IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Ramsi A. Woodcock,

Plaintiff,

Case No. 5:25-cv-00424

v.

Honorable Danny C. Reeves

Eli Capilouto et al.,

Defendants.

Plaintiff's Emergency Motion for Injunction Pending Appeal

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The plaintiff, Ramsi A. Woodcock ("Plaintiff"), through undersigned counsel, respectfully requests entry of an emergency order pursuant to Federal Rule of Civil Procedure 62(d) enjoining Defendants Eli Capilouto, Robert DiPaola, William Thro, and James Duff (collectively "Defendants") from continuing to (a) "reassign" or suspend him from his position as a professor in the College of Law, (b) bar him from the College of Law building, and (c) carry out the investigation into his speech on Palestine announced on July 18, 2025 pending Plaintiff's appeal of the Court's January 8, 2025 order granting Defendants' Motion to Abstain and denying Plaintiff's Motion for a Preliminary Injunction.

INTRODUCTION

Defendants are harassing Plaintiff in retaliation for speech that is clearly protected by the First Amendment by: subjecting him to a baseless investigation that circumvents established procedures; imposing a suspension on teaching, research, and service activities; and banning him from the law school building for the duration of the investigation. Am. Compl. at 18–27, 37–41, Dkt. 36. Defendants have refused to adjudicate Plaintiff's First Amendment retaliation and Fourteenth Amendment due process challenges to the investigation, suspension, and ban until after the investigation concludes. Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2; Thro Letter 9/19/25 at 2, Dkt. 19-4, Ex. 2. On November 13, 2025, Plaintiff brought his claims to this Court and, on December 12, 2025, motioned for a preliminary injunction to halt the investigation, suspension, and ban while this Court considered, *inter alia*, his constitutional objections. On January 8, 2025, this Court granted Defendants' Motion to Abstain based on the doctrine of *Younger v. Harris*, denied Plaintiff's preliminary injunction motion, and stayed the proceedings until the conclusion of the investigation and any subsequent disciplinary proceedings. PI Order at 41, Dkt. 37; 401 U.S. 37 (1969). Plaintiff is filing a notice of appeal today and will ask the U.S. Court of Appeals for the Sixth Circuit to reverse this Court's grant of the motion to abstain and denial of the preliminary injunction. PI Order at 41,

Dkt. 37. As Plaintiff challenges an ongoing unconstitutional investigation and interim measures rather than any future permanent sanction that Defendants may wish to impose, Plaintiff requests that this Court preserve the status quo that existed before Defendants initiated their unconstitutional investigation, suspension, and ban by enjoining the same during the pendency of proceedings before the Sixth Circuit. Denial of this request will deprive Plaintiff of the opportunity to avoid ongoing constitutional harm. Every day during which First Amendment freedoms are violated inflicts irreparable harm on Plaintiff as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). These harms will be magnified shortly as the University's investigator has requested that Plaintiff respond to forty-two intrusive questions about his speech by this Friday, January 23, 2026 and will issue a secret report about Plaintiff's speech shortly thereafter. Thompson Email 1/13/26, Exhibit 4; Questions, Exhibit 5. Moreover, as the spring semester has just started, lifting the suspension would allow an understaffed law school to return Plaintiff to teaching right away. Am. Compl. ¶ 118, Dkt. 36.

STATEMENT OF FACTS

Plaintiff is a tenured law professor and teacher of International Law at University of Kentucky's J. David Rosenberg College of Law ("the law school") who, since early 2024, has been speaking about his research conclusion that Israel is a colonial state structure and should be dismantled through international military intervention in order to stop a genocide. Am. Compl. ¶¶ 2, 22, 41–50, Dkt. 36. On July 18, 2025, Defendants initiated a Title VI hostile environment investigation into Plaintiff's speech about Israel and Palestine at academic conferences and in online discussion groups for law professors. *Id.* at ¶¶57–76. They also suspended him from teaching, research, and service and banned him from the law school building "for the duration of the investigation." *Id.*; Duff Letter at 1, Dkt. 19-3, Ex. 17. Defendants had no basis for initiating the investigation. On July 18, 2025, when the University initiated the investigation, suspension, and ban, the University had received no complaints about Plaintiff from any member of the University community. Duff Tr. at 181:15–20, Dkt. 40. It had

received four complaints from professors at other schools who were not covered by Title VI and at least one complaint related to a conference in Hong Kong, which is not covered by Title VI because the statute does not apply extraterritorially. First NOI at 1–2, Dkt. 19-15, Ex. 1; *see Snyder-Hill v. Ohio State University*, 48 F. 4th 686, 708 (6th Cir. 2022) (like Title VI, Title IX protects only those who experience discrimination while participating or attempting to participate in a university program or activity); *Doe v. University of Central Missouri,* No. 4:20-00714-CV-RK, slip op. at 2–3 (W.D. Mo Dec. 28, 2020). Rules regarding affiliation disclaimers, spamming and responsible use of University resources, which Defendants also alleged that Plaintiff had violated, had never been enforced by the University against any law professor. Am. Compl. ¶¶ 99–106, Dkt. 36; Douglas Decl. ¶ 3, Dkt. 19-7; Bird-Pollan Decl. ¶¶ 6–11, Dkt. 19-8; Ethical Principles, Dkt. 19-3, Ex. 25; Tech. Pol'y § IV.J.c.vii, Dkt. 19-3, Ex. 27; Inst. Stmt. Pol'y, Dkt. 19-3, Ex. 21.

The speech that the University thought problematic was that while attending antitrust-related conferences at George Mason Law School in February 2024 and Chinese University of Hong Kong in May 2025, Plaintiff had accused Israel of being a colonization project that practices apartheid and commits genocide. Am. Compl. ¶ 75, Dkt. 36. In addition, the University objected to the fact that Plaintiff had shared a petition of law professors for international military action against Israel with online discussion groups of law professors hosted by the Association of American Law Schools (AALS) and shared his views on the law faculty listserv.[1] *Id.* The University told him to "stop immediately." First NOI at 2, Dkt. 19-15, Ex. 1. The investigation has since uncovered that Plaintiff

[1] To be precise, the four allegations in the notice of investigation were that Plaintiff had: "assert[ed] that the United States government was supporting Israel in what was alleged to be a genocide of the Palestinian people" at the George Mason conference while attending "in your capacity as a University of Kentucky Law Professor"; launched a "tirade against the United States and its 'colony' for coming genocide in Gaza" and "chant[ed]" "apartheid" at the Hong Kong conference while attending "in your capacity as a University of Kentucky Law Professor"; "spammed" listservs, including "the" AALS "listserv" with "your personal viewpoints concerning the Israeli-Palestinian conflict"; and "us[ed] the University's resources to circulate" the petition for military action against Israel. First NOI at 1–2, Dkt. 19-15, Ex. 1. The reference to listservs in plural is the source of the inference that the University also objects to Plaintiff's sharing of his views on the law faculty listserv in addition to his posts to AALS discussion groups. Plaintiff disputes the University's characterization of his remarks at the Hong Kong conference. Am. Compl. ¶ 75, Dkt. 36.

had made two mild pro-Palestine statements at extracurricular events in late 2024 and early 2025 about which no member of the community had complained at the time. Second NOI at 1–2, Dkt. 19-15, Ex. 3. According to the University's allegations, Plaintiff said at an "optional lecture" that he did not need to invite pro-Israel speakers to campus events because they are pro-genocide and that he had shouted "free Palestine" while driving students who had won a public interest auction bid to spend time with him.[2] Courts routinely hold that such pro-Palestine statements do not violate Title VI. *See, e.g.*, *Stand With Us v. MIT*, No. 24-1800, slip op. at 32 (1st Cir. Oct. 21, 2025) (collecting cases).

Lacking a basis for initiating a hostile environment investigation, Defendants circumvented established procedures in order to bring one. The University proceeds under color of no extant University regulation and in violation of written procedures—both those currently in effect and those that the University deleted after the start of the investigation. Am. Compl. ¶¶ 107–16, Dkt. 36. The University is employing an extraordinary process that it invented specifically for Plaintiff, which transfers to Defendants responsibility for commencing and resolving a discrimination investigation that is normally initiated and resolved by the University's Office of Equal Opportunity (OEO). Off. Equal Opp. Pol'y at 10–15, Exhibit 1 [hereinafter OEO Pol'y]; Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2; PI Abst. Resp. at 3–4, Dkt. 29. The procedure employs an outside investigator publicly associated with a highly partisan thinktank that explicitly calls for suppression of pro-Palestine speech on campus. Am. Compl. ¶¶ 31, 58, Dkt. 36. It places the same University President who publicly described Plaintiff's views as "repugnant" in charge of choosing the sanction to impose upon him based on a secret investigator's report—whereas under the normal OEO process, a hearing panel

[2] In particular, the second notice of investigation stated that, at "an optional educational program with guest lecturers", Plaintiff had said that he "does not need to invite or include any speakers or guest lecturers with a pro-Israeli viewpoint because such speakers are pro-genocide", and that, "while driving a car with University of Kentucky law students who won a bid during a fundraiser for the Student Public Interest Law Foundation to spend time with" him, Plaintiff had "shout[ed] 'Free Palestine[.]'" Second NOI at 1–2, Dkt. 19-15, Ex. 3. A recording of the event shows that the University's characterization of the remark regarding a "pro-genocide" viewpoint is not correct. Am. Compl. ¶ 77, Dkt. 36.

of impartial decisionmakers would take the first crack at identifying a sanction based on an investigator's report disclosed to Plaintiff. Am. Complaint ¶¶ 59, 72–73, 115; OEO Pol'y at 11; Equal Dignity Due Proc. Regul. §§ I.C.1, I.E.2, Dkt. 19-3, Ex. 14; Interim Due Proc. Regul. § II.D.4, Dkt. 19-3, Ex. 15. OEO policy requires a threat to the physical health or safety of the University community before the OEO director may impose a suspension pending completion of an investigation. OEO Pol'y at 15; Duff Letter at 1, Dkt. 19-3, Ex. 17. None of the complaints that Defendants had received about Plaintiff suggested such a threat. First NOI at 1–2, Dkt. 19-15, Ex. 1; Second NOI at 1–2, Dkt. 19-15, Ex. 3. Defendants circumvented the threat requirement by summarily reassigning Plaintiff to zero teaching, research, and service effort. Am. Compl. ¶¶ 62, 107, Dkt. 36. During the pendency of the investigation, Defendants unilaterally rewrote University termination procedures to deprive tenured faculty facing termination of the right to an investigation and hearing conducted by faculty committees. Regul. Affecting Emp't § B.1.f, Dkt. 19-3, Ex. 12; Am. Compl. ¶ 112, Dkt. 36. Defendants substituted a new procedure that empowers Defendant Capilouto to send a termination case to the Board of Trustees in his "sole discretion" even if a hearing and appeals panel recommends otherwise. Interim Due Proc. Regul. § II.F, Dkt. 19-3, Ex. 22.

ARGUMENT

An injunction pending appeal will issue upon a favorable balancing of these interrelated concerns: (1) Plaintiff has a strong likelihood of success on the merits and (2) would otherwise suffer irreparable injury; (3) there would not be substantial harm to others; and (4) the public interest would be served. *Monclova Christian Acad. v. Toledo-Lucas County*, 984 F. 3d 477, 478 (6th Cir. 2021).

A. Injunction Harms and Interests

There is irreparable injury, and the balance of harms and the public interest favor granting an injunction. The deprivation of Plaintiff's First Amendment rights is irreparable harm as a matter of

law. *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003). Every day that the investigation, suspension, and ban continue inflicts harm on plaintiff that cannot adequately be remedied through damages. *Id.* Because Defendants have refused to decide Plaintiff's constitutional objections until after the conclusion of the investigation, Plaintiff has no opportunity to avoid this constitutional harm other than through an injunction pending appeal to the Sixth Circuit. Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2; Thro Letter 9/19/25 at 2, Dkt. 19-4, Ex. 2.

Continuing the investigation, suspension and ban will also inflict the following additional harms, none of which can be adequately remedied at law. The suspension and ban would continue to prevent Plaintiff from teaching for at least nine more months and possibly years. The semester started on January 12, 2025. The first week of classes and Martin Luther King, Jr. Day-abbreviated second week are non-substantive or introductory in nature and the law school occasionally adds classes or substitutes teaching assignments during or immediately after this period. Woodcock Decl., Exhibit 6. Defendant Duff could choose to return Plaintiff to teaching this semester if the Court were to enjoin the investigation, suspension, and ban. Thro Letter 9/19/25 at 1, Dkt. 19-4, Ex. 2. The law school is at present severely understaffed. Am. Compl. ¶ 118, Dkt. 36. If this opportunity to return to teaching is lost—and the window of time when it will be administratively possible to do so is closing rapidly—then Plaintiff will not be able to teach at the law school until the fall semester starts in August, even if the Sixth Circuit reverses this Court and this Court goes on to rule in Plaintiff's favor on the merits of his preliminary injunction motion. Even if Defendant Duff were not to return Plaintiff to teaching this semester, an injunction pending appeal would permit Plaintiff to participate in law school and University service by serving on faculty committees, attending faculty meetings, and participating in the law school's ongoing search for a permanent dean. It would also restore Plaintiff to his office and to the law library, which is located in the law building, both of which will facilitate his research. Am. Compl. ¶ 121, Dkt. 36. Accordingly, grant of the injunction would halt harms associated with denial

of the ability to teach, conduct research, and engage in service, which cannot be fully compensated at law. Woodcock New Decl. ¶¶ 2–6, Dkt. 35. Grant of the injunction would also greatly reduce the chill on speech created by the University's actions both for Plaintiff and for the law school and University community. *Id.* at ¶¶ 3–9; Zachary Lee Decl. ¶ 8, Dkt. 19-11; Donovan Decl. ¶ 7, Dkt. 19-12; Bolter Decl. ¶ 7, Dkt. 19-9. For example, the investigation will culminate in a letter by Defendant Capilouto, which, if negative, would transform the University's official position from neutrality to guilt, significantly increasing the chilling effect of Defendants' actions on Plaintiff's and the community's speech. Woodcock New Decl. ¶ 10, Dkt. 35. An injunction would forestall this. Finally, the investigation, suspension, and ban have caused Plaintiff embarrassment, reputational and dignitary harm, and emotional distress that would be stanched by an injunction. Woodcock New Decl. ¶¶ 4, 8, 9, Dkt. 35. Those harms, too, are not adequately compensable at law.

Defendants do not have an interest in continuing the investigation, suspension, and ban, so they would not be harmed by an injunction. Preliminarily enjoining a baseless investigation, suspension, and ban that circumvents established procedures for investigating civil rights complaints cannot harm Defendants or the University community. Am. Compl. ¶ 115, Dkt. 36. Even if the University has an interest in completing the investigation, that interest is weak. If the Sixth Circuit reverses and this Court ultimately finds in favor of Plaintiff on the merits of the original preliminary injunction motion, the university's investment in completing the investigation and disciplinary process (approximately $100,000 per month so far) will be wasted and Defendants' liability to Plaintiff for these adverse actions increased whereas if the Court halts the investigation, the order would shield Defendants from liability for any resulting community harm. University Legal Bills, Dkt. 19-3, Ex. 28. Such harm would in any case be limited because there is no allegation that Plaintiff calls for an end to Israel in class. First NOI at 1–2, Dkt. 19-15, Ex. 1; Second NOI at 1–2, Dkt. 19-15, Ex. 3. Defendants acknowledge that the investigation has failed to silence Plaintiff's off campus calls to end Israel so the decision

whether to grant the injunction will not likely reduce any harm from that speech unless the university continues the disciplinary process through to termination months from now. PI Hearing Tr. But at that point Plaintiff might well obtain an injunction because termination would make Plaintiff's retaliation case even stronger. So even running the process through to termination would not necessarily reduce any alleged harm. Moreover, while grant of an injunction would prevent Defendants from circumventing established anti-discrimination processes to retaliate against Plaintiff, it would not prevent the University from using established processes to respond to further complaints. OEO Pol'y at 10–15. OEO would be free to handle any new complaints through routine processes and to impose an interim suspension if the "threat to physical health or safety" standard contained in its written policies is met. OEO Pol'y at 15.

The public interest strongly favors grant of the injunction. The public has an interest in discouraging abuse of administrative processes to retaliate against protected speech. *Meriwether v. Hartop*, 992 F. 3d 492, 509–10 (6th Cir. 2021). As the University is not following its own established anti-discrimination processes, the public interest in preventing discrimination is not implicated. Am. Compl. ¶ 115, Dkt. 36. The imbalance of interests in Plaintiff's favor is greatly magnified by Plaintiff's strong likelihood of success on the merits. Plaintiff will show both that he has a strong likelihood of success on his appeal of this Court's decision to abstain based on *Younger* and that he has a strong likelihood of success on the underlying merits of his challenge to the investigation, suspension, and ban, thereby justifying an order to enjoin them during the pendency of the appeal.

B. Likelihood of Success

1. Merits of *Younger* Appeal

Plaintiff has a strong likelihood of success on his appeal of this Court's decision to abstain under *Younger*. With respect to civil enforcement proceedings, *Younger* abstention is only appropriate where the proceeding (1) provides a federal plaintiff with "an adequate opportunity to raise his

constitutional claims", (2) is "judicial in nature" and "akin to criminal proceedings", (3) is ongoing, and (4) involves an important state interest." *Doe v. University of Kentucky*, 860 F. 3d 365, 369 (6th Cir. 2017). Even if those factors are satisfied, exceptions apply for bad faith, bias, and flagrant unconstitutionality. *Doe*, 860 F. 3d 371 (bad faith and flagrant unconstitutionality); *Gibson v. Berryhill*, 411 U.S. 564, 577–78 (1973) (bias). With all due respect to this Court, it erred in concluding that each of the four *Younger* requirements were met and that none of the exceptions apply.

(a) Plaintiff Does Not Have an Adequate Opportunity to Raise Constitutional Claims

This Court concluded that Plaintiff had an opportunity to raise constitutional claims because Plaintiff had raised constitutional objections at the Zoom meeting with the investigator and one of the written questions of the investigator asked him to outline constitutional objections. PI Order at 28–29, Dkt. 37. This is not an "adequate opportunity" to raise constitutional objections because Defendants have made clear that they will not rule on Plaintiff's objections until after the investigation and associated interim suspension and ban have ended. *Doe v. University of Kentucky*, 860 F. 3d at 369; Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2; Thro Letter 9/19/25 at 2, Dkt. 19-4, Ex. 2. Plaintiff brings First Amendment and due process challenges to the constitutionality of the decision to launch the investigation, as well as to the imposition of the interim suspension and ban, which will last "for the duration of the investigation". Am. Compl., Dkt. 36, 43–45, 52–55; Duff Letter at 1, Dkt. 19-3, Ex. 17. Every day during which First Amendment freedoms are violated inflicts irreparable harm on Plaintiff as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In order for Plaintiff to avoid the constitutional harm associated with these ongoing actions, he must have access to a forum that will rule on his objections while the investigation, suspension, and ban are ongoing (or paused by injunction) rather than after they have come to an end. An opportunity to obtain a ruling after constitutional harms have come to an end is not adequate. *Gibson v. Berryhill*, 411 U.S. 564, 577 & n.16 (1973) (opportunity to raise claims must be "timely").

(b) The University's Ad Hoc, Invented Process Is Not Judicial in Nature

As relevant to this case, a court may abstain only from a state proceeding that is "judicial in nature" *Doe v. University of Kentucky*, 860 F. 3d at 369. This Court found that the state action in this case is "unconventional" but failed to consider the implication of that finding for the question whether the state action is judicial. PI Order at 21, Dkt. 37. Judicial process is *conventional*, which is to say that it follows an established procedure. Accordingly, the Supreme Court has observed that the sort of proceeding from which courts abstain "investigates, declares, and enforces liabilities . . . under laws supposed already to exist". *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 370–71 (1989) [hereinafter *NOPSI*].

The University's actions lack the conventional character of a judicial proceeding undertaken according to laws "supposed already to exist" and therefore are not abstainable under *Younger*. *Id.* Defendants did not follow the University's established procedure for responding to discrimination complaints, pursuant to which the OEO would decide whether to investigate, conduct the investigation, recuse in case of bias, make a probable cause determination, and send the case to a disciplinary panel that would disclose the investigatory report and decide sanctions in the first instance. OEO Pol'y at 10–12; Equal Dignity Due Proc. Regul. § I.C.1, Dkt. 19-3, Ex. 14. Instead, Defendants invented an ad hoc process specifically for Plaintiff pursuant to which a Washington, DC lawyer with ties to a group seeking to suppress pro-Palestine speech on campus will produce a secret investigatory report on the basis of which a University President who publicly declared Plaintiff's views "repugnant" will decide both whether to charge Plaintiff and recommend a particular sanction. Am. Compl. ¶¶ 31, 58, Dkt. 36; Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2; Capilouto Message at 1, Dkt. 19-3, Ex. 18. Rather than follow the established procedure for imposing an interim sanction, pursuant to which the OEO would make a written finding regarding a threat to the physical health or safety of the University community, Defendants "reassigned"

Plaintiff to do nothing without making the requisite threat assessment. OEO Pol'y at 15; Duff Letter at 1, Dkt. 19-3, Ex. 17. Making the rules up as you go along is not an activity that is judicial in nature.

The Supreme Court has never considered, much less affirmed *Younger* abstention in the case of an ad hoc process. *See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 425–26 (1982) (abstaining on challenge to attorney disciplinary proceedings carried out pursuant to New Jersey State Supreme Court rules). None of the cases cited by this Court involve such a process; all describe proceedings carried out pursuant to established procedures. *See, e.g., Doe v. University of Kentucky*, 860 F. 3d at 370 (abstaining from challenge to the University's established student disciplinary process); *Durstein v. Alexander*, No. 3:19-0029, slip op. 3, 21, 23 (S.D. W. Va. Dec. 13, 2019) (abstaining from challenge to action by superintendent of schools to revoke teaching certificates in accordance with West Virginia Administrative Procedures Act); *Doe v. Nastase*, No. SAG-25-03239, slip op. at 2–5, 10, 15 (D. Md. Oct. 23, 2025) (abstaining from challenge to sexual harassment proceedings carried out by a university's Office of Civil Rights and Sexual Misconduct). This Court suggested that the "number and diversity" of the regulations at issue explain the University's embrace of an ad hoc process. PI Order at 21, Dkt. 37. But whether the University has a good reason for employing an essentially executive process rather than a judicial one does not convert the executive process into a judicial process. States have good reasons to carry out legislative and executive functions, but that has not rendered them abstainable under *Younger*. *NOPSI*, 491 U.S. at 368.

(c) University Disciplinary Proceedings Commence with the Filing of Charges

Even if Defendants' ad hoc investigation can be considered part of an abstainable state proceeding for *Younger* purposes, there remains the question whether Plaintiff filed suit before that

proceeding officially commenced for *Younger* purposes. *Doe v. University of Kentucky*, 860 F. 3d at 369. Plaintiff sued before the filing of formal disciplinary charges (which has not yet taken place) but after the commencement of the investigation. This Court held that University disciplinary proceedings commence when the preliminary investigation opens, making Plaintiff's lawsuit abstainable. PI Order at 22–25, Dkt. 37. With all due respect, this Court's reasoning is flawed. Courts should not as a general matter abstain from challenges to investigations, particularly in a case such as this one in which the higher education context counsels in favor of providing access to federal court to vindicate First Amendment claims.

This Court reasoned that if investigations are not treated as part of the disciplinary process to which they lead, then *Younger* would effectively be eliminated by allowing plaintiffs to file in federal court as soon as an investigation is announced. *Id.* at 23. There are, however, no reports of massive declines in the rate of *Younger* abstention in the First, Fourth, and Ninth circuits, each of which has rejected the general proposition that abstention is required in the investigatory part of a judicial proceeding. *Seattle Pacific University v. Ferguson*, 104 F. 4th 50, 64 (9th Cir. 2024); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F. 3d 508, 519 (1st Cir. 2009); *Telco Communications, Inc. v. Carbaugh*, 885 F. 2d 1225, 1229 (4th Cir. 1989). These courts suggest that the danger instead cuts in the other direction. Because the opening of an investigation is often the first sign that state actors intend to engage in unconstitutional action, abstention from investigations may prevent plaintiffs from ever bringing their claims in federal court. *See Seattle*, 104 F. 4th at 64. A plaintiff lacks standing to sue in the absence of a threat of unconstitutional action and will likely be precluded from suing by the *Rooker-Feldman* doctrine once the plaintiff exhausts state avenues of attack. *See id.* The better rule is therefore that the proceeding will not commence for *Younger* purposes until the University initiates the hearing process by filing disciplinary charges against Plaintiff.

This Court relied on *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, and its progeny, which hold that attorney discipline proceedings commence with the filing of a complaint—and so encompass the investigation stage. 457 U.S. 423, 433–34 (1982); *Berger v. Cuyahoga County Bar Ass'n*, 983 F. 2d 718, 723 (6th Cir. 1992); *O'Neill v. Coughlan*, 511 F. 3d 638, 634 (6th Cir. 2008). But the attorney discipline cases are inapposite because attorney discipline proceedings are run by the judiciary from start to finish, making the entire process "judicial in nature." *See Middlesex*, 457 U.S. at 433 (noting that the New Jersey Supreme Court considers the filing of a complaint about an attorney to constitute a filing with the Supreme Court); *see also Seattle*,104 F. 4th at 1229 (distinguishing *Middlesex* on the ground that formal disciplinary charges had already been filed when the plaintiff initiated his federal case). By contrast, public universities belong to the executive branch; more is required for their proceedings to take on a judicial character.

(d) The State Does Not Have an Important Interest in an Ad Hoc Investigation

Even if the ad hoc investigation is a judicial proceeding and it commenced for *Younger* purposes before Plaintiff filed suit, *Younger* abstention is not appropriate unless the state has an important interest in the state proceeding. *Doe v. University of Kentucky*, 860 F. 3d at 369. This Court held that the state has an interest in the orderly operation of its public universities, preserving the integrity of the tenure process, administering effective public service of its employees, and preventing conduct that creates a hostile environment. PI Order at 25–26, Dkt. 37. But the ad hoc process followed by the University in this case implicates none of those interests. The University's process has been anything but orderly. Defendants created an ad hoc process that circumvents the policies of the office that normally handles discrimination investigations and violated multiple University regulations in the process. Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2; OEO Pol'y at 10–15; Equal Dignity Due Proc. Regul. §§ I.C.1, I.E.3, Dkt. 19-3, Ex. 14; Regul. Affecting Emp't §§ B.1.f(2), B.1.f(3), Dkt. 19-3, Ex. 12. These actions do not serve the purpose of preventing

a hostile environment because they bypass the office and associated policies that the University created to address hostile environment claims. Old Discrim. Regul. (AR 6.1), Exhibit 2 (tasking the OEO with enforcing University discrimination rules); OEO Pol'y at 10–15. Accordingly, while the University may have all of the interests listed by this Court in the abstract, the proceeding at issue in this case does not implicate any of them. To the extent that it implicates any interest, the University's investigation implicates an interest in harassing a scholar based on his protected speech. But that is an interest that is appropriate to a state. *Cf. Meriwether*, 992 F. 3d at 509–10. Accordingly, this Court erred in finding that the state's actions implicate an important state interest.

(e) The Bias, Bad Faith, and Flagrant Unconstitutionality Exceptions to *Younger* Apply

The ad hoc process employed by Defendants exhibits initiator-adjudicator bias that brings it within *Younger*'s bias exception. Under *Williams v. Pennsylvania*, it is unconstitutional bias for a judge to adjudicate a case in which the "judge had a direct, personal role in the defendant's prosecution." 579 U.S. 1, 10 (2016). That is because "there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process." *Id.* at 11. In this case, Defendant Duff testified that Defendant Capilouto collaborated on the decision to investigate, suspend, and ban Plaintiff. Duff Tr. at 185:24–25, 186:1, 188:11–14, Dkt. 40. Under the University's ad hoc process, Defendant Capilouto will now decide in the first instance whether Plaintiff has violated any rule and will choose a sanction. Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2. Moreover, under the new interim regulations unilaterally adopted by the University in October, Defendant Capilouto will have independent authority to recommend termination to the Board of Trustees even if University hearing and appeals panels acquit Plaintiff of any charges Defendant Capilouto may prefer against Plaintiff after the investigation. Interim Due Proc. Regul. § II.F, Dkt. 19-3, Ex. 22. This Court sought to distinguish *Williams* on the ground that the investigation was "instigated by complaints from third parties, not

the University" so "Capilouto cannot be said to be acting as the accuser." PI Order at 31–32, Dkt. 37. But the *Williams* Court thought that bias exists whenever the judge has "a personal role in the defendant's prosecution", regardless of whether the judge initiated the prosecution or filed a complaint that served as its basis. *Williams*, 579 U.S. at 10.

Abstention is also inappropriate where the plaintiff challenges application of a rule that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53–54. Plaintiff challenges the University's application of the IHRA definition of antisemitism to determine whether Plaintiff's speech creates a hostile environment in violation of Title VI. First NOI at 1–2, Dkt. 19-15, Ex. 1; Second NOI at 1–2, Dkt. 19-15, Ex. 3; IHRA Definition, Exhibit 3. The IHRA definition characterizes three kinds of speech in opposition to Israel or Zionism as antisemitic: speech comparing Israel policy to Nazi policy, denying a Jewish right to self-determination, or holding Israel to standards to which other democracies are not held. *Id.*

Each of these parts of the IHRA definition is flagrantly unconstitutional. The First Amendment prohibits discrimination based upon viewpoint. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). A rule prohibiting comparisons of Israeli policy to Nazi policy discriminates based on viewpoint. A speaker who views Israeli policy as not remotely comparable to Nazi policy would not run afoul of the rule, but a speaker who views Israeli policy as similar to Nazi policy would. Similarly, a rule prohibiting a speaker from holding Israel to a different standard from other democracies discriminates based on viewpoint. A speaker who views Israel as a normal democracy would not run afoul of the rule, but a speaker who views Israel as a colonization project masquerading as a democracy would run afoul of the rule. Finally, a rule prohibiting denial of a

Jewish right of self determination discriminates based on viewpoint. A speaker who supports Jewish self determination would escape censure whereas a speaker who opposes it would not.

The Supreme Court also recognizes an exception to *Younger* where state action is "motivated by a desire to harass or is conducted in bad faith". *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1974). In this case, the only plausible interpretation of the University's end run around the OEO is that the University is acting in bad faith and with intent to harass. The University claims that its intent is merely to comply with obligations under Title VI. MTD at 3–4, Dkt. 23. But, if that were true, the University would have allowed the OEO to initiate and carry out the investigation according to established procedures instead of inventing an ad hoc process for investigating Plaintiff. Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2. This Court's suggestion that "number and diversity" of alleged rule violations justified an ad hoc process cannot be right because, as already noted, the University could have brought all of the allegations to a faculty committee for investigation under existing rules. PI Order at 21, Dkt. 37; Regul. Affecting Emp't § B.1.f, Dkt. 19-3, Ex. 12. Moreover, virtually every discrimination case is likely to implicate a diversity of rules. All speech on campus implicates rules regarding responsible use of University resources, for example. Ethical Principles § B.11, Dkt. 19-3, Ex. 25. If a nexus with other rules precluded the OEO from conducting an investigation and making a probable cause finding, then the OEO would not be able to investigate any case.

The Court has held that a proceeding falls within the bad faith exception when it is brought "without hope of obtaining a valid conviction." *Kugler*, 421 U.S. at 124. The most plausible explanation for the end run around the OEO is that despite announcing to the world on July 18, 2025 that it was bringing a hostile environment investigation, the University knew that it had no basis for initiating one. The University had received no complaints from any student or faculty

member. Duff Tr. at 181:15–20, Dkt. 40. The only complaints had been lodged by professors at other schools who were not covered by Title VI. First NOI at 1–2, Dkt. 19-15, Ex. 1; *Snyder-Hill*, 48 F. 4th at 708. One related to events in Hong Kong, which are not covered because Title VI does not apply extraterritorially. First NOI at 1, Dkt. 19-15, Ex. 1; *Doe v. University of Central Missouri,* No. 4:20-00714-CV-RK, slip op. at 2–3 (W.D. Mo. Dec. 28, 2020).

This Court suggested that Title VI requires an investigation. PI Order at 32, Dkt. 3. But that is not so because the complaints, even if taken as true, do not relate to persons or conduct covered by Title VI but were instead made by non-members of the community or extraterritorially. Moreover, the First Amendment clearly protects all of the speech as alleged by the University. Both the applicability of Title VI and First Amendment protection will be discussed in detail in the section on the likelihood of success of Plaintiff's First Amendment retaliation claim below.

2. Merits of First Amendment Retaliation and Due Process Claims

(a) First Amendment Retaliation Standard and Application of Causation Prong

The Sixth Circuit has recognized that "in First Amendment cases, only one question generally matters to the outcome" of a motion for an injunction pending appeal: "Have the plaintiffs shown a likelihood of success on the merits of their First Amendment claim?" F*ischer v. Thomas*, 52 F. 4th 303, 307 (6th Cir. 2022). Defendants retaliated in violation of the Free Speech Clause if (1) Plaintiff engaged in protected speech, (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to speak, and (3) there is a causal connection between the protected speech and the adverse action. *Thaddeus-X v. Blatter*, 175 F. 3d 378, 394 (6th Cir. 1997). The investigation, suspension and ban are adverse actions taken by Defendants in response to the speech described in the two notices of investigation. All of that speech is protected even if Defendants' allegations regarding what was said and where it was said are taken as true.

There is causation. A Plaintiff creates a presumption of but-for causation by showing that speech was a "motivating factor" in Defendants' actions. *Lemaster v. Lawrence County*, 65 F. 4th 302, 309 (6th Cir. 2023). The burden then shifts to the defendant to try to rule out but-for causation by showing by a preponderance of the evidence that "they would have taken the same action even if the plaintiff had not spoken." *Id.* The motivating factor requirement is met in this case because the University's allegations against Plaintiff provide the basis for the investigation and the allegations are all directed at speech. Am. Compl. ¶¶ 75, 77, Dkt. 36; First NOI at 1–2, Dkt. 19-15, Ex. 1; Second NOI at 1–2, Dkt. 19-15, Ex. 3. Moreover, Defendants maintain that each allegation also serves as the basis for the suspension and banishment. Thro Email 10/30/25, Dkt. 19-4, Ex. 7. Defendant Capilouto's characterizations of plaintiff's petition as "repugnant", "calling for the destruction of a people based on national origin", and "express[ing] hate" are further evidence that Plaintiff's speech was a motivating factor. Capilouto Message at 1, Dkt. 19-3, Ex. 18. Courts sometimes permit an inference of motivation if the adverse action followed the speech within "days or weeks". *Lemaster*, 65 F. 4th at 310. Plaintiff shared his petition on AALS listservs on July 6, 2025 and the University acted twelve days later, on July 18, permitting such an inference. *See Dye v. Office of the Racing Com'n*, 702 F. 3d 286, 306 (6th Cir. 2012).

(b) Adverse Action Prong of First Amendment Retaliation

The University has taken multiple adverse actions. The courts have emphasized that the ordinary firmness inquiry is meant to "weed out only inconsequential actions." *Thaddeus-X*, 175 F. 3d at 398. Adverse actions include: suspensions; bans; defamation or invasion of privacy if the resulting emotional distress would be sufficiently severe; the seizure of files; and threats to deprive the target of a benefit, such as employment, through actions, such as an investigation, for which deprivation is a possible outcome. *Michael v. Caterpillar Financial Services Corp.*, 496 F. 3d 584, 596 (6th Cir. 2007) (paid suspension); *Howard v. Livingston County,* No. 21-1689, 2023 WL 334894, at *9 (6th Cir. Jan. 20, 2023)

(ban); *Mattox v. City of Forest Park*, 183 F. 3d 515, 521 (6th Cir. 1999) (defamation or invasion of privacy); *Bell v. Johnson*, 308 F. 3d 594, 604–05 (6th Cir. 2002) (document seizure); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 574 (1968) ("the threat of dismissal from public employment is . . . a potent means of inhibiting speech"); *Thomas v. Eby*, 481 F. 3d 434, 441 (6th Cir. 2007) (holding that prison guard's issuance of a sexual misconduct ticket was adverse action because "inmates convicted of major-misconduct charges lose their ability to accumulate disciplinary credits for a month" even though inmate himself was not actually deterred from speaking); *Fritz v. Charter Tp. of Comstock*, 592 F. 3d 718, 726 (6th Cir. 2010) (encouraging employer to terminate contract constituted adverse action where defendants' power over employer's business made the threat "tangible"); *White v. Lee*, 227 F. 3d 1214, 1230 (9th Cir. 2000) (discrimination investigation); *Ulrich v. City and County of San Francisco*, 308 F. 3d 968, 977 (9th Cir. 2002) (hospital investigation and revocation of clinical privileges). Actions that do not individually count as adverse can be collectively adverse. *Thaddeus-X*, 175 F. 3d at 398.

Here, as part of the investigation, the University has suspended and banned Plaintiff. Duff Letter at 1, Dkt. 19-3, Ex. 17. The University has also threatened him with termination by linking the investigation to a determination of sanctions—all other investigative processes described in University rules save the determination of sanctions for the end of the hearing stage. Thompson Letter 8/25/25 at 2–3, Dkt. 19-15, Ex. 2 (stating that investigation will culminate in letter from Defendant Capilouto determining sanctions); Equal Dignity Due Proc. Regul. § I.E.2, Dkt. 19-3, Ex. 14 (tasking hearing panel with determining sanctions in the first instance); OEO Pol'y at 11 (discussing investigation outcomes without mentioning determination of sanctions). The investigator provided Plaintiff with a set of "allegations against" him that has the appearance of formal charges. First NOI at 1, Dkt. 19-15, Ex. 1. The investigator specified that Defendant Capilouto would issue a letter to Plaintiff that would determine sanctions, including possible "termination", and cited the Kentucky statute authorizing the

board of trustees to terminate an employee with cause. Thompson Letter 8/25/25 at 3, Dkt. 19-15, Ex. 2. So long as the investigation continues, the threat that Defendant Capilouto will move to terminate him based on its outcome hangs over Plaintiff.[3]

The University also might wish to argue that there is no adverse action because it merely seeks information. But the University has gone far beyond information collection in suspending and banning Plaintiff, ordering him to "stop immediately" any activities that "violate University policy", and embedding its search for information in a process for which the threat of termination is an explicit and integral part, as discussed above. *See ACLU v. National Sec. Agency*, 493 F. 3d 644, 663 (6th Cir. 2007) (holding that mere data collection is not adverse action but only if "government regulation, prescription, or compulsion" are not involved); First NOI at 2, Dkt. 19-15, Ex. 1. If Defendants merely sought information, they would have responded to Plaintiff's July 9 offer to Vice Provost Jasinski to chat about his conference statements instead of acting against him without warning nine days later. Am. Compl. ¶¶ 55–57, Dkt. 36.[4]

(c) Protected Speech Prong of First Amendment Retaliation

Plaintiff's speech is protected if it is (1) on a matter of public concern, (2) constitutes either academic speech or speech as a private citizen, and (3) Plaintiff's interest in speaking outweighs the University's interest in efficient operations. *Meriwether v. Hartop*, 992 F. 3d 492, 504–08 (6th Cir. 2021) (academic speech); *Noble v. Cincinnati & Hamilton Cty. Pub. Library*, 112 F. 4th 373, 380–81 (6th Cir. 2024) (private citizen speech). Alternatively, Plaintiff's speech is protected if it takes place in a public

[3] The investigation is an adverse action even if there is a possibility that the University will choose not to prefer formal charges against Plaintiff because the adversity stems from the threat of termination rather than its completion. Many of the investigations that courts have held to be adverse actions ultimately acquitted the plaintiff. *See, e.g., White v. Lee*, 227 F. 3d 1214, 1220 (9th Cir. 2000).

[4] The University might also wish to argue that the investigation has not deterred Plaintiff from speaking. But Plaintiff need only show that others of ordinary firmness might be deterred by the university's actions. *Bell v. Johnson*, 308 F. 3d 594, 606 (6th Cir. 2002). In any case, Plaintiff's speech has been chilled. Woodcock New Decl. ¶¶ 3–5, Dkt. 35.

forum or falls within the speaker and content parameters of a limited public forum and the University lacks a compelling interest in regulating it. *Kincaid v. Gibson*, 236 F. 3d 342, 348, 354 (6th Cir. 2001).

As a threshold matter, it bears emphasis that Plaintiff need not show that all of his speech is protected in order to prevail. Instead, Plaintiff prevails if he can show that *any* of his speech was protected and a but-for cause of Defendant's actions, even if the rest of his speech is not protected. *Thaddeus-X*, 175 F. 3d at 394. Plaintiff's post of a petition for military action against Israel to AALS discussion groups on July 6, 2025 is likely to have been the but-for cause of the suspension, ban, and investigation. Defendant Capilouto initiated the investigation a mere nine days later and referenced only the petition in his announcement. Capilouto Message at 1, Dkt. 19-3, Ex. 18. The University knew that Plaintiff had posted about his views to the law faculty listserv as early as March 2024 and had made his statement at the George Mason conference a month before that. Mudd Tr. at 148:16–25, 149:1–13, 150:2–10, Dkt. 40; First NOI at 2, Dkt. 19-15, Ex. 1. But the University had not acted. Given that the July 6 post of the petition to AALS discussion groups was the cause, Plaintiff need only demonstrate that the petition was protected.[5] However, Plaintiff will nevertheless show that all of the speech identified in the two notices of investigation was obviously protected.[6] First NOI at 1–2, Dkt. 19-15, Ex. 1; Second NOI at 1–2, Dkt. 19-15, Ex. 3; *cf. White v. Lee*, 227 F. 3d 1214, 1229–30 (9th Cir. 2000) (investigation not needed because constitutional violation obvious).

All of Plaintiff's speech as alleged by the University is protected academic or private citizen speech. All of it consists of general statements about Palestine. First NOI at 1–2, Dkt. 19-15, Ex. 1; Second

[5] This is true even if the investigation leads to additional allegations involving speech that is not protected. The unearthing of allegations pursuant to a retaliatory investigation is itself retaliation if the new allegations lead to an adverse action such as termination. That is because the cause of the termination would ultimately be the speech that triggered the retaliatory investigation. For the same reason, Plaintiff need not show that the speech alleged in the second notice of investigation is protected. Second NOI at 1–2, Dkt. 19-15, Ex. 3.

[6] In the second notice of investigation, the University alleged that Plaintiff called for "the genocide of Israeli people" but did not identify any example of such a statement by Plaintiff. Second NOI at 1–2, Dkt. 19-15, Ex. 3. Accordingly, this allegation must be set aside. It appears to be an attempt to interpret Plaintiff's call for military action to end Israel as a call for genocide and is not based on any allegation that Plaintiff expressly called for a genocide of Israelis.

NOI at 1–2, Dkt. 19-15, Ex. 3. Because the statements are general, it does not fall into any of the exceptions to the First Amendment for threats, incitement, fighting words, and the like. *See, e.g.*, *Counterman v. Colorado*, 143 S. Ct. 2106, 2113 (2023) (threats). Because the statements are about Palestine, they are all on a matter of public concern. Because the University alleges that Plaintiff made the statements at academic conferences, in online discussion groups for law professors, or as part of extracurricular activities, they are all protected as either academic speech (especially the statements at academic conferences, in discussion groups for law professors, and at the optional lecture) or private citizen speech (especially the statement made while driving a car with students who paid to spend time with Plaintiff) or both. *Josephson v. Ganzel*, 115 F. 4th 771, 790 (6th Cir. 2024) (holding that the applicability to conference speech of the protection for academic speech established in *Meriwether* is "clearly established"); *Vaughn v. Lawrenceburg Power System*, 269 F. 3d 703, 716 (6th Cir. 2001) (recognizing that a person may speak in professional and private capacities at the same time). No one in the University community complained about this speech so the efficiency interest of the University in limiting Plaintiff's speech is nil.[7] Duff Tr. at 181:15–20, Dkt. 40; *cf. Meriwether*, 992 F.3d at 507. Statements in the optional lecture, on the law faculty listserv, and while driving a car on a public street are also protected under public forum or limited public forum doctrine regardless of the capacity in which Plaintiff spoke. *See Kincaid v. Gibson*, 236 F. 3d 342, 354 (6th Cir. 2001). The University has not historically regulated speech at optional lectures or on the law faculty listserv. Am. Compl. ¶¶ 99–106, Dkt. 36; Douglas Decl. ¶ 3, Dkt. 19-7; Bird-Pollan Decl. ¶¶ 6–11, Dkt. 19-8. The University has

[7] Potential disruption associated with threats by politicians who disagree with a professor's speech to cut funding to universities may not be considered in determining whether academic speech is protected. To do otherwise would run counter to the First Amendment's categorical rejection of viewpoint discrimination. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). If it were otherwise, then university administrators could leverage politicians' threats of funding cuts to discriminate based on viewpoint. Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 CASE WESTERN RESERVE L. REV. 1121, 1158 (2022) (noting that the disapproval of politicians "cannot, consistent with academic freedom and free speech values, be the basis for employer punishment of a member of the faculty"); *Meriwether v. Hartop*, 992 F. 3d 492, 511 (6th Cir. 2021) ("The mere fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

suggested that Plaintiff's conference speech was "off-topic", but *Meriwether* extended protection to academic speech even where not "germane." *Meriwether*, 992 F.3d at 507; MTD at 12, Dkt. 23.[8]

Defendants suggest that Title VI withdraws speech that creates a hostile environment from First Amendment protection and requires the University to act against it.[9] *Id.* at 13, 19. That is not so because the Constitution is the supreme law of the land. U.S. Const. art. VI, cl. 2. Title VI requires that universities not show "deliberate indifference" to "actual notice" of a hostile environment. *Wamer v. University of Toledo*, 27 F. 4th 461, 466–67 (6th Cir. 2022). But it does not permit the University to address a hostile environment by retaliating against protected speech in violation of the constitution. Universities, states and federal administrative agencies are similarly powerless to withdraw protection for speech by stipulating that it is hateful, offensive, or antisemitic. *Cf.* S.J. Res. 55, 2025 Ky. Acts Ch. 157. If the University believes that Plaintiff's speech creates a hostile environment, it may address it by, for example, sponsoring counterprogramming aimed at making Jewish students feel welcome.[10] That would likely satisfy the University's duty to avoid deliberate indifference. Regardless, the University may not retaliate against Plaintiff.

Suppose that speech that creates a duty for the University to act under Title VI were automatically denied First Amendment protection, as Defendants argue should happen. PI Resp. at 13, Dkt. 26. Even then, Plaintiff's speech would remain protected because it is not harassment so severe or pervasive and objectively offensive that it effectively bars access to an educational opportunity or

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[8] Defendants argue that they cannot determine whether Plaintiff's speech is protected until they complete the investigation because they need to ascertain what Plaintiff actually said. PI Resp. at 14, Dkt. 26. That is not so because, as just indicated, Plaintiff's speech is protected even if the University's allegations are accepted as true.

[9] This appears to be a longstanding misconception of Defendant Thro. *See* William Thro, *Follow the Truth Wherever It May Lead: The Supreme Court's Truths and Myths of Academic Freedom*, 45 U. Dayton L. Rev. 261, 269 n.40 (2020). Leading free speech scholars disagree. *See, e.g.,* Mark Tushnet, *Some Thoughts About Free Speech and Hostile Environment Discrimination on College Campuses* at 27, Harvard Law School (2024), https://hls.harvard.edu/bibliography/some-thoughts-about-free-speech-and-hostile-environment-discrimination-on-college-campuses/ (ruling out retaliation against speakers who create a hostile environment through general statements because that is "pure political speech").

[10] Mark Tushnet advocates this approach. *Some Thoughts About Free Speech and Hostile Environment Discrimination on College Campuses* at 27–28, Harvard Law School (2024), https://hls.harvard.edu/bibliography/some-thoughts-about-free-speech-and-hostile-environment-discrimination-on-college-campuses/.

benefit offered by the university, as required for a hostile environment to exist. *Stand With Us v. MIT*, No. 24-1800, slip op. at 32 (1st Cir. Oct. 21, 2025) (antizionist speech does not violate Title VI; collecting cases).[11]

(d) Due Process

Plaintiff has a property interest in teaching, research, and service. The contours of state employees' property interests are determined by state rules. *The Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972). Applying that principle, the Sixth Circuit and other courts have repeatedly found property interests in the terms and conditions of employment. *Gunasekera v. Irwin*, 551 F.3d 461, 468 (6th Cir. 2009); *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240–42 (1988). In *Hulen v. Yates*, for example, the court held that reassignment of a professor to a different department implicated a property interest because the value of a tenured position extends beyond pay to include the "terms and conditions" of the appointment and the "unanimous custom and practice of the university." 322 F.3d 1229, 1241–44 (10th Cir. 2003). *A fortiori*, the University's reassignment of Plaintiff to "professional development" when University rules characterize teaching, research, and service as the essential elements of his tenured faculty position implicates a property interest. Am. Compl. ¶¶ 62, 107, Dkt. 36; Faculty Rules 6/30/24 at 24–25, Dkt. 19-8, Ex. 2.

Defendants suspended and banned Plaintiff without notice or a pre-deprivation hearing of any kind. Am. Compl. ¶ 62, Dkt. 36. Pre-deprivation process is the "root requirement" of the Due Process Clause, which is "an opportunity for a hearing *before* [an individual] is deprived of any significant property interest." *Hieber v. Oakland County*, 136 F.4th 308, 321 (6th Cir. 2025). Pre-deprivation process

[11] Even if Plaintiff's speech did create a hostile environment, the University had no duty to respond with a ban, suspension, and investigation threatening termination because the "deliberate indifference" standard sets a low bar. For example, when U.S. Department of Education investigated a Hunter College professor who "demoniz[ed]" Israel in class, it directed only that Hunter contemplate providing training. OCR Letter 6/17/2024 at 7, https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/02222034-a.pdf; Hunter College Res. Ag. at 8 (June 10, 2024), https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/02222034-b.pdf.

can only be circumvented in "extraordinary situations" where there is a "special need for very prompt action." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002). This rule is not limited to terminations. In *Gunasekera v. Irwin*, for example, the court held that a hearing was required before deprivation of advising privileges. 551 F.3d at 469.

Defendants fail to identify a need for prompt action against Plaintiff. They claim a vague interest in protecting Plaintiff and the community, and in addressing a hostile environment under Title VI. Duff Letter at 1, Dkt. 19-3, Ex. 17; PI Resp. at 19, Dkt. 26. But at the time that Defendants acted on July 18, 2025, they had received no complaints about Plaintiff from any student or faculty member at the University. Duff Tr. at 181:15–20, Dkt. 40; Mudd Tr. at 146:25, 147:1, Dkt. 40. They acted in summer when Plaintiff was not teaching and the law building was mostly empty, in response to complaints by faculty at other schools who were likely not covered by Title VI either because they had no intention of accessing University resources or because they were located abroad, on the basis of statements made in Hong Kong, Washington, DC and on the Internet. First NOI at 1–2, Dkt. 19-15, Ex. 1; *Snyder-Hill*, 48 F. 4th at 708; *Doe v. University of Central Missouri,* No. 4:20-00714-CV-RK, slip op. at 2–3. Defendants labeled the suspension a reassignment presumably because they could not show the threat of physical harm needed to obtain an interim suspension, banned Plaintiff from the law building but not the surrounding campus in which vulnerable undergraduates predominate, and acted without warning days after Plaintiff offered to meet with the Vice Provost to answer questions. Am. Compl. ¶¶ 55–57, 62, Dkt. 36; Duff Letter at 1, Dkt. 19-3, Ex. 17; OEO Pol'y at 15. Very prompt action was not needed and Defendants do not appear to have really thought that it was.

CONCLUSION

WHEREFORE, Plaintiff begs this Court to grant Plaintiff's motion for an injunction pending appeal.

Respectfully submitted,

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