequences").

"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment

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purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti*, 547 U.S. at 421. There is no comprehensive framework for ascertaining whether an individual is speaking as a private citizen or as a public employee in the scope of his employment, but “the proper inquiry should be practical and focused on the scope of the employee’s professional duties.” *Powers*, 951 F.3d at 307. We have interpreted professional duties as “activities undertaken in the course of performing one’s job,” looking to factors such as job descriptions, whether the speech was directed at coworkers or supervisors, whether the speech was a result of special knowledge gained as an employee, and whether the speech was directed externally or internally “up the chain of command.” *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

Assuming without deciding that Lucio’s refusal to shake the BISD board members’ and employees’ hands qualifies as protected speech,⁸ Plaintiffs fail to adequately allege that Lucio was speaking as a private citizen rather than in his capacity as a public employee. Plaintiffs allege that Lucio, acting in his capacity as a coach and performing a coach’s duties, accompanied his team to the “regularly scheduled” meeting after the BISD board formally invited the team and coaches to congratulate their success at the state competition. *See Lane v. Franks*, 573 U.S. 228, 240 (2014) (“The critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee’s duties . . .”). The team was “escorted to the

⁸ First Amendment speech refers to expressive activity that is “intended to be communicative” and that “would reasonably be understood . . . to be communicative.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *see Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 65–66 (2006) (explaining that the Supreme Court has rejected the view that conduct can be labeled speech merely because the person acting intends to express an idea, for First Amendment protection extends only to conduct that is “inherently expressive.”). On appeal, Defendants do not challenge whether Lucio’s refusal to shake hands was “inherently expressive.”

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chambers where school board meetings are held” and proceeded down the line of BISD board members and staff to shake hands in congratulations. While Plaintiffs allege that Lucio spoke “as a citizen” and that the board meeting was a “political event,” these conclusory allegations do not demonstrate that Lucio spoke outside the scope of his duties as a coach, in the presence of his students, at the board meeting he was invited to attend in his official capacity rather than as a private citizen. Furthermore, Lucio’s conduct was directed internally and “up the chain of command” at each BISD employee or board member rather than externally to the public at large. *See Davis*, 518 F.3d at 313.

Although Plaintiffs attempt to liken Lucio’s conduct to the high school football coach in *Kennedy*, that case is distinguishable. In *Kennedy*, the Supreme Court held that the coach’s brief, post-game prayer was private speech because he was not engaged in speech “ordinarily within the scope” of his duties as a coach: he did not speak pursuant to school policy; he was not actively coaching or interacting with players at the time he knelt in prayer, and his speech was post-game when coaches were free to attend to personal matters. 597 U.S. at 529–30. “Simply put: Mr. Kennedy’s prayers did not ‘ow[e their] existence’ to [his] responsibilities as a public employee.” *Id.* at 530 (quoting *Garcetti*, 547 U.S. at 421). But here, Lucio’s actions occurred during the board meeting that he was invited to in his capacity as a coach, in the presence of and while the board members were congratulating the students he coached for their success. The allegations reveal that his actions “ow[ed their] existence” to his responsibility as a coach, accepting congratulations on behalf of his team. *Id.* And as referenced in his amended complaint, his speech was directly governed by school policy, which puts a duty on every employee to relate “to colleagues and supervisors with respect, courtesy, and in a professional manner.”

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Because Plaintiffs fail to allege that Lucio spoke as a private citizen, we need not address whether he spoke on an issue of public concern. *See Powers*, 951 F.3d at 307. Accordingly, we affirm the district court’s dismissal of Plaintiffs’ First Amendment retaliation claim.⁹

IV

For the foregoing reasons, we AFFIRM the district court’s judgment.

⁹ Plaintiffs’ outstanding claim under Article I, § 8 of the Texas Constitution fails for the same reasons their First Amendment claim fails. *See Wetherbe v. Smith*, 593 F. App’x 323, 329 (5th Cir. 2014) (“Texas courts will assume the protections are identical if the litigant does not show why they are different.”) (citing *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 455 n.5 (Tex. 2008)). Moreover, we reject Plaintiffs’ arguments concerning Article I, § 8’s application to this case because the authorities cited concern the prohibition on prior restraints. *See, e.g., Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992) (“Under our broader guarantee, it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs.”). Here, Plaintiffs allege that the BISD imposed a post-event employment sanction after the conduct occurred—not a prior restraint on Lucio’s speech.

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JAMES C. HO, *Circuit Judge*, dissenting in part:

I agree that Plaintiffs failed to allege a Fifth Amendment claim. But I disagree with my colleagues with respect to the First Amendment retaliation claim. The court today concludes that, as a matter of law, Marc Lucio was speaking as a public employee, and not as a private citizen, when he declined to shake the hands of certain officials at an awards ceremony. *See ante*, at 11–13. The court affirms the dismissal of the complaint on that basis. *Id.* I would vacate and remand for further proceedings. So I respectfully dissent.

This case presents two competing narratives. One is that school board officials are trying to punish a political detractor for his personal decision not to shake hands with them, in violation of the First Amendment. The other is that Lucio is facing legitimate discipline for refusing to do his job by participating respectfully in a sports celebration event for his students.

Which narrative is correct turns on whether Lucio’s refusal to shake hands constitutes private or government speech. That’s a fact question.

To be sure, our court has previously held that “[w]hether a statement is made as an employee or as a citizen is a question of law” that’s ultimately for the court to decide. *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 736 (5th Cir. 2015).

But that inquiry requires us to answer “[t]he critical question . . . whether the speech at issue is itself ordinarily within the scope of an employee’s duties.” *Id.* at 737 (quoting *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). And in a number of our unpublished decisions, we have treated that question—what an employee’s job duties ordinarily entail—as a fact-intensive one. *See, e.g., Foerster v. Bleess*, 2022 WL 38996, *2 (5th Cir. 2022) (per curiam) (“To decide if a public employee is speaking as an employee or as a private citizen on a matter of public concern, we analyze whether the person spoke pursuant to his official duties. Our inquiry is a practical [and]

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fact-intensive analysis.”) (cleaned up); *Rodriguez v. City of Corpus Christi*, 687 F. App’x 386, 389 (5th Cir. 2017) (per curiam) (“determining whether and when a public employee is speaking as a citizen” is “a fact-intensive practical analysis”) (cleaned up); *Hardesty v. Cochran*, 621 F. App’x 771, 776 (5th Cir. 2015) (per curiam) (same).

So unless we’re prepared to reject all of these past (non-precedential) decisions as legally erroneous, we must regard these issues as fact-intensive.

The district court thus should have denied the motion to dismiss, so long as the complaint contains sufficient factual matter to state a claim for relief that is plausible on its face. *See, e.g., Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019).

As the majority acknowledges, the complaint alleges that the awards ceremony was a “purely political event”—and that Lucio refused to shake hands with certain board members and school officials because he didn’t want to send the message that he endorsed them as political candidates. *See ante*, at 3–4, 12.

Accepting those allegations as true, one could plausibly infer that Lucio was expressing personal political views that BISD officials found offensive—and that they sought to punish him for it.

The majority contends that dismissal was warranted because Plaintiffs didn’t adequately allege that Lucio spoke as a private citizen. *See id.* at 11, 13. To reach that result, they emphasize other allegations found in the complaint: that Lucio was in proximity of board members and students when he snubbed the officials, that the expressive conduct occurred at a regularly scheduled board meeting in chambers where such meetings are customarily held, and that he was only invited to attend the event because of his coaching activities. *See id.* at 12–13. The majority also observes that Lucio’s expressive conduct was, in its view, directed at the BISD officials, rather than toward the public

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at large. *See id.* at 11 (citing *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (speech directed “up the chain of command” may suggest it is pursuant to a public employee’s official duties)). The majority construes these allegations to conclude that Lucio must have acted as a public employee.

And in reaching that conclusion, the majority distinguishes this case from *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022)—where the facts were sufficient to show that Coach Kennedy hadn’t engaged in speech “ordinarily within the scope of his duties as a coach.” *Ante*, at 12–13.

Of course, *Kennedy* was decided on summary judgment, after the parties had engaged in discovery that allowed the court to determine what the precise scope of Kennedy’s coaching duties were. *See Kennedy*, 597 U.S. at 521.

Here, by contrast, we can’t say whether Lucio acted within the ordinary scope of his coaching duties, because there’s been no factual development of what those duties actually entail.

As *Kennedy* itself instructs, the fact that Lucio’s speech took place “within the office environment” isn’t decisive of whether he spoke in his capacity as an employee. *See id.* at 530 (cleaned up). So the majority errs by giving too much weight to the alleged facts that he was at a board meeting and in his students’ and other officials’ vicinity when the expression took place.

And in deciding that Lucio’s speech was directed at BISD officials, the majority discounts Lucio’s explicit allegations to the contrary—that he declined the handshakes for “political reasons,” *i.e.*, because he believed the officials were unfit for their jobs and feared it would send the “wrong message to the public” if he was seen shaking their hands.

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To be sure, we do not simply accept Lucio’s conclusory assertion that he “spoke as a citizen” in evaluating the sufficiency of his complaint. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (courts are “not bound to accept as true a legal conclusion couched as a factual allegation”).

But nor can we selectively credit some of the complaint’s allegations over others, as the majority opinion seems to do here. Instead, we are to accept *all* well-pleaded facts as true in deciding whether the complaint makes out a plausible claim—not to assess whether Plaintiffs’ claim will ultimately prevail. *See, e.g., Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

Construing the complaint in Plaintiffs’ favor, one could plausibly conclude that Lucio spoke in his personal capacity. Taking him at his word, he participated in a “purely political” awards ceremony—that participation wasn’t within the scope of his ordinary coaching responsibilities—and BISD officials retaliated against him for expressing political views that they found personally offensive. That should be enough to overcome a motion to dismiss.

Accordingly, I would vacate and remand for further proceedings. I respectfully dissent.