

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I

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Ramsi A. Woodcock,

*Plaintiff,*

v.

Case No. 26-CI-885

Gregory Van Tatenhove et al.,

*Defendants.*

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**WOODCOCK'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

Defendants' appointment of a member and leader of the faculty of the University of Kentucky J. David Rosenberg College of Law ("law school") over the objection of the law school's professional faculty and despite his lack of any record of scholarship takes the law school back to the dark days of American academia before the rise of the great American research university in the early 20th century.

American colleges before the end of the 19th century generally demanded little in the way of analytical thinking from their students and generated little new knowledge through original research. In comparison to institutions of higher learning in Europe, especially those in Germany, American colleges through most of the 19th century were generally second rate in quality and afforded their faculties little role in institutional governance.

LARRY G. GERBER, *THE RISE AND DECLINE OF FACULTY GOVERNANCE* 3 (Johns Hopkins University Press 2014). At that time, instruction was not provided by professional scholars but by "young men who were themselves recent graduates and who often did not see" "teaching as a career but rather as a form of temporary employment[.]" *Id.* at 14. "In the last quarter of the nineteenth century, however, American higher education began to come of age." *Id.* at 4.

An essential element in the improving academic quality of American colleges and universities in the late 19th century was the development of a more professional faculty. A growing number of faculty members experienced a process of professionalization that included going through an extended period of advanced training in a specific academic discipline that often led to a PhD, identifying with peers across the country involved in the same discipline rather than only with one's own local college community, coming to see college teaching as a lifetime career, and beginning to consider research as part of one's academic responsibilities. In order to carry out a broadened conception of their role as professors, increasingly professionalized faculty members demanded not only academic freedom in their research and teaching but also a larger degree of control over academic decision making as a matter of professional right and responsibility.

*Id.*

It is a measure of the extent to which Defendants University of Kentucky, Capilouto, and DiPaola (“University Defendants”) have forgotten that the business—and duty—of a great public university is *expertise* that in their motion to dismiss they ridicule Woodcock for asserting his right to faculty autonomy and the maintenance of scholarly standards—calling him “haughty”, “pretentious”, and “hubris[tic]”, and characterizing professors as a “narrow elite”. It is a further symptom that they argue that “attorneys” are just as qualified to review the quality of scholarship as the scholars who devote their lives to producing it. Mot. Dismiss at 11–12. Their motion provides insight into the mindset that caused University Defendants to break from at least fifty years of settled practice and violate their own written policies, accreditation standards, contractual duties, and multiple provisions of the Kentucky Constitution in appointing an unqualified dean over the objection of the law faculty.

#### STATEMENT OF THE CASE

Woodcock incorporates by reference all exhibits, and declarations attached to his Amended Verified Complaint and his Supplemental Memorandum of Law in Support of His Emergency Motion For a Temporary Injunction. Exhibits incorporated from the Amended Verified Complaint are designated as Exhibits 1 through 81 and those incorporated from his memorandum are designated as Exhibits 82 through 90.

Between January 16 and February 3, 2026, Defendant DiPaola, who is the provost of the University, brought four finalists for the position of dean of the law school to campus to participate in open fora with the University community. Ex. 1 at 2; Ex. 2 at 2. The University’s job posting stated that “academic administrative leadership experience” was “[r]equired” and that any candidate “[m]ust qualify for appointment at the rank of tenured, full professor[.]” Ex. 3 at 1. Three of the finalists were tenured law professors with academic administrative experience. Leary CV, Ex. 4; Higdon CV Ex. 5; Sterio CV Ex. 6. The fourth was Van Tatenhove, whose only scholarly

publication was his student note, had never held a full-time faculty role at a law school, and had no academic administrative experience. Van Tatenhove CV, Ex. 7 at 1–4.

On February 4, the faculty sent an email to DiPaola, copying Senior Adviser to the President George Wright, declaring that the faculty had approved three of the finalists. Fac. Email, Ex. 8 at 1; Woodcock Decl. ¶ 26. With respect to the fourth, the email expressed the “collective view[] of the faculty” that Van Tatenhove was “unacceptable to be our next Dean” because he lacks “academic administrative leadership experience” or a “record of scholarship[]” sufficient “to be granted tenure.” *Id.* at 2. DiPaolo did not make an offer to any of the three finalists approved by the faculty, at least one of whom would have accepted. Leary Email, Ex. 28 at 1; Complaint ¶ 16. Instead, on February 27, DiPaola made an offer to Van Tatenhove to become the next dean of the law school. Offer Ltr., Ex. 11 at 1. Van Tatenhove accepted on or before March 3 and DiPaola announced the appointment on March 6. *Id.* at 4; Announc., Ex. 17 at 1. After public outcry regarding Van Tatenhove’s appointment, the board directed Capilouto to revise the governing regulations to ensure that “all future Dean appointments are approved by the” board. Bd. Action, Ex. 16 at 1. However, the board did not block the appointment of Van Tatenhove at its Jun 30 meeting and Van Tatenhove took office on July 20, 2026. *Id.*; Ex. 75.

### LEGAL STANDARD

#### **A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction Based on Standing under Ky. R. Civ. P. 12.02(a).**

“The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court.” Ky. Const. § 112(5). “[T]he existence of a plaintiff’s standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth.” *Commonwealth of Ky. v. Sexton*, 566 S.W.3d 185, 188 (Ky. 2018). The Kentucky Supreme Court “has adopted the federal *Lujan* test to determine whether a party has standing.” *Pikeville v. Ky. Concealed Carry Coal.*, 671 S.W.3d

258, 263 (Ky. 2023); see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “Because the standing requirements contained in the Kentucky Constitution mirror the standing requirements under the United States Constitution, federal decisions on standing may be accepted as persuasive authority.” *Pikeville*, 671 S.W.3d at 264. “Moreover, a court must determine whether a party has established standing for each of the particular claims asserted.” *Id.* at 264 (cleaned up). A “dismissal for lack of subject-matter jurisdiction should ordinarily be without prejudice because such a dismissal does not operate as an adjudication on the merits of the dispute.” *Id.*

#### **B. Motion to Dismiss and Judgment on the Pleadings under Ky. R. Civ. P. 12.02(f)**

“A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint.” *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (cleaned up). “The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’union v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). “Accordingly, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law.” *Fox*, 317 S.W.3d at 7 (cleaned up).

Defendants incorrectly cite to an unpublished Kentucky Court of Appeals opinion that quotes the heightened federal pleading standard, which holds that “plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Durrett v. Iko Industries, Inc.*, No. 2019-CA-001307-MR (Ky. Ct. App. Aug. 21, 2020) (unpublished) (quoting *Bell Atlantic Corp. v. Twombly*, 550 US 544, 545 (2006)). But the Kentucky Supreme Court has held that “Kentucky’s pleading standard is more lenient than the federal rules” and has “reiterate[d] Kentucky’s requirement of bare-bones, notice pleading.” *Russell v. Johnson & Johnson, Inc.*, 610 S.W.3d 233, 241

(Ky. 2020). Accordingly, “a complaint couched in general and conclusory terms” is sufficient. *Id.* (cleaned up).

### C. Objection to Some of Defendants’ Exhibits to Their Motion to Dismiss

Defendants have attached nine exhibits to their motion. These include public court records from a prior federal action, official university regulations, and a private letter sent by the University to the law school’s accreditor. Woodcock acknowledges that under Ky. R. Evid. 201(b)(2), this Court may take judicial notice of facts “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *See Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App. 2005). Accordingly, this Court may therefore take judicial notice of the University’s governing regulations contained in Exhibits 1 through 4 (some of which Woodcock already introduced as exhibits to his Amended Verified Complaint).

This Court may also take judicial notice of the *existence* of the filings in the prior federal action contained in Exhibits 5 through 8. But this Court may not take judicial notice of any facts contained in those filings. Those facts were “subject to reasonable dispute” during litigation in the federal court and are in dispute in the present case. Ky. R. Evid. 201(b). Moreover, any orders or opinions in the federal case are not binding in this one because the action was voluntarily dismissed without prejudice and the federal court’s denial of Woodcock’s injunction motion was not a resolution “on the merits”. *Woodcock v. Van Tatenbove*, No. 26-0262, Text Order (E.D. Ky. Aug. 4, 2026), Dkt. 21; *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464–66 (Ky. 1998); *Am. Exp. Travel Related Servs. Co. v. Kentucky*, 730 F.3d 628, 632 (6th Cir. 2013) (“Denials of preliminary relief are generally not given preclusive effect”, because ‘the prior proceeding must have resulted in a final judgment on the merits’” for estoppel to apply). If this Court relies on any of the facts in the federal filings, Defendants’ motion to dismiss will be converted into a motion for summary judgment. “[R]eliance on matters outside the pleadings by the court effectively converts a motion to dismiss into a motion

for summary judgment. *DF Bailey, Inc. v. GRW Engineers, Inc.*, 350 S.W.3d 818, 821 (Ky. Ct. App. 2011); Ky. R. Civ. P. 12.02 (stating that when matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss, “the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.”).

Similarly, this Court cannot take judicial notice of the University’s letter to the law school’s accreditor, which is Exhibit 9. The facts contained in that letter are “subject to reasonable dispute” in this case. Ky. R. Evid. 201(b). This Court’s reliance on them will convert the motion to dismiss into a motion for summary judgment. *DF Bailey*, 350 S.W.3d at 821.

Because this litigation is in its infancy and the parties have had no opportunity to conduct discovery regarding the accuracy of the investigation response (Exhibit 9) or any of the facts contained in the federal court filings (Exhibits 5 through 8), a summary judgment posture would be prejudicial to Woodcock. Accordingly, Woodcock respectfully requests that this Court exercise its discretion to “exclude” these “matters” (i.e., all facts contained in Exhibits 5 through 8, as well as Exhibit 9 in its entirety) because they have been “presented to” this Court “outside the pleading”. Ky. R. Civ. P. 12.02.

## ARGUMENT

### A. Woodcock Has Standing to Bring Each Claim

#### 1. *Lujan* Factors and Defendants’ Limited Challenge to Standing

The Kentucky Supreme Court applies the federal *Lujan* test to determine standing. *Sexton*, 566 S.W.3d at 196; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992):

[F]or a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability. In other words, a plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief. A litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent[.] The injury must

be . . . distinct and palpable, and not abstract or conjectural or hypothetical. The injury must be fairly traceable to the challenged action, and relief from the injury must be likely to follow from a favorable decision.

*Pikeville*, 671 S.W.3d at 263–64 (quoting *Sexton*, 566 S.W.3d at 196 (quoting ) (cleaned up).

With respect to Woodcock’s expressive association claim, Defendants argue only that the injury is not “concrete and particularized”. Mot. Dismiss at 8–9. And with respect to Woodcock’s arbitrary power and speech chill claims, Defendants argue only that Woodcock’s injury is not “actual or imminent” but rather “conjectural or hypothetical”. Mot. Dismiss at 8, 10–12. Defendants do not challenge concreteness and particularity with respect to Woodcock’s arbitrary power or chill claims, and do not challenge actuality or imminence with respect to Woodcock’s expressive association claim. They do not challenge causation or redressability with respect to any claim. They do not challenge standing with respect to Woodcock’s breach of contract or tortious interference claims. And they are silent regarding standing for Woodcock’s civil conspiracy claim. Because this Court can raise standing *sponte sua*, however, Woodcock will demonstrate that each of his claims satisfies all elements of standing. Before turning to that analysis, Woodcock will consider Defendants’ erroneous suggestion that Woodcock seeks to assert the rights of the faculty as a group as opposed to his own individual rights. Mot. Dismiss at 31–32. Woodcock will also consider ripeness. Mot. Dismiss at 21–22.

## **2. Woodcock Asserts Individual Rights Not Group Rights**

Defendants suggest that Woodcock sues on behalf of the faculty. Mot. Dismiss at 3–4, 6, 15, 26, 31–32. That is not so. Woodcock asserts rights that are personal to him.

### **a) Woodcock’s Expressive Association Rights Are Personal to Him**

A government action that violates the right of expressive association, such as forced inclusion of a member, may be directed at a group rather than a specific individual. But the rights that the action

violates are always the individual rights of the members of the group. That is because an individual uses his choice about which group to join to send a message that he, individually, wishes to send. Government meddling with the internal composition of a group changes the message sent by membership in the group, depriving the individual member of a tool (membership in the group) that he had used to convey a message about himself. *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000). By the same token, while government action to limit access to ink may be directed at the ink (e.g., by seizing it) rather than a particular writer, the right that government action limiting access to ink violates is an individual right of each writer who is deprived of access to ink. *Blick v. Ann Arbor Public School District*, 105 F.4th 868, 882 (6th Cir. 2024). Individual writers use ink to send messages. Deprivation of access to ink deprives individuals of a tool that they use to convey messages and thereby burdens their speech on an individual basis.

Consistent with the foundation of the right of expressive association in the individual group member's right of free speech, the standing of a *group* to assert expressive association rights has long been considered *derivative* of the individual rights of its members. In order for a group to sue for violation of a right of expressive association, the group must prove that "its members would otherwise have standing to sue in their own right". *Com. ex rel. Brown v. Interactive Media Entertainment & Gaming Ass'n, Inc.*, 306 SW 3d 32, 38 (Ky. 2010). Accordingly, when Woodcock sues for violation of a right of expressive association, he asserts his own individual right, not the right of the faculty as a group.

**b) Woodcock's Arbitrary Power, Speech Chill, Contract, Tortious Interference, and Civil Conspiracy Rights Are Personal to Him**

The personal nature of the other rights asserted by Woodcock is clear. Woodcock's right to be free of arbitrary power under Section 2 of the Kentucky Constitution is personal to him. Individual plaintiffs frequently bring Section 2 claims. *See, e.g., University of Kentucky v. Davis*, 551 SW 3d 443, 448

(Ky. Ct. App. 2017) (holding that two state employees denied disability benefits could sue under Section 2). And the right to freedom of speech as a scholar is an individual right. *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) (describing free speech protections for scholarship as belonging to “professors”). Accordingly, government action that chills scholarly speech violates an individual right. Because Woodcock’s constitutional rights are personal to him, his right against a civil conspiracy to violate those constitutional rights is also personal to him. Woodcock’s contract rights are personal to him as a party to his employment agreement with the University. It follows that Woodcock’s right against tortious interference with his personal contract rights is also personal to him.

### 3. Ripeness

“Ripeness” “prevents courts from interfering with legislative enactments until it is necessary to do so, and thus enhances the quality of judicial decision-making by ensuring that cases present courts an adequate record to permit effective review and decision-making.” *WB v. Com.*, 388 S.W.3d 108 (Ky. 2012) (cleaned up). “[R]ipeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review.” *Id.*

All of Woodcock’s claims allege the same bad act: the appointment of Van Tatenhove. Am. Compl. ¶¶ 2, 4, 18. It is his appointment that impairs the message Woodcock sends through the faculty, violates the prohibition on arbitrary power, chills his speech, breaches his contract, tortiously interferes with his contract, and forms the subject of the civil conspiracy. Am. Compl. ¶¶ 3, 5, 6. The question posed by ripeness is therefore whether delaying Van Tatenhove’s removal would cause hardship to the parties and whether his appointment is fit for judicial review. The answer is yes. Because Van Tatenhove has already taken office, Woodcock is suffering ongoing harm, including ongoing impairment of his ability to send his peer review message through his association with the faculty, ongoing deprivation of his governance rights as a member of the faculty, ongoing chill to his

speech, and ongoing expectation damages associated with the university's failure to deliver the valuable service of faculty autonomy promised in his contract. Am. Compl. ¶¶ 42, 43, 46.

Withholding court consideration would therefore create hardship for Woodcock. Am. Compl. ¶¶ 42, 44, 46. It would also create hardship to Defendant University because the longer a dean remains in office the more that the University is likely to invest in its relationship with him and to rely on his operational decisions. Am. Compl. ¶¶ 18, 45, 60. Accordingly, the longer that the court waits to remove him the greater the potential costs for the law school. Am. Compl. ¶¶ 34, 45, 47.

Even if there were no hardship associated with delay, it would make little sense to delay adjudication because the University's action is already final. Am. Compl. ¶¶ 2, 8, 18. Van Tatenhove took office on July 20. Am. Compl. ¶¶ 2, 8, 41. The process of hiring him is complete. Accordingly, the record is fit for judicial review.

Defendants argue that Woodcock's speech chill claim is not ripe because Van Tatenhove has not yet sanctioned Woodcock for his speech. Mot. Dismiss at 21–22. But that misunderstands the nature of a speech chill claim, which, as the name suggests, is a challenge to actions that are likely to cause self-censorship, not to actions that retaliate for speech or directly muzzle it. Woodcock alleges that Van Tatenhove's appointment chills his speech. Am. Compl. ¶¶ 6, 44, 118. Accordingly, the question for ripeness purposes is whether Van Tatenhove has in fact been appointed, not whether he has retaliated against Woodcock's speech. Am. Compl. ¶¶ 2, 8, 18. Defendants also challenge Woodcock's speech chill claim on the ground that the injury is speculative. Mot. Dismiss at 10–11. That is not a ripeness challenge but rather a challenge implicating the *Lujan* factors. It is discussed below.

#### **4. Expressive Association (Counts I, II)**

Woodcock has standing to bring his expressive association claims.

### a) Actuality or Imminence

To serve as a basis for standing, the injury must be “either actual or imminent” not “conjectural or hypothetical.” *Pikeville*, 671 S.W.3d at 263–64. The premise of an expressive association claim is that choices about who you associate with send a message about who you are. When the government forces a group to accept certain members, that changes the composition of the group, and that in turn changes the message that you send by associating with it. In consequence, forced inclusion of members is tantamount to forcing the other members of the group to change the message they send through their association with the group. If the members do not like the new message that their association with the group sends, they can leave the group. But then they will have been deprived of a tool—association with the group—that had been “useful for speaking.” *Blick*, 105 F.4th at 882. The First Amendment, and hence the free speech provisions of the Kentucky Constitution, prohibits not only direct restrictions on speech, but also restrictions on tools that are “useful for speaking”, including printing presses, ink, and membership in an expressive association. *Id.* For purposes of standing, the key point is that, by altering the expressive significance of membership, the government’s forced inclusion of a member in a group impairs the ability of each of the other members of the group to use a tool that is “useful for speaking.” *Id.* It is equivalent to a government order that anyone who uses a printing press must append a government-mandated statement to each page that he prints. The message that people using printing presses are able to send through use of the presses will be affected by the rule.

The harm occurs at the moment that the government forces the group to accept the member. For it is at that moment that the composition of the group changes and therefore at that moment that the message sent by membership in the group changes. And the U.S. Supreme Court has made clear that “intangible injuries” to speech provide standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 1549 (2015); *Transunion Llc v. Ramirez*, 594 US 413, 425 (2021). In *Boy Scouts of America v. Dale*, the Supreme

Court held that the mere “presence in the Boy Scouts” of an openly gay, gay rights activist scoutmaster “would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” 530 U.S. 640, 653–54 (2000). There was no allegation in the case that the government had taken any other action against the Boy Scouts or its members apart from the New Jersey court’s order that Dale’s membership be restored. *Id.* at 644, 653–54. Thus the only possible injury in the case stemmed from the attempt to force the Boy Scouts to accept a member that they did not want. *Id.* at 653.

By the same token, the harm sustained by a user of printing presses who is forced to append a government message to each printed page would occur when the government orders the inclusion of the government message. For it is at that moment that the tool that the printer has found “useful for speaking” is altered by the government. *Blick*, 105 F.4th at 882. From that moment on, any message the printer wishes to send with his press is altered and he is forced to choose between sending an altered message and giving up the use of the printing press as a tool that is “useful for speaking.” *Id.*

Notably, and contrary to the suggestion of Defendants, injury in forced inclusion cases does not turn on future public perceptions regarding the nature of the message sent by forced inclusion. In *Dale*, the Court had nothing to say about public perceptions. *Dale*, 530 U.S. at 653. Instead, the Court’s focus was on what message forced inclusion sends, rather than on how it is received by the public. The Court stated that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” *Id.* Indeed, the Court made clear in *Dale* that the question of what message the forced inclusion sends is to be primarily based on the

perceptions of the group members themselves rather than that of the public. The Court stated that “we must” “give deference to an association’s view of what would impair its expression.” *Id.*

Woodcock has pled the facts that (1) the faculty associate to send the message that their work is subject to peer review, (2) that the appointment of Van Tatenhove brings a non-peer onto the faculty in a leadership position, and (3) that the presence of a non-peer member and leader on the faculty changes the message that Woodcock’s membership in the faculty conveys from that of “peer reviewed” to that of “non-peer reviewed.” Am. Compl. ¶¶ 2, 3, 19. Indeed, Woodcock further pleads (4) that the announcement of Van Tatenhove’s appointment in March altered the message sent by Woodcock’s membership because the implication of the announcement was that within a few months Woodcock’s work would be subject to review by a non-peer. Am. Compl. ¶¶ 18, 20, 21. These factual assertions, if proven, are sufficient to establish actual, ongoing injury to Woodcock in the form of government interference with the message that Woodcock sends through his membership in the faculty. Notably, and contrary to Defendants’ suggestion, none of these factual assertions relate to the future. Accordingly, the injury pled by Woodcock is “actual” rather than “conjectural or hypothetical.”

The injury is ongoing, thereby providing standing to seek injunctive and declaratory relief, because the message sent by membership in the law faculty remains impaired so long as a non-peer member-leader remains in place. Only once the leader is removed will the government interference with the peer review message end.

#### **b) Concreteness**

“A concrete injury must be de facto; that is, it must actually exist.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). It must be “real, and not abstract.” *Id.* The U.S. Supreme Court has “recognize[d]” “in many of” its “previous cases” that “intangible injuries” such as those to “free speech” “can” “be concrete.” *Id.* As noted in the previous section, the forced inclusion of a member in an expressive

association impairs speech at the moment that the inclusion takes place. As a result, a concrete, intangible harm to speech is inflicted at the moment that the inclusion takes place. As noted in the previous section, this harm is ongoing because the message sent by membership in the law faculty remains impaired so long as a non-peer member-leader remains in place. Only once the leader is removed will the government interference with the peer review message end.

### **c) Particularity**

“For an injury to be particularized, it must affect the plaintiff in a personal and individual way.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up). The appointment of Van Tatenhove affects Woodcock in a personal and individual way because it deprives him of a tool that he finds “useful for speaking.” His membership in the faculty no longer sends the signal that it once did—that he is subject to peer review. The fact that the appointment also impairs the speech of all other members of the faculty does not deprive the harm of particularity. Indeed, the standing of groups to sue for expressive association violations is not direct but rather derivative of the standing of individual group members to sue. *See Com. ex rel. Brown v. Interactive Media Entertainment & Gaming Ass’n, Inc.*, 306 SW 3d 32, 38 (Ky. 2010); *San Francisco County Democratic Cent. Com. v. Eu*, 826 F. 2d 814, 817 (9th Cir. 1987) (stating that to accord standing to a group to enforce a right of association but deny standing to an individual member of the group “turns the associational interest at stake on its head”).

### **d) Causation and Redressability**

“The injury must be fairly traceable to the challenged action, and relief from the injury must be likely to follow from a favorable decision.” *Pikeville*, 671 S.W.3d at 264. The action that Woodcock challenges is the appointment of Van Tatenhove, which constitutes a forced inclusion of a non-peer member-leader in the faculty. Am. Compl. ¶¶ 2, 4, 18. The injury that Woodcock alleges is the impairment of his ability to send the message of peer review through his association with the faculty.

The inclusion of a non-peer member leader causes that harm because if a scholar is subject to evaluation by a non-peer he can no longer claim to be subject to peer review. Woodcock requests removal of Van Tatenhove as a remedy along with money damages. Am. Compl. ¶¶ 48–49, Request for Relief ¶¶ A–G. Removing the non-peer member leader restores a faculty of peers, and therefore permits Woodcock once again to send the message of peer review through his association with the faculty. Money damages compensate Woodcock for the harm to his speech suffered during the period of Van Tatenhove’s tenure in office.

**e) The “Lone Wolf” Case Is Inapposite**

Defendants cite to a case that uses the colorful phrase “lone wolf” in denying standing to an individual plaintiff to assert an association claim. But that case turned on a problem of redressability that does not apply here. *Ames v. LaRose*, 86 F. 4th 729, 732 (6th Cir. 2023). In that case, an Ohio statute placed limits on who could serve on a political party central committee. *Id.* at 730. And the Ohio Republican Party had adopted bylaws that imposed the same limits. *Id.* The court held that the plaintiff, who was a member of the Republican Party, lacked standing because he had not alleged that the Ohio Republican Party would change its bylaws to remove the limits if the state law were struck down. *Id.* at 732–33. Because the First Amendment provided a remedy against the state statute but not against the bylaws adopted by the Ohio Republican Party, which is a private organization, the court was powerless to afford the relief from the eligibility rules for central committee membership sought by the plaintiff. The court described the plaintiff as a “lone wolf” only because “[h]e offers no indication that the” Ohio Republican Party “would move to amend” its eligibility “rules but for” the existence of the state law. *Id.* at 733. That is, the plaintiff in that case was a “lone wolf” because he had not shown that the group to which he belonged actually opposed the government action that he sought to challenge. That is not the circumstance in the present case. Here, the faculty sent a letter to the University expressing the “collective” view that Van Tatenhove

is “unacceptable.” Faculty Email, Ex. 8. Thus, Woodcock seeks to challenge a government action that the group is already on the record as opposing.

## **5. Arbitrary Power (Counts III and IV)**

Woodcock alleges that the appointment of Van Tatenhove was an exercise of arbitrary power. Am. Compl. ¶¶ 4, 72, 80; Ky. Const. § 2. Three of the injuries caused by that arbitrary exercise of power are common to other claims. Specifically, the arbitrary exercise of power impairs Woodcock’s ability to send his peer review message through association with the faculty, chills his speech, and causes him expectation damages associated with the University’s failure to supply him with bargained-for peer review services and governance rights. Am. Compl. ¶¶ 4, 79, 80. Accordingly, to the extent that each of those harms serves as a basis for standing for Woodcock’s other claims they also serve as a basis for standing for Woodcock’s arbitrary power claims. Because standing based on those harms is discussed in relation to the other claims, the arguments will not be repeated in this section.

There is an additional independent harm that supports standing for Woodcock’s arbitrary power claim: deprivation of plaintiff’s share in the faculty’s control over the appointment of deans. There is causation and redressability. Van Tatenhove was appointed in violation of accreditation requirements incorporated into university regulations that prohibit the appointment of a dean over the objection of the faculty without good cause. Am. Compl. ¶¶ 24, 25, 75. Woodcock is a member of the faculty and voted against Van Tatenhove’s appointment. Am. Compl. ¶¶ 1, 16, 27. If the university had not acted arbitrarily, but had instead followed its own written policies and generations of past practice, and had adhered to the basic requirement that it not invoke the good cause exception in the absence of substantial evidence to support it, then the University would have honored the faculty’s opposition to the appointment—an opposition in which Woodcock shared. Am. Compl. ¶¶ 28, 76, 78. The failure to honor the faculty’s opposition therefore injured Woodcock, as it deprived his voice

of opposition of the power it would normally have enjoyed, when combined with the voices of other faculty members, to block the appointment. The removal of Van Tatenhove would enable Woodcock's opposition to the appointment to become effective and therefore relieve the harm. And the harm is actual as Van Tatenhove is in office in spite of Woodcock's attempt to exercise his right alongside his colleagues to block the appointment.

The harm is concrete. Woodcock joined with others to oppose the appointment and their role in shared governance was nullified. Am. Compl. ¶¶ 27, 28, 78. As a result of the University's actions, Woodcock's will was frustrated in circumstances in which it could have carried the day. In recent years, the Supreme Court has imposed a restrictive standard for concreteness that Kentucky courts have not adopted and need not follow. But the harm in this case meets even that restrictive standard. The Court has opined that "courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021). Courts traditionally recognized that members of a religious society are injured by interference on the part of trustees that control the organization's meeting place or other property in disputes over governance of the church and allow them a private right of action to enforce a Kentucky statute requiring trustees equitably to divide access to property between contending factions. Ky. Rev. Stat. Ann. § 273.120; *Hazelip v. Doyel*, 267 Ky. 477, 102 S.W.2d 321, 323 (1936). The harm to a member of a church who has been excluded from control over property of the church lay trustees is analogous to the harm of plaintiff who has been excluded from control over leadership of his faculty by university administrators exercising power delegated to them by the university's trustees. The traditional harm need not be an "[e]xact duplicate" but only "analogous", as it is here.

The harm is also particularized. Woodcock suffers it only as a member of the faculty who opposed Van Tatenhove, not as a citizen or member of the public at large. *Massachusetts v. EPA*, 549

U.S. 497, 517 (2006) (“[W]here a harm is concrete, though widely shared, the Court has found injury in fact[.]” (cleaned up)). And the harm is ongoing because Woodcock’s ability to exercise his share of control over governance of the law school will be restored only once the University comes back into compliance with its own rules by removing Van Tatenhove.

## **6. Speech Chill (Counts VIII and IX)**

In the context of chill claims, the injury elements (concreteness, particularity, and actuality) are generally considered together, and will be here. The injury is ongoing because the presence of a non-peer dean in office is the source of the chill. It will therefore continue until he is removed.

### **a) Injury**

Woodcock can establish injury both under a rejuvenated subjective chill doctrine and under a conventional credible threat analysis.

#### **(1) Subjective Chill**

Declarations asserting subjective “fear[]” of government “hostility” or suggestion of “hesit[ance]” to speak based on “commonsense inference[s]” sufficient to establish injury. *First Choice Women's Res. Centers, Inc. v. Davenport*, 146 S. Ct. 1114, 1121, 1125 (2026) (declarations of group members, some anonymous, were sufficient to establish chill caused by state Attorney General’s request for donor lists from pro-life group even though lists would be kept confidential). *See also Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721, 744 (2011) (candidates who challenged public matching funds program provided evidence that they had “curtail[ed] fundraising efforts, and actively discourage[ed] supportive independent expenditures, to avoid triggering matching funds”); *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 605, 625 (2020) (Sotomayor, J., dissenting) (associations that had received “harassing calls” “and even pornographic letters” in the past had showed that disclosure of donors to state attorney general “would make their donors less likely to

contribute”). As these cases show, the Court has “abandon[ed] the requirement” articulated in some older cases that “[a]llegations of a subjective chill”, standing alone, “are not” “adequate” to demonstrate injury. *Id.* at 629; *Laird v. Tatum*, 408 U.S. 1, 14 (1972). Accordingly, this Court need not follow the lower federal court and older U.S. Supreme Court cases cited by Defendants, which apply the older rule. Mot. Dismiss at 10–12.

Woodcock’s declarations make clear that Woodcock is engaging in self-censorship right now with respect to a specific example of desired speech. Woodcock declares that because Van Tatenhove is not a scholar, Woodcock cannot draw upon shared experience and training in scholarship to predict whether Van Tatenhove will judge Woodcock’s scholarship to be bad or not to be scholarship at all. Woodcock 2d Decl. ¶¶ 3–4. He fears that, as a result, he may publish work that Van Tatenhove dislikes, leading to negative performance reviews or discipline that could lead to his termination. *Id.* Specifically, Woodcock declares that he chose not to submit an article on Palestine to law journals this summer as a result of Van Tatenhove’s presence in office and that he “expect[s] to continue to engage in” “self-censorship while Dean Van Tatenhove remains in office”. *Id.* at ¶¶ 5–7. This is sufficient to establish injury.

## **(2) Credible Threat**

The courts also sometimes apply the “*Driehaus* factors” to determine standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). This test requires: (1) “an intention to engage in a course of conduct arguably affected with a constitutional interest”, (2) but “arguably” “proscribed by government policy” and (3) “and a credible threat of imminent, adverse government action against claimant.” *Turner v. US Agency for Global Media*, 502 F. Supp. 3d 333, 359 (D.D.C. 2020); *Driehaus*, 573 U.S. at 162. One federal district court has held that, where the plaintiff belongs to a unit that has historically been protected by a regulatory “firewall” against interference from agency leadership, and the firewall is meant to protect “editorial” “independence”, the *Driehaus* factors are met where

(1) the plaintiff “inten[ds] to exercise editorial” “independence”, (2) “defendants have made a habit of penalizing” that independence, and there is (3) “a reasonable expectation that defendants will continue to restrict and penalize acts of editorial” “independence”. *Turner*, 502 F. Supp. 3d at 360 (holding that a managing editor who had not herself been the target of any retaliatory actions by agency leaders had suffered sufficient injury to sue because the agency’s “personnel actions” and “investigations” had “chill[ed]” her “right” “to fully exercise” “editorial control and judgment” in violation of the First Amendment). These factors are met here.

***Intent to speak.*** Woodcock wishes to engage in conduct affected with a constitutional interest because he wishes to publish law scholarship relating to Palestine. Woodcock 2d Decl. ¶ 6. “[A]cademic freedom” is “a special concern of the” constitution. *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589, 603 (1966). It is affected with the constitutional interest in free speech. Moreover, the University’s rules protecting the autonomy of the faculty in the selection of a dean, including the rules incorporating ABA accreditation requirements prohibiting the appointment of a dean without tenure over the objection of the faculty and the rule requiring that written statements be solicited from the faculty regarding the recommendation of a candidate for dean, as well as the University’s declared concern for protecting “academic freedom” and engaging in “[s]hared governance”, establish the equivalent of a “firewall” between senior University administrators and the faculty for the purpose of protecting the “editorial” “independence” of the faculty. Employee Code § I.D, Ex. 20 at 1; ABA Standards Interp. 203-1, Standard 203(b), Ex. 19 at 14; SACSCOC Requirement 10.4, Ex. 73 at 7; AR Univ. Appts. § A.3, Ex. 74; Governing Reg. I — Decl. Principals. § B, Ex. 26 at 2. Woodcock’s wish to publish law scholarship conveying his own unvarnished research conclusions regarding Palestine is an “intent to exercise editorial” “independence”.

***Speech proscribed.*** Woodcock’s speech about Palestine is also “arguably” proscribed by government policy. *Driebeaus*, 573 U.S. at 162. The policy proscribing Woodcock’s speech about

Palestine is reflected in ongoing University attempts to investigate and sanction him for his speech. On July 18, 2025, an interim dean of the law school suspended Woodcock from teaching, banned him from the law building, and worked with University administrators, including Capilouto and DiPaola, to launch a hostile environment investigation into a petition Woodcock had circulated to law professors at other schools based on his research conclusions regarding Palestine. Duff Ltr., Ex. 82 at 1; Duff 2d Tr., Ex. 83 at Page ID # 1989:11–14; Thro Ltr. 7-18-25, Ex. 84 at 1, Am. Compl. ¶¶ 48–50, *Woodcock v. University of Kentucky*, No. 25-0424 (E.D. Ky. Nov. 13, 2025), Ex. 85 at 16–17. According to the dean, despite the absence of complaints from any student or faculty member, he could not “allow for an individual to operate as if nothing had happened or nothing was wrong” with Woodcock’s speech about Palestine. Ex. 83 at Page ID ## 1983: 25, 1984:1–4. Woodcock wrote to Van Tatenhove after he took office on July 22, 2026, asking him to reverse the suspension and ban imposed by his predecessor because, according to the University, a dean has “absolute authority” to impose those sanctions. Woodcock Ltr. 7-22-26, Ex. 88; Thro Ltr. 9-19-25, Ex. 87 at 1. As of the filing of this case, Van Tatenhove had not responded, thereby ratifying the suspension and ban. These sanctions, along with the investigation, continue. They establish that “defendants have made a habit of penalizing” the sort of “editorial” “independence” that Woodcock seeks to exercise.

***Credible threat.*** There is also a credible threat of imminent, adverse government action. A credible threat may be shown by a “history of past enforcement”. *Driehaus*, 573 U.S. at 164. The investigation, suspension, and ban constitute a “history of past enforcement” and convey a threat of continuing and escalating sanctioning based on Woodcock’s speech about Palestine. *Driehaus*, 573 U.S. at 164. The University has informed Woodcock that “termination of a tenured appointment may be” an “appropriate” outcome of the investigation. Thompson Ltr., Ex. 90 at 3. And the University’s appointment of a non-scholar dean in violation of faculty autonomy has coincided with the penalization of Woodcock’s speech in the past. Woodcock first shared his views about Palestine

in early 2024 under the tenure of a dean who was a scholar and tenured member of the faculty. Am. Compl. ¶ 119; Am. Compl. ¶¶ 50–52, *Woodcock v. University of Kentucky*, No. 25-0424 (E.D. Ky. Nov. 13, 2025), Ex. 85 at 16–17. Consistent with the requirements of academic freedom, that dean defended Woodcock’s right to speak. Am. Compl. ¶ 119. The University then replaced that dean with James Duff, who, like Van Tatenhove, is not a scholar. *Id.* Duff suspended Woodcock and banned him from the law building 18 days after taking office. Ex. 82 at 1. In light of this history, the appointment of another non-scholar in the form of Van Tatenhove, this time over the stated objection of the faculty and to the position of permanent, as opposed to interim, dean, conveys a credible threat of adverse action if Woodcock continues to speak.

A “warn[ing] to stop” and “threat[]” of “prosecution if” “disobeyed” can also be sufficient to show a credible threat. *Driehaus*, 573 U.S. at 159. In a letter explaining that the University was investigating Woodcock’s speech on Palestine, the University demanded that Woodcock “stop immediately”. Notice of Investigation, Ex. 89 at 1–2. The University has also informed Woodcock that if the investigation turns up more examples of speech to which the University objects, “those aspects would [be] an additional basis for the [suspension and ban] as well”. Thro Email 10-30-25, Ex. 86 at 1. Taken together, these actions, including the appointment of Van Tatenhove without tenure and over the objection of the faculty, create “a reasonable expectation that defendants will continue to restrict and penalize acts of editorial” “independence”. *Turner*, 502 F. Supp. 3d at 360.

#### **b) Causation and Redressability**

There is causation because the speech chill suffered by Woodcock can “fairly can be traced to the challenged action of the defendant[s]”, namely, Defendants’ insistence on appointing a dean that the faculty has determined is not a peer, thereby preventing Woodcock from relying on the dean’s expertise as a scholar and professional training as a scholar to neutralize any influence from outside interests in the judgment of his work and further preventing him from predicting, based on shared

scholarly training and experience, how the dean will evaluate Woodcock's scholarship. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). And there is redressability. Blocking the appointment of a non-peer is “reasonably designed” to restore Woodcock's ability to rely on the expertise of the dean to quell his fears regarding sanction for his protected speech, thereby “avoid[ing] the specific injury alleged.” *NAACP v. Town of Huntington*, 689 F.2d 391, 394 (2d Cir. 1982).

**c) Civil Conspiracy (Count V)**

Because Woodcock's civil conspiracy claim is predicated upon his expressive association, arbitrary power, and speech chill claims, standing to bring any of those claims also provides standing to bring the civil conspiracy claim.

**d) Breach of Contract and Tortious Interference with Contract (Counts VI and VII)**

Woodcock is a party to a written contract with the University that provides a number of guarantees of faculty autonomy, including that a dean not be appointed over the objection of the faculty. Am. Compl. ¶¶ 5, 23, 25. These guarantees transform membership in the faculty into a valuable platform for Woodcock to share ideas with the public because insulation from influence by special interests renders his speech credible in the eyes of the public. Am. Compl. ¶¶ 3, 23, 29. In exchange for these guarantees, Woodcock accepted a massive pay cut relative to what he could earn in industry. Am. Compl. ¶¶ 23, 29, 31. The appointment of Van Tatenhove breached these guarantees and deprived Woodcock of the value for which he paid and continues to pay through his pay cut. Am. Compl. ¶¶ 5, 32, 105. Accordingly, there is causation. This harm is particular to Woodcock because it flows from breach of a bilateral contract between him and the University. The economic loss is concrete. It is a share of the pay he has foregone and continues to forgo in order to associate with the faculty. And it is actual. A dean appointed in violation of the contractual guarantees remains in office. In consequence, Woodcock is not receiving the association with an autonomous faculty for which he took his pay cut. Removing Van Tatenhove would bring the

university back into compliance with the contract and therefore restore the guarantees for which plaintiff took his pay cut. As a result, ongoing losses would stop. Money damages would to some extent compensate for the lost value of the pay cut during Van Tatenhove's tenure in office.

Accordingly, the harm is redressable. Because the breach of contract is a predicate of the tortious interference claim against Van Tatenhove, the injury that supplies standing for the breach of contract claim also supplies standing for the tortious interference claim.

## **B. Immunity**

### **6. Van Tatenhove**

Van Tatenhove does not enjoy immunity because Woodcock has sued him for tortious interference with contract and civil conspiracy in his private capacity based on his efforts to obtain and remain in an office to which he is not entitled. Am. Compl. ¶¶ 8, 110, 119. The question whether to *become and continue* as a dean is a private one. Van Tatenhove acts as a “representative” of the University and “within the scope of” his “authority” as an “employee” only once he has made that private decision. *Yanero v. Davis*, 65 S.W. 3d 510, 521–22 (Ky. 2001). Hence, he enjoys neither official nor qualified immunity in relation to his decision to become and remain as dean. *Id.*

### **7. University Defendants**

#### **b) Declaratory Relief**

Declaratory relief is categorically exempt from governmental immunity. *Com. v. Kentucky Retirement Systems*, 396 S.W. 3d 833, 838–39 (Ky. 2013); *University of Kentucky v. Moore*, 599 S.W. 3d 798, 810 (Ky. 2019).

### c) Injunctive Relief

The immunity of a Kentucky state agency (and, by extension, its officials acting in an official capacity<sup>1</sup>) from suit in Kentucky courts does not apply to state law claims for prospective injunctive relief, such as the injunction removing Van Tatenhove from the deanship that Woodcock seeks based on each of his claims (with the exception of the individual capacity constitutional claims contained in Counts II, IV, and XI).

“Sovereign immunity is founded on the notion that the resources of the state, its income and property, cannot be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process.” *Com. v. Kentucky Retirement Systems*, 396 S.W. 3d 833, 836 (Ky. 2013). Accordingly, where “[t]here is no harm to state resources”, there is no immunity. *Id.* at 838. The Kentucky Supreme Court has interpreted this exception to mean that “prospective injunctive powers”, “includ[ing] temporary relief”, “are available to Kentucky courts” in suits against state agencies unless “the action is in essence one for the recovery of money from the state”. *Beshear v. Haydon Bridge Co., Inc.*, 416 S.W. 3d 280, 289, 293 (Ky. 2013). And the Kentucky Supreme Court has held that an action is one for recovery of money only where it seeks the return of money that was “due to the state—even if those funds were unlawfully or improperly collected.” *Long v. Dept. of Revenue*, 718 S.W. 3d 868, 883 (Ky. 2025). Thus, even injunctive relief “directing a refund from the state treasury” is *permissible* so long as the state was not the “true owner of” the funds and the funds “had been adjudged by a Court” to have been at all times” the plaintiff’s “own”. *Id.* at 885. The University itself has taken the position in prior litigation that there is an “injunctive relief exception” to sovereign immunity and that it applies where plaintiff “alleges an ongoing violation of . . . law and seeks” “prospective” “relief”. *University of Kentucky v. Moore*, 599 S.W. 3d 798, 812 (Ky. 2019).

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<sup>1</sup> See *Yanero v. Davis*, 65 S.W. 3d 510, 522 (Ky. 2001) (noting that “when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer’s or employee’s actions are afforded the same immunity, if any, to which the agency, itself, would be entitled”).

Woodcock's request for the removal of Van Tatenhove is not barred by governmental immunity because it is not "in essence" an action "for the recovery of money from the state." *Haydon Bridge Co., Inc.*, 416 S.W. 3d at 293. Woodcock does not seek an order commanding the government to pay money, much less to pay money for which Woodcock has not "at all times" been the "true owner." *Long*, 718 S.W. 3d at 885. Instead, Woodcock seeks an order that would remove Van Tatenhove from the dean position. So far from commanding the University to cut a check, the order would likely save the University money. That is because the University likely would not be required to pay Van Tatenhove his \$442,000 annual salary while the injunction is in effect. "[T]he law charges" Van Tatenhove, as a private actor contracting with the government, "with the knowledge of any and all limitations upon [the] power" of government agents like DiPaola and Capilouto to bind the government to a contract with him. *Com. v. Whitworth*, 74 S.W. 3d 695, 699–700 (Ky. 2002). A court order barring Van Tatenhove from holding the office of dean would be a "limitation[] upon [the] power" of Capilouto and DiPaola to bind the University to employ Van Tatenhove and hence would relieve the University of its obligation to pay him while the order is in place.

And the University would not need to pay an interim dean to substitute for Van Tatenhove. Woodcock has requested that this Court order the University to permit the law school's Faculty Executive Committee, which consists of four full-time law faculty members, to run the law school pending resolution of this case. Am. Compl. ¶ 48. As the Faculty Executive Committee is a standing committee of the faculty, service on the committee is part of the faculty's regular service obligations, hence covered by the regular salary that the University already pays to each faculty member. L. Fac. R. & Pol'ys § 2.A, Ex. 30 at 4–5. Accordingly, the University would not need to pay anyone to replace Van Tatenhove during the pendency of this litigation.

Woodcock's request for injunctive relief is also properly characterized as prospective because Woodcock seeks relief from *ongoing* violations of his legal rights and associated harm—the

continuing impairment of Woodcock’s ability to send his desired message through his membership in the faculty in violation of his right of expressive association, an ongoing chill on Woodcock’s protected speech caused by the presence of a non-peer dean beholden to senior administrators and outside interests, ongoing violations of University policies and custom that in turn breach Woodcock’s contract and violate protections against arbitrary exercise of power, ongoing tortious interference with that contract, and an ongoing conspiracy to violate his constitutional rights by maintaining Van Tatenhove in office. Am. Compl. Woodcock Decl. ¶ 13; Am. Compl. Woodcock 2d Decl. ¶¶ 4–9; Ausness Decl. ¶ 3; Employee Code § I.D, Ex. 20 at 1; ABA Standards Interp. 203-1, Standard 203(b), Ex. 19 at 14; Admin. Reg. — Univ. Appts. § A.3, Ex. 74 at 2. These violations will not end until the University nullifies the appointment of the non-compliant dean by entering an injunction removing him. Governmental immunity does not bar such an act.

Defendants assert that immunity applies only to a claim for an ongoing violation of the Kentucky Constitution. Mot. Dismiss at 14. But the standard for application of immunity, that “the state, its income and property, cannot be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process” turns on the nature of the remedy not the character of the cause of action. *Com. v. Kentucky Retirement Systems*, 396 S.W. 3d at 836. Accordingly, the Kentucky Supreme Court in *Long v. Dept. of Revenue* applied the rule to permit even retrospective injunctive relief for the violation of a Kentucky statute. *Id.* at 882, 885. Given that the rule turns on whether money is demanded of the state, there is no basis for restricting access to prospective injunctive relief such as the relief sought in this case on the basis of *any* cause of action, whether constitutional, statutory, or common law. *Id.* at 882 (stating that sovereign immunity “arises from common law and prohibits claims against the government treasury absent the consent of the sovereign” (cleaned up)). Defendants also suggest that prospective injunctive relief against the state implicates separation of powers issues. Mot. Dismiss at 33–34. But they cite to authority that

discusses actions for the payment of money by the state—which implicate the core immunity concern—rather than actions for prospective injunctive relief such as the one at issue here. *Id.* at 33 nn.153–54; *Haydon Bridge*, 416 S.W.3d at 295 (stating that “the constitutional separation of powers precludes the courts’ ordering the *requested transfer of funds* from the general fund to the BRF as retroactive relief” (cleaned up and emphasis added)).

#### **d) Money Damages**

##### **(1) Breach of Contract Claim against the University**

“A state university of the Commonwealth is a governmental body and entitled to governmental immunity unless waived by the General Assembly.” *University of Kentucky v. Regard*, 670 S.W.3d 903, 911 (Ky. 2023) (plurality opinion). But “[t]he General Assembly has passed a general, unqualified waiver of immunity for all written contracts[.]” *Id.*; Ky. Rev. Stat. § 45A.245(1). The University regulations that serve as the basis for Woodcock’s breach of contract claim, namely, the Employee Code regulation and the University Appointments regulation, are both written. Employee Code § I.D, Ex. 20 at 1; Admin. Reg. — Univ. Appts. § A.3. And they are part of Woodcock’s contract for three reasons.

First, the offer letter that both Woodcock and the law school’s dean signed when Woodcock joined the faculty in 2018 incorporates the University’s “rules and regulations” by reference. Ex. 21 at 1 (stating that Woodcock’s “responsibilities” are “as outlined in the . . . University of Kentucky rules and regulations”). The document “clear[ly] refer[s]” to the regulations and signals that they “control, decide, or affect” the contract because the document describes Woodcock’s position using terms that are only defined in University regulations (e.g., it appoints him “Assistant Professor” in “our Regular Title Series”) and states that his “responsibilities” are “as outlined in the . . . University of Kentucky rules and regulations.” Ex. 21 at 1; AR 2.1-1 § V.A., Ex. 39 at 3 (defining Assistant Professor); AR 2.2-1 § III.B.1(a), Ex. 38 at 2 (defining Regular Title Series); *University of Kentucky v.*

*Regard*, 670 S.W. 3d 903, 913 (Ky. 2023); *Britt v. University of Louisville*, 628 S.W. 3d 1, 8 (Ky. 2021). And the Code shares “mutuality of subject matter” with the offer letter because it governs the behavior of employees. *Regard*, 670 S.W. 3d at 914.

Second, the University’s governing and administrative regulations also create a contract with Woodcock under *Parts Depot, Inc. v. Beiswenger*, because they constitute an “express personnel policy”, Woodcock “continues to work while the policy remains in effect” and “the language used in the personnel policy is not precatory [and] there is no disclaimer”. 170 S.W. 3d 354, 363–64 (Ky. 2005). The language of the Code and governing regulations is mandatory (“must”, “obligation”, “ensure”, “comply”) and punishes violations with termination. GR I § E, Ex. 26 at 4; Code § D, Ex. 20 at 1. And there is no disclaimer. Instead, the University’s Faculty Handbook refers to “the contract between the faculty member and the institution” and states that “[s]pecific questions regarding the rights and duties of University employees - including faculty employees - can only be resolved by reference to the appropriate official documents”, which it describes as including “the Governing Regulations, and the Administrative Regulations (GR and AR)[.]” Ex. 40 at 1.

In *Furtula v. University of Kentucky*, three Justices of the Kentucky Supreme Court construed a Kentucky Court of Appeals opinion as “implicit[ly]” “holding” that a contract recognized under the doctrine of *Parts Depot* is an implied contract and “an implied contract is not a written contract.” 438 S.W.3d 303, 307–08 (Ky. 2014) (Venters, J., joined by Cunningham and Keller, JJ.) (construing *University of Kentucky v. Furtula*, No. 2009-CA-000811-MR (Ky. Ct. App. Oct. 8, 2010)). However, the Kentucky Court of Appeals had decided the case on two alternative grounds, the other being that the personnel policy included a disclaimer, and a majority of the Justices of the Kentucky Supreme Court affirmed only on the disclaimer ground rather than on the ground that the personnel policy did not constitute a written contract. *Furtula*, 438 S.W.3d at 310 (stating that Noble, J., and Scott, J., dissented, Minton, J., “agrees with Justice N[oble]’s dissent to the extent that employee handbooks

and other documents can be a written unilateral contract sufficient to meet the requirements of KRS 45A.245”, and Abramson, J., was not sitting). In her dissent regarding the written contract question, Justice Noble, joined by half of the sitting Justices, rejected the notion that contracts recognized under *Parts Depot* are not written contracts. Justice Noble wrote that: “*Parts Depot* relied on a substantial writing issued by one party to another describing rights and obligations”, that “*Parts Depot* simply does not discuss the importance of a writing because that fact was not dispositive in that case”, that it was “highly unusual to find an implied contract in such circumstances”, and that the best way to understand “[e]mployee-handbook cases” under *Parts Depot* is that “[t]here is a writing, an offer, and acceptance by performance” creating a written unilateral contract. *Id.* at 313. Because the Kentucky Court of Appeal’s holding in *Furtula* was an alternative holding that was not affirmed questioned by a majority of the sitting Justices of the Kentucky Supreme Court, this Court is free to conclude that the University’s *written* regulations make a written contract under the *Parts Depot* doctrine for purposes of the legislature’s waiver of immunity for written contract claims. *Cf. Pogue v. Principal Life Ins. Co.*, 979 F.3d 534, 536 (6th Cir. 2020) (stating that “the Restatement view” is “that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision”).

Third, Woodcock is tenured, and “tenure leaves” “no doubt that the Faculty Manual is a contract”. *Crenshaw v. Erskine College*, 850 S.E. 2d 1, 20 (S.C. 2020). As noted above, the University’s Faculty Handbook specifically refers faculty interested in learning about their “rights and duties” and their “contract” with “the institution” to the “the Governing Regulations, and the Administrative Regulations (GR and AR)[.]” Ex. 40 at 1. And those regulations are in writing. Accordingly, the University’s immunity from contract damages is waived.

## (2) Constitutional Claims and Civil Conspiracy against Capilouto and DiPaola

“[W]hen sued in their individual capacities, public officers and employees enjoy only qualified official immunity[.]” *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Qualified immunity applies to “(1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee’s authority.” *Id.* These are conjunctive elements, which means that if any one of them is not present, there is no qualified immunity. Woodcock’s constitutional and civil conspiracy claims challenge Capilouto and DiPaola’s appointment of Van Tatenhove as a violation of Woodcock’s right of expressive association, to be free of arbitrary exercises of power, and to be free of speech chill. Capilouto and DiPaola do not have qualified immunity in relation to their appointment of Van Tatenhove because none of the qualified immunity elements is met in this case.

### (a) Not Within the Scope of Employment

Capilouto and DiPaola’s appointment of Van Tatenhove was not within the scope of their appointment because they acted outside of the scope of the appointments authority delegated by the University’s Board of Trustees (“board”). The board has delegated to Capilouto “the authority to” “appoint” “all employees[.]” including the law dean. Governing Reg. III —The President § B, Ex. 37. However, the board has stated that this delegation “is consistent with the University’s accrediting body.” Governing Reg. I — Decl. Principals. § A.3, Ex. 26. The University’s accrediting body is SACSCOC, which provides that the University must “publish[] and *implement*[] policies on the authority of faculty in academic and governance matters[.]” SACSCOC Requirement 10.4, Ex. 73 at 7 (emphasis added); Governing Reg. I — Decl. Principals. § A.3 & n.10, Ex. 26 at 2, 5. Thus, if an action by Capilouto interferes with the implementation of policies regarding faculty governance and thereby violates a SACSCOC rule, the action is not “consistent with the University’s accrediting body” and consequently not within the scope of the board’s delegation of authority to Capilouto.

The appointment of Van Tatenhove interferes with the implementation of policies regarding faculty governance and therefore represents an exercise of power beyond that delegated by the board to Capilouto. ABA Interpretation 203-1, ABA Standard 203(b), and Administrative Regulation — University Appointments all relate to faculty governance and are violated by the appointment of Van Tatenhove. It follows that Capilouto did not have delegated authority to appoint Van Tatenhove. Because, as a member of the University president’s cabinet, DiPaola “report[s] directly” to Capilouto, his “duties” are “those delegated by” Capilouto. Admin. Reg. — Univ. Org. § F.1, Ex. 22 at 10; Admin. Reg. 1:1 §§ IV, IV.F, Ex. 66 at 2–3. Capilouto’s lack of authority to appoint Van Tatenhove therefore means that DiPaola lacked such authority to appoint Van Tatenhove as well.

#### **(b) Bad Faith**

Bad faith exists if (1) the official violated “a constitutional, statutory, or other clearly established right which a person in the public employee’s position presumptively would have known was afforded to a person in the plaintiff’s position” or (2) “the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.” Both elements are satisfied here.

**Clearly Established.** The laws violated by Capilouto and DiPaola are clearly established. As a general matter, the right of faculty autonomy that is protected by the constitutional rights that Woodcock asserts is clearly established. The U.S. Supreme Court acknowledged that faculty have an “essential freedom” to determine “who may teach, what may be taught,” and “how it shall be taught” as early as the 1950s. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Capilouto and DiPaola would be familiar with this rule because the case in which it was articulated is cited in the University’s governing regulations. Governing Reg. I § C n. 14, Ex. 26. And the U.S. Supreme Court has since made clear that “autonomous decisionmaking” by the “academy” is necessary for academic freedom to thrive. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214,

226 n.12 (1985). The specific constitutional provisions that the appointment of Van Tatenhove violates are also clearly established. The rule against forced inclusion of a member-leader in an expressive association is at least a quarter century old. *Boy Scouts v. Dale*, 530 U.S. 640, 647–48 (2000). And it has been two decades since two different federal district courts held that “law schools and law faculties”, including those that are “components of a larger parent university”, “qualify as expressive associations entitled to constitutional protection” even when acting without “the blessings of their . . . parent institutions”. *FAIR v. Rumsfeld*, 291 F. Supp. 2d at 286, 289–90, 304; *see also Burt v. Rumsfeld*, 322 F. Supp. 2d 189, 197–98 (D. Conn. 2004). Those holdings were part of a high-profile challenge to military recruiters on law school campuses that made national news at the time. *See, e.g., Sam Dillon, Law Schools Seek to Regain Ability to Bar Military Recruiters*, the N.Y. Times (Sept. 20, 2003). Kentucky’s prohibition on arbitrary exercises of government power has been in the Kentucky Constitution since 1859. John David Dyche, *Section 2 of the Kentucky Constitution - Where Did It Come From and What Does It Mean*, 18 N. Ky. L. Rev. 503 (1990). Interpretations of the rule prohibiting the violation of written policies and longstanding custom are decades old. *See Com., Transportation Cabinet v. Weinberg*, 150 S.W. 3d 75, 77 (Ky. Ct. App. 2004) (failure to follow rules); *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W. 2d 893, 900–01 (Ky. 1985) (unexplained change in longstanding practice). The protection for scholarly speech upon which Woodcock’s speech chill claim also dates to the 1950s. The same case cited in the governing regulations states that “[p]olitical power must abstain from intrusion” into “scholar[ly]” “inquiries” “except for reasons that are exigent and obviously compelling”. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring). And when the U.S. Supreme Court restricted the First Amendment rights of public employees, it expressly carved scholarship out of the restriction. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2005) (“We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”). And the U.S. Supreme Court’s prohibition on activities

that chill protected scholarly speech stretches back at least to the 1960s. *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589, 601 (1967) (striking down law prohibiting faculty from belonging to any organization that is “treasonous” or “seditious” because “[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery”).

***Willful or Corrupt.*** Capilouto and DiPaola acted “willfully or maliciously” and “with a corrupt motive”. This is clear from their statements and conduct after public outcry regarding the appointment of Van Tatenhove over the objection of the faculty in violation of accreditation rules. Rather than rescind the appointment, Capilouto told the board (in paraphrase) that “American Bar Association standards” “do not exist to give a group of faculty veto power on decisions[.]” Ex. 79. The plain language of the standards, with which Capilouto would by then have been familiar, says the diametric opposite: “Except for good cause, a dean should not be appointed or reappointed to a new term over the stated objection of a substantial majority of the faculty.” Ex. 19. And DiPaola expressed an intent to dodge the rules when he defended the appointment to the board on the ground that “it would be a number of years before we’re reviewed again by the ABA”. Exs. 13–14. Moreover, Capilouto and DiPaola have themselves emphasized that their reason for choosing Van Tatenhove is “external fundraising” even though for the past two decades Van Tatenhove has held a position as a federal judge for which fundraising is illegal, suggesting that it is not Van Tatenhove’s fundraising *skills* that attract them but the hope for a quid pro quo from donors who support Van Tatenhove. Announc., Ex. 17 at 1–2; Bd. Min. 4/24/26, Ex. 15 at 3; Ex. 14; Ex. 80 (stating that David Rosenberg, an alum for whom the school is currently named, had told reporters that Van Tatenhove would “engage” “alumni in supporting [the school’s] success”).

### (c) Ministerial Rather Than Discretionary

Ministerial acts are not discretionary in nature and therefore do not give rise to immunity. *Yanero*, 65 S.W.3d at 522. An act is ministerial rather than discretionary where it “requires only obedience to the orders of others, or when the” associated “duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” *Id.* However, “[t]hat a necessity may exist for the ascertainment of” “facts does not operate to convert the act into one discretionary in nature.” *Id.* Compliance with each of the constitutional rules at issue in this case is ministerial in nature.

Compliance with the constitutional rule that a government official should not force an expressive association to accept a member it does not want is ministerial in nature. It requires only that the official ascertain a fixed fact—namely, whether the association is willing to accept the member. And the act to be executed in response is specific. If the association is not willing to accept the member, the official should not compel the association to accept the member. Compliance with the constitutional arbitrary power rules, which require that officials follow their agency’s written policies, is also ministerial in nature, at least as applied to this case. The accreditation rules requiring that a dean not be imposed over the objection of a substantial majority of the faculty and that the dean have tenure are ministerial in nature. The official must simply ask the faculty whether a substantial majority of the faculty have objected or the candidate untenurable. The faculty’s response is a fixed fact and the specific act to be done thereafter is specific—either reject or appoint the candidate. The accreditation rules contain exceptions for “good cause” and “extraordinary circumstances”. But these, too, are fact-based determinations, and “[t]hat a necessity may exist for the ascertainment of” “facts does not operate to convert the act into one discretionary in nature.” *Id.* Finally, the University regulation requiring that at least the tenured faculty write letters about dean candidates prior to the selection of a new dean is a ministerial task. It depends on a fixed fact:

whether a dean search is under way. And it requires a single, specific action: soliciting letters from at least the tenured members of the faculty.

Defendants also appear to argue that Capilouto and DiPaola cannot be liable in money for arbitrary power violations because one court characterized the arbitrary power provision as applying to the “state and its agencies”. *University of Kentucky v. Davis*, 551 S.W.3d 443, 447 (Ky. Ct. App. 2017); Mot. Dismiss at 39. This misunderstands the nature of individual liability of government officials. Liability exists where officials tortiously fail to carry out their duties in ways that cause the government to violate the duties that the government owes to the people under the Kentucky Constitution. Constitutional rights normally do not bind individuals; they bind governments. (Indeed, it has been remarked that the only constitutional right that appears directly to bind individuals is the prohibition on enslavement. George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1367 (2008).) But government officials control the behavior of governments. And when they tortiously fail to carry out their duties in ways that violate the constitution, they are liable.

### C. Merits

#### 2. The University’s Academic Freedom Arguments Are Inapposite Because Woodcock Does Not Bring an Academic Freedom Claim

Defendants argue that the law faculty do not have a right to academic freedom. Mot. Dismiss at 14–15. Woodcock does not bring an academic freedom claim and does not sue on behalf of the faculty. Am. Compl. ¶¶ 1, 50–123. He brings expressive association, arbitrary power, speech chill, civil conspiracy, breach of contract, and tortious interference claims. Am. Compl. ¶¶ 50–123.

Defendants cite *Minnesota State Bd. for Community Colleges v. Knight* for the proposition that “there is no constitutional right to participate in academic governance”. 465 U.S. 271, 288 (1983). But the plaintiff in *Knight* did not bring, and the U.S. Supreme Court did not consider, an expressive

association claim, a chilled speech claim or an arbitrary power claim such as those brought by Woodcock. The case was decided on individual free speech grounds. *Id.* Equally important, the case did not involve an attempt by university administrators to interfere with a faculty's determination regarding who has the necessary qualification to join and lead the faculty, an area in which the U.S. Supreme Court defers to faculty determinations. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (stating that “a federal court is not” “suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.”). Instead, it involved a challenge brought by individual faculty members to a statewide faculty union's designation as the exclusive representative of statewide community college faculty in statewide compensation negotiations with the state's community college board. *Knight*, 465 U.S. at 274–75. The plaintiffs wanted to participate in those negotiations, and the Court held that the plaintiffs “have no constitutional right” “to a government audience for their policy views.” *Id.* at 286. Faculty autonomy was not at stake in *Knight* because the faculty were represented in the negotiations by the statewide union. *Id.* at 275. The question in that case was instead which faculty could represent faculty interests. And membership or leadership of the faculty was not at stake. The negotiations had to do with statewide employment terms such as compensation. *Id.* Indeed, *Knight* represents almost the opposite of this case in that the question was whether individual faculty had a right to interfere with employment terms unrelated to academic matters that have traditionally been the purview of University administrators. This case, by contrast, involves attempts by University administrators to interfere in questions of faculty leadership and membership that fall within the purview of the faculty.

When a court sometimes loosely refers to the right to academic autonomy as belonging to the “university”, it means the “faculty”, whose “professional judgment”, the Supreme Court has said,

the courts “may not override[.]” *Id.* at 225. For the courts, “a community of scholars . . . is what a university is.” *Greene v. Howard University*, 412 F. 2d 1128, 1135 (D.C. Cir. 1969). Judges themselves are occasionally misled by this imprecision, as Defendants note. Mot. Dismiss at 20. But it would make little sense to ascribe a right of deference based on “expert evaluation of cumulative information” “by faculty members” to inexperienced University administrators and the lay boards that supervise them rather than to the faculty themselves. *Ewing*, 474 U.S. at 226.

### 3. Expressive Association

“[T]he minimum guarantee of individual rights under the United States Constitution as interpreted by the United States Supreme Court” represents a “federal *floor*” on “state constitutional protection[.]” *Com. v. Wasson*, 842 S.W. 2d 487, 492 (Ky. 1992). Accordingly, Sections 1(4), 1(6), 2, and 8 of the Kentucky Constitution, which protect the freedoms of expression and association, also protect the right of *expressive association* recognized by the U.S. Supreme Court under the U.S. Constitution. *Blue Movies, Inc. v. Louisville/Jefferson County*, 317 S.W. 3d 23 (Ky. 2010) (recognizing a right of “free association” under Sections 1 and 2 of the Kentucky Constitution); *Associated Industries v. Com.*, 912 SW 2d 947, 952 (Ky. 1995) (recognizing a “freedom of association” under Sections 1(4) and 1(6) of the Kentucky Constitution); *Boy Scouts v. Dale*, 530 U.S. 640, 647–48 (2000) (recognizing a federal constitutional right of “expressive association”). There is a violation of the right to expressive association if (1) the members of a group “associate partly to express a message”, (2) state action “significantly burden[s] the group’s ability to spread its message” and (3) “this burden on speech outweigh[s] any governmental interests justifying the burden”. *Blick v. Ann Arbor Public School Dist.*, 105 F. 4th 868, 882 (6th Cir. 2024).

#### c) The Law Faculty Are an Expressive Association

Defendants’ contention that the faculty has not joined together to express a message contradicts the allegations in the complaint. Mot. Dismiss at pp. 24-26. And several courts have held that law

faculty do constitute an expressive association. Any group that (1) associates (2) “in pursuit of” “educational” “ends” has a right of expressive association. *Dale*, 530 U.S. at 647. The faculty associate. University rules acknowledge the existence of the faculty as a unit and that they “establish [their] own rules” and make “recommendations” regarding who may be granted “membership” in the faculty. AR Org. §§ E.3.a, E.3.b, F.2.c, Ex. 22 at 5–6, 12. Indeed, the faculty as an associational unit long predates the advent of central university administrations. “At early universities, the faculty were the school” and “traditions of collegiality continue to play a significant role at many universities, including” University of Kentucky. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1979). And the faculty associate specifically for educational ends. The faculty’s rules declare that the faculty must “advance[e]” “legal knowledge” through “scholarship and research.” Fac. R. § 13.B, Ex. 30 at 22. That is an educational end.

In *FAIR v. Rumsfeld*, a federal district court held that there was “no doubt” that “law schools and law faculties”, including those that are “components of a larger parent university”, “qualify as expressive associations entitled to constitutional protection” even when acting without “the blessings of their . . . parent institutions”. 291 F. Supp. 2d at 286, 289–90, 304; *see also Burt v. Rumsfeld*, 322 F. Supp. 2d 189, 197–98 (D. Conn. 2004). The U.S. Court of Appeals for the Third Circuit agreed that “because” these groups “possess clear educational philosophies, missions and goals . . . they qualify as expressive associations.” *FAIR v. Rumsfeld*, 390 F. 3d 219, 231 (3d Cir. 2004) (cleaned up). The Supreme Court left that holding untouched and reversed on other grounds. *Rumsfeld v. FAIR*, 547 U.S. 47, 64 (2005). Similarly, in *Burt v. Rumsfeld*, the district court held that the Yale Law School *faculty* (as distinguished from the Yale Law School) was “clearly an expressive association for the purposes of First Amendment analysis” 354 F. Supp. 2d 156, 185 (D. Conn. 2005). The Defendants statement that “[a]ll of the freedom of association cases involve attempts by the government to force private groups to include persons that the groups wish to exclude” is simply

false. *See, e.g., Akers v. McGinnis*, 352 F.3d 1030, 1037 (6th Cir. 2003) (discussing the proper standard of review for “government employee association” claims).

Defendants also claim that expressive associations “deal[] with close personal relationships.” Mot. Dismiss at 27. But Defendants confuse expressive associations (at issue in this case) and “intimate human relationship” cases. *Roberts v. United States Jaycees*, 468 US 609, 617–18 (1984). It is the latter that involves “close personal relationships.” *Id.* The Court has cautioned that these are “distinct” “line[s] of decisions.” *Id.*

Defendants’ contention that “a law faculty should be defined by intellectual diversity” and therefore cannot be sending a message as a group is incompatible with Woodcock’s allegations and therefore inappropriate at the motion to dismiss stage. Mot. Dismiss at 26; Am. Compl. ¶¶ 7, 19–20; *Hickey v. Gen. Elec. Co.*, 539 S.W.3d 19, 25 (Ky. 2018) (courts must take allegations as true at the motion to dismiss stage). And the U.S. Supreme Court made clear in *Dale* that “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be expressive association. The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes.” 530 U.S. at 655 (cleaned up). And the faculty, too, have taken a position, both when they declared their mission to be the advancement of knowledge, which implies peer review, and when they sent an email to Capilouto and DiPaola rejecting Van Tatenhove because of his lack of a record of scholarship. Am. Compl. ¶¶ 17, 19, 56. Defendants do not otherwise challenge Woodcock’s contention that the message that the faculty associate to send is peer review.

#### **d) The Appointment Significantly Affects the Ability of the Faculty to Send Their Message**

Defendants do not seriously contest that the appointment of a non-peer changes the message that association with the faculty sends from that of “peer review” to that of “non-peer review”. Defendants merely assert in conclusory fashion that Van Tatenhove’s “mere presence” does not

impair the faculty's message. Mot. Dismiss at 29. But the Court in *Dale* was clear that the right of expressive association was significantly affected because "Dale's presence in the Boy Scouts" "would" "force the organization to send a message[.]" 530 U.S. at 653. By the same token, the presence of a non-peer on the faculty forces the faculty to send the message that non-peer review is an acceptable mode of academic inquiry.

Defendants also argue that "it is not unusual for a dean to be from a completely different field from that of a faculty member", giving the example that the dean of the College of Arts and Sciences is a psychologist who presides over departments ranging from history to chemistry. Mot. Dismiss 28. But *Dale* made clear that courts "must" "give deference to an association's view of what would impair its expression." *Id.* University administrators, like courts, are not "suited to evaluate the substance of the multitude of academic decisions that are made" "by faculty members", including the decision who is qualified to evaluate the faculty's scholarship. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). The structure of the College of Arts and Sciences bears this out. The College of Arts and Sciences is divided into departments along disciplinary lines. And it is the role of the departments, and not the dean, to evaluate faculty within the department in the first instance. Admin. Reg. — Univ. Org. § E.5.c., Ex. 22. By contrast, the law school has no departments, so the dean carries out the evaluative role normally played by a department chair. *Id.* at § F.2.c., Ex. 22 ("In addition to the roles and responsibilities described above, the dean of a college without departments shall have any other roles and responsibilities which are delegated to a department chair.").

Balancing will be discussed below in a separate section.

#### **4. Chilled Speech**

In deciding whether government action chills speech in violation of free speech protections, federal courts applying the U.S. Constitution consider whether: (1) the speech is constitutionally protected; (2) the challenged action would objectively chill speech; and (3) the government action

lacks justification. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 194–95 (1998) (objective chill); *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721, 736, 745 (2011) (ditto); *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 614–15 (2020) (justification).

Defendants’ challenge to Woodcock’s standing to bring a chilled speech claim was addressed above. Defendants do not challenge the merits of Woodcock’s chilled speech claim., apart from the third, balancing prong, which is discussed in the next section.

## 5. Speech Balancing

Both Woodcock’s expressive association claims and his chilled speech claim have a third element that requires this Court to engage in some form of balancing to determine whether Woodcock’s interest in speaking outweighs the University’s interest in regulating speech. Accordingly, this prong of both claims will be considered jointly here.

### c) The Public Concern and Not-Government-Speech Requirements Are Not Needed Here But in Any Case Are Met

Courts sometimes apply the “*Pickering* framework” to require that public employee speech be on a matter of public concern and the speech of a private citizen as opposed to an employee in order to garner protection. But in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Supreme Court declared that framework to be a “painful fit” in cases that involve a public employer’s attempt to “compel[]” the speech of a “broad categor[y] of employees”, such as the law faculty category at issue in this case. 585 U.S. 878, 905–08 (2018). Accordingly, this Court should not require that the faculty’s speech be on a matter of public concern or be the speech of a private citizen as opposed to an employee. *Cf. Lynch v. Ackley*, 811 F. 3d 569, 583 n.15 (2d Cir. 2016) (stating that the applicability of the employee speech requirement to association claims is “unclear”). Regardless, both requirements are satisfied here.

**Public Concern.** A message is on a matter of public concern if, taking account of the “content, form, and context of the statement”, but not “motive[]”, it “relates to any matter of political, social, or other concern to the community”. *Rodgers v. Banks*, 344 F. 3d 587, 596 (6th Cir. 2003); *Farhat v. Jopke*, 370 F.3d 580, 589 (6th Cir. 2004); *Chappel v. Montgomery County Fire Protection*, 131 F. 3d 564, 575–76, 578 (6th Cir. 1997).

With respect to the expressive association claim, the faculty’s (and Woodcock’s) message that its scholarship is tested by peer review is a matter of public concern. “Academic freedom” “thrives” on “autonomous decisionmaking by the academy”. *Ewing*, 474 U.S. at 226 n.12. And “[a]cademic freedom” is “of transcendent value to all of us and not merely to the teachers concerned”. *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589, 603 (1966). Moreover, because “society at large fails to get from its scholars . . . the service which it is the office of the professional scholar to furnish” when the faculty is not autonomous, the faculty’s message is “information . . . needed . . . to enable the members of society to make informed decisions about” whether the government is managing their publicly-funded law school appropriately. *Farhat*, 370 F. 3d at 590; 1915 Decl., Ex. 27 at 294–95. With respect to the chilled speech claim, Woodcock’s scholarship on Palestine, as well as his scholarship on law and economics and antitrust, are obviously matters of public concern. The question of Palestine is a major foreign policy question for our government and we are currently fighting a war against Iran explicitly to protect Israel. Similarly, corporate size is a perennial matter of political debate in this country.

**Not Government Speech.** “When public employees speak as agents of public employers,” their speech receives no protection because “this speech is effectively the government’s.” *DeCrane v. Eckart*, 12 F. 4th 586, 595 (6th Cir. 2021). With respect to the expressive association claim, the faculty’s message of peer review is not government speech. When the faculty sends the message that their professional advancement depends on peer review, the faculty is declaring itself “autonomous”

in relation to the University administration in matters of professional advancement based on scholarly achievement. *Ewing*, 474 U.S. at 226 n.12. Such a declaration of independence from University administrators cannot be the speech of an agent of the University or indeed “effectively the government’s”. *Cf.* Restatement (Third) of Agency § 3.10(1) (Am. Law Inst. 2006) (stating that “an agent’s actual authority terminates if the agent renounces it”). The faculty’s speech is also protected because it counts as scholarship. In *Meriwether v. Hartop*, this Court distinguished between the “non-ideological ministerial task[s]” of professors, such as “call[ing] roll at the start of class”, which amount to employer speech and receive no protection, and “core academic functions, such as teaching and scholarship”, which remain the protected speech of the professors. 992 F. 3d 492, 505, 507 (6th Cir. 2021). The message sent by the law faculty that it is subject to peer review is a “core academic function” because that message is what sets scholarship apart from mere research reports. That message invites the public to view the faculty’s conclusions as those of experts motivated by “a desire for the respect of their fellow experts” rather than the favor of University administrators. 1915 Decl., Ex. 27 at 294. Defendants are therefore wrong to liken the message of peer review sent by the faculty to “internal discussions among faculty or a faculty member’s email with other faculty.” Mot. Dismiss at 18. Indeed, the faculty’s message of peer review is not directed inward. It is directed outward because it is meant to give the faculty’s scholarship credibility with the public. Woodcock Decl. ¶¶ 1–9, 14; 1915 Decl., Ex. 27 at 294.

With respect to the chilled speech claim, all of Woodcock’s scholarship is protected. *Meriwether*, 992 F. 3d at 505 (“[P]rofessors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.”); *Pernell v. Florida Board of Governors of the State University*, No. 22-13992 slip op. 22–25 (11th Cir. 2026); *Reges v. Cauce*, 175 F.4th 1014, 1030–33 (9th Cir. 2026); *Kilborn v. Amiridis*, 131 F.4th 550, 557–58 (7th Cir. 2025); *Heim v.*

*Daniel*, 81 F.4th 212, 224–28 (2d Cir. 2023); *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019); *Adams v. Trs. of Univ. of North Carolina-Wilmington*, 640 F.3d 550, 562–64 (4th Cir. 2011).

**d) The University Has No Efficiency Interest in Imposing a Dean Whom the Law Faculty Reject, Much Less Can the University Show a Compelling Interest to Spurn Significantly Less Restrictive Alternative Dean Candidates**

If this Court chooses to apply the *Pickering* framework despite *Janus*, the burden shifts to the University Defendants to show that the University’s “interest in promoting efficiency in the educational services that it provides and in avoiding disruption to its operations” “outweigh[s]” the faculty’s “right to free speech and academic freedom.” *Hardy v. Jefferson Community College*, 260 F. 3d 671, 680 (6th Cir. 2001); *Myers v. City of Centerville, Ohio*, 41 F. 4th 746, 764–65 (6th Cir. 2022) (regarding burden). In determining the University’s interest in promoting efficiency and avoiding disruption, this Court considers whether an employee’s message “meaningfully interferes” with the performance of its duties or employer mission, creates disharmony, undercuts discipline, or destroys a relationship of trust or confidence. *Hardy*, 260 F. 3d. at 680–81. The University’s Defendants’ justifications for appointing Van Tatenhove—that he has “vision”, “commitment”, “dedication to service and leadership”, and “executive, fundraising, and workforce-development skills”—do not suggest that the faculty’s message of peer review or Woodcock’s scholarship causes any of these harms. Announc., Ex. 17 at 1–2; Bd. Min. 4/24/26, Ex. 15 at 3. Moreover, with respect to the expressive association claim, the substance of the faculty’s message precludes the University Defendants from meeting their burden. The faculty’s message of peer review cannot interfere with their duties or create disharmony because University regulations already accord the faculty, including their dean, primary authority over hiring, salary, and promotion and require the faculty to comply with ABA standards which guarantee the same. AR Org. §§ E.3.c, E.5.c, F.2.c, F.2.e, Ex. 22 at 6, 9, 12–15; ABA Standards 201(b), 203(b), Interp. 203-1, Ex. 19 at 13–14. The faculty’s message of peer review cannot undermine the University’s mission because the University’s mission, similar to the

faculty's mission, is to "[e]xpand[] knowledge through . . . scholarship", and, as argued above, any mission to expand knowledge implies a commitment to peer review. Univ. Mission, Ex. 18 at 3; 1915 Decl., Ex. 27 at 294–95, 300. The faculty's message cannot undercut discipline because the faculty claims only a right to determine its own professional advancement *based on scholarly achievement*—what the 1915 Declaration calls "matters of opinion" as opposed to matters of conduct. *Id.* at 300. "Lay governing boards" and University administrators remain free "to judge [faculty] concerning habitual neglect of assigned duties" and "charges of grave moral delinquency". *Id.* Finally, the message the faculty wish to send cannot "destroy[] a relationship of trust or confidence" because faculty do not "exercise[]" "discretionary authority with respect to enforcement of [a] law" or "control[] the lines of communication to" someone who does, as required for this employer interest to apply. *Rose v. Stephens*, 291 F. 3d 917, 924 (6th Cir. 2002).

Similarly, with respect to the chilled speech claim, Woodcock's scholarship cannot undermine the University's mission or otherwise disrupt the University because the University's mission *is* scholarship. And the courts have made clear that controversial scholarship is protected even if it attracts the wrath of outside interests. *Hardy v. Jefferson Community College*, 260 F. 3d 671, 675, 678, 682 (6th Cir. 2001) (rejecting claims of disruption where outside interests threatened to create a scandal that would reduce enrollments because "undifferentiated fear or apprehension of disturbance" is not a legitimate University interest).

In *Janus*, the Court applied the more demanding "exacting scrutiny" standard, which requires that the government action "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." 585 U.S. at 894–95. Even if the University Defendants' professed justifications survive the *Pickering* standard, they must fail this stricter test because the justifications all amount to claims of "administrative convenience", which the Supreme Court has held are insufficient to establish a compelling state interest. *Frontiero v.*

*Richardson*, 411 U.S. 677, 690 (1973). And the University Defendants have made no effort to explain why the three other candidates deemed acceptable by the faculty, each of whom represents a “significantly less restrictive” alternative, would be a less effective administrator. Unable to meet their burden under either standard, the University Defendants have violated Woodcock’s right to expressive association and his right to be free of speech chill.

## 6. Arbitrary Power

Section 2 of the Kentucky Constitution prohibits the exercise of “arbitrary power” by a state agency. “As a general rule, the yardstick of fairness is sufficiently broad to measure the validity of administrative action.” *American Beauty Homes Corp. v. Louisville*, 379 S.W. 2d 450, 457 (Ky. 1964). “The question of reasonableness is one of degree and must be based on the facts of a particular case.” *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W. 2d 893, 900 (Ky. 1985). Examples of exercises of arbitrary power include (1) “failure of an administrative agency to follow its own rule or regulation[,]” (2) action lacking “substantial evidentiary support[,]” (3) “change[]” to a “formula” or practice that had been followed “for many years” “without reason or explanation[,]” and (4) “action in excess of granted power[.]” *American Beauty*, 379 S.W. 2d at 456 (excess of granted authority or lack of evidentiary support); *Com., Transportation Cabinet v. Weinberg*, 150 S.W. 3d 75, 77 (Ky. Ct. App. 2004) (failure to follow rules); *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W. 2d 893, 900–01 (Ky. 1985) (unexplained change in longstanding practice).

Defendants do not meaningfully contest elements (2) and (3) apart from making conclusory statements that they are not met. Mot. Dismiss at 31. And Defendants have nothing to say about element (4). With respect to (1), Defendants do not contest that the appointment of Van Tatenhove violated the appointments regulation requiring the solicitation of written statements from the faculty or the SACSCOC accreditation standard incorporated into the Employee Code requiring that the University honor its faculty governance rules. Mot. Dismiss at 30–31; Am. Compl. ¶¶ 75, 77. They

argue only that there is no violation of the ABA standards incorporated into the Employee Code because the ABA has not yet ruled that the University has violated accreditation requirements. Mot. Dismiss at 30. But ABA enforcement also has no bearing on whether the University has violated Section 2 of the Kentucky Constitution. The University’s Employee Code mandates “compl[iance] with . . . accreditation requirements.” Employee Code § I.D, Ex. 20 at 1. The rule makes no distinction between actions that have been adjudicated by the ABA to violate ABA requirements and actions that have not been so adjudicated. It does not delegate authority to the ABA to decide when a violation of accreditation requirements has occurred. Rather, it makes the ABA requirements into University requirements and mandates “compl[iance]”.

The University’s incorporation of accreditation rules into its own written policies makes sense. Allowing a violation of accreditation rules to lead to enforcement by an accreditor can damage a school’s reputation, making it harder for the school to attract students and faculty, and potentially leading to a death spiral. In consequence, schools that receive letters of noncompliance from the ABA often sue to block their release on the ground that it would cause irreparable injury. *See, e.g., Thomas M. Cooley Law School v. the American Bar Association*, No. 17-13708 slip op. 8–9 (E.D. Mich. Dec. 12, 2017). In one case, the court acknowledged the existence of “reputational injury” and noted that “prospective students [had] already drawn conclusions about the School” after “word” got “out” that the ABA had issued a letter. *Id.* at 9. In mandating compliance with accreditation requirements, the University prohibits activity by its employees that can lead to accreditor sanctions, thereby preventing harm to reputation before it occurs.

Defendants attempt to argue that Section 2 is coextensive with protections of the U.S. Constitution. That is not so. “Section 2 of our Bill of Rights is unique, only the Constitution in Wyoming having a like declaration[.]” *Com. Nat. Res. & Envir. Prot. v. Kentec*, 177 S.W.3d 718, 726 (Ky. 2005) (cleaned up). For example, Section 2’s requirement that state agencies follow their own rules is

not duplicated by the U.S. Constitution. *Compare Com., Transportation Cabinet v. Weinberg*, 150 S.W. 3d 75, 77 (Ky. Ct. App. 2004) *with Doe v. Miami University*, 882 F.3d 579, 603 (6th Cir. 2017).

## 7. Breach of Contract

“The elements of a breach of contract claim are” (1) “existence of a contract;” (2) “breach of that contract; and” (3) “damages flowing from the breach of contract.” *Metro Louisville/Jefferson County Govt. v. Abma*, 326 S.W. 3d 1, 8 (Ky. Ct. App. 2009). The University’s appointment of Van Tatenhove breached Woodcock’s employment agreement with the University.

Defendants appear only to challenge element (2) on the ground that the Employee Code is not part of Woodcock’s contract. Mot. Dismiss at 41–42. As discussed above in the section on waiver of contract immunity, the Employee Code is part of Woodcock’s contract because it is incorporated by reference, is an independently binding personnel policy under *Parts Depot*, and is a binding personnel policy because Woodcock has tenure. Am. Compl. ¶¶ 32, 96–98, 108; *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 362–63 (Ky. 2005). Defendants do not explain why the incorporation language in Woodcock’s offer letter is not effective, why the Employee Code does not satisfy the requirements of *Parts Depot*, or why tenure does not contractualize the University’s regulations. Am. Compl. ¶¶ 32, 96–98. Defendants fail entirely to challenge the binding character of the University’s appointments regulation requiring solicitations of written statements from faculty. Am. Compl. ¶¶ 101, 104.

## 8. Tortious Interference

“To recover for a claim for intentional interference with contractual relations, a plaintiff must establish the following elements: (1) the existence of a contract; (2) [the d]efendant[’s] knowledge of this contract; (3) that [the defendant] intended to cause its breach; (4) [the defendant’s] conduct caused the breach; (5) this breach resulted in damages to [the plaintiff]; and (6) [the d]efendant had no privilege or justification to excuse its conduct.” *Epps Chevrolet Co. v. Nissan North America, Inc.*, 99 F. Supp. 3d 692, 704 (E.D. Ky. 2015).

Element (1) is discussed in the previous section. Defendants do not challenge elements (2) or (4). They challenge element (3) on the ground that Woodcock has not shown malice. But that is not the standard for tortious interference with contract (in contrast to tortious interference with prospective business advantage). “It is sufficient that” the interferor “designs the result” “because he regards it as a necessary, even if regrettable, means to some other end[.]” *Knight Enterprises, Inc. v. RPF Oil, Co.*, 829 N.W. 2d 345, 348–49 (Mich. Ct. App. 2013) (quoting Restatement (Second) of Torts § 766). “Ill will” is not required. *National Coll. Athletic Ass’n v. Hornung*, 754 S.W. 2d 855, 859 (Ky. 1988) (quoting Restatement (Second) of Torts § 766 cmt. s). Here, Van Tatenhove learned that his appointment violated ABA rules no later than April 23, when he attended a board committee meeting in which DiPaola “mentioned” the “email” “he received” “which opposed Van Tatenhove’s appointment on behalf of” the faculty and DiPaola argued in response that “it would be a number of years before we’re reviewed again by the ABA”. Herald Leader 4/24/26, Ex. 43 at 3; Courier J. 4/24/26, Ex. 13 at 1–3. That day, Van Tatenhove affirmed his intent to become dean regardless of any violation of ABA standards when he defended his appointment to reporters at the meeting and to faculty having “strong disagreement” with him. *Id.* at 2–3. These facts establish that Van Tatenhove “designs [the] result” of a breach of ABA rules “as a necessary” “means to [the] end” of achieving, as he put it, the “honor[]” and “excite[ment]” of being “appointed dean of my alma mater.” *Id.* at 1–2; *Knight Enterprises*, 829 N.W. 2d at 348–49.

Defendants also challenge element (6), arguing that Woodcock must show “improper purpose.” Mot. Dismiss 43. That is not the case. “[I]nducing a breach of contract absent compelling justification is, in and of itself, improper” and “malice is not required.” *Mathis v. Liu*, 276 F. 3d 1027, 1030 (8th Cir. 2002); *Hornung*, 754 S.W. 2d at 859 (“proof of lack of justification” suffices to show interference improper); Voigt, 55 Clev. St. L. Rev. at 383–84 & nn. 204–05. Van Tatenhove interfered to enjoy “honor[]”, “excite[ment]”, \$442,000 in annual pay additional to his \$249,900 judicial

pension, plus a \$1.3 million golden parachute. Courier J. 4/24/26, Ex. 13 at 1–2; Complaint ¶ 15 & n.2. The pursuit of honor and wealth are not compelling justifications for interference with contract.

**9. This Court Should Allow Woodcock to Obtain Money Damages from Capilouto and DiPaola for Violating the Kentucky Constitution by Recognizing Constitutional Torts for Violation of the Kentucky Constitutional Rights of Expressive Association, Against Arbitrary Exercises of Power, and Against Speech Chill**

Defendants suggest that Woodcock cannot recover money damages for Capilouto and DiPaola’s violation of the Kentucky Constitution because in Kentucky there are no constitutional torts. Mot. Dismiss at 39. (No constitutional tort is required for Woodcock to obtain prospective injunctive relief based on his constitutional claims.) In *St. Luke Hosp., Inc. v. Straub*, the Kentucky Supreme Court declined “to create a new tort cause of action in Kentucky to provide money damages for constitutional violations” because of the “availability of other remedies for the alleged violation” of the plaintiff’s “rights under the Kentucky Constitution — traditional tort actions.” 354 S.W.3d 529, 536–37 (Ky. 2011). The Court thereby signaled that it will consider whether to recognize new constitutional torts on a case-by-case basis based on the availability of alternative remedies.

Woodcock lacks alternative damages remedies. Woodcock may not be able to recover mental anguish, emotional distress, or punitive damages based on his breach of contract claim against the University despite the evidence in this case that Capilouto and DiPaola acted knowing that they were violating University regulations and doubled down on their lawless actions after public outcry. Am. Compl. ¶¶ 69, 88, 105. Woodcock can recover these from Van Tatenhove based on his tortious interference claim, but is unlikely to be able to do so from Capilouto and DiPaola—unless this Court recognizes new constitutional torts for violation of the rights of expressive association, to be free of arbitrary exercises of power, and speech chill under the Kentucky Constitution. The situation in this case contrasts with that in *Straub*, in which the plaintiff could obtain the full panoply of tort remedies, including punitive damages, via her tort claims of false imprisonment, false arrest, outrage,

and assault and battery in relation to her arrest. *Straub*, 354 S.W.3d at 532, 537. Woodcock has no available tort claim against the University Defendants.

In *A.H. v. Louisville Metro Government*, the Court stated that 42 U.S.C. § 1983 might constitute an adequate remedial alternative. 612 S.W.3d 902, 914 (Ky. 2020). But the Court also noted that the plaintiffs in that case had brought a panoply of traditional tort claims ranging from negligence to wrongful death. *Id.* And the Court also noted that the legislature’s decision not to waive immunity for a statute requiring humane treatment of prisoners at issue in that case suggested a policy decision not to “open the floodgates to endless prisoner litigation.” *Id.* In this case, no tort actions against Capilouto or DiPaola are available, and nothing suggests a legislative policy against liability for their assault on faculty autonomy. Indeed, to the contrary, the legislature has in recent years shown a pronounced willingness to authorize private suits for money damages where public universities and speech concerns intersect. It waived sovereign immunity and authorized money damages for violation of the Campus Free Speech Protection Act as well as for HB 4, which aims to protect viewpoint diversity on campus. Ky. Rev. Stat. § 164.348(3)(c); *University of Louisville v. Wolek*, No. 2024-CA-1246-MR (Ky. Ct. App. Oct. 24, 2025) (interpreting the Campus Free Speech Protection Act to waive immunity); Act of Mar. 28, 2025, ch. 120, 2025 Ky. Acts (codified at Ky. Rev. Stat. Ann. ch. 164). Moreover, in light of the fact that University administrators appear never before to have imposed a dean on the law faculty over the faculty’s objection, limited recognition of constitutional torts for violation of expressive association, chilled speech, and arbitrary power rules in the public university context would open no floodgates. Am. Compl. ¶¶ 16, 78. Indeed, it would instead serve to keep the floodgates of administrator overreach closed by creating a financial deterrent to such action.

Even if the availability of remedies under 42 U.S.C. § 1983 precludes recognition of constitutional torts, Woodcock’s arbitrary power claim would not be precluded. That is because the

U.S. Constitution does not have an analogue to Section 2 of the Kentucky Constitution. The closest federal doctrine to Section 2 as applied to the present case, is the *Accardi* doctrine, which prohibits administrative agencies from violating their own rules. *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955). But *Accardi* applies only to federal agencies. The U.S. Supreme Court has held that the doctrine “enunciate[s] principles of federal administrative law rather than of constitutional law binding upon the States”. *Board of Curators of Univ. of Mo. v. Horowitz*, 435 US 78, 92 n.8 (1977). Thus, if this Court concludes that Woodcock’s expressive association and chilled speech claims fail as a matter of law—a judgment that might suggest that Woodcock cannot state expressive association and chilled speech claims under 42 U.S.C. § 1983 either—then Woodcock will not actually have any adequate remedy under 42 U.S.C. § 1983 either, even if this Court concludes that his arbitrary power claim survives. Accordingly, this Court should recognize a Kentucky constitutional tort in this case to provide Woodcock access to tort damages not available to him on his breach of contract claim. Because Woodcock’s constitutional claims serve as predicates for his civil conspiracy claim, recognition of a constitutional tort would also permit Woodcock to recover money based upon his civil conspiracy claim.

## CONCLUSION

WHEREFORE, Woodcock requests that this Court deny the motion to dismiss.

Respectfully Submitted,

/s/ Rima N. Kapitan

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**Admitted *pro hac vice***

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### **CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2026, a true and accurate copy of the foregoing document was filed electronically with the Clerk of the Court using the Kentucky Court of Justice eFiling system, which will automatically send a copy of the foregoing to all counsel of record.

/s/ Soha Saiyed

Counsel for Plaintiff