IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ALLAN M. JOSEPHSON, *Plaintiff*, v. **TONI M. GANZEL**, *et. al.*, *Defendants.*	Case No: 3:19-cv-00230-RGJ-CHL **THE HONORABLE REBECCA GRADY JENNINGS**

PLAINTIFF'S CONSOLIDATED BRIEF IN OPPOSITION TO DEFENDANTS' SIX MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants filed six summary judgment motions, with 132 pages of briefing[1]—all in an effort to say that the facts are undisputed and the law favors them. Most of the facts they raise are not material. Most are disputed. None change the fact that, as a matter of law, the truly material and undisputed facts in this case point to only one conclusion: Defendants harassed and terminated Dr. Josephson because of his constitutionally protected speech.

Defendants' 55 pages of facts contain many assertions that contradict their own e-mails, their own documents, and their own testimony, as outlined in Dr. Josephson's summary judgment motion, which he incorporates by reference here. *See* Pl.'s Br. in Supp. of Mot. for Summ. J. ("Pl.'s Br."[2]), Doc. 64-1. Many of their other assertions, while not material, are also disputed.

Defendants also pretend as if faculty have no free speech rights, on campus or off. Yet the Sixth Circuit rejected this notion as "totally unpersuasive" twenty years ago. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). Shortly thereafter, it reaffirmed that professors do not "leave their First Amendment rights at the campus gate." *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 594 (6th Cir. 2005). So when Dr. Josephson left the campus to speak on his own time and on his own behalf, he fell within the First Amendment's protections.

Moreover, Defendants proceed as if an issue roiling parents and school boards across the country right now—gender dysphoria, and specifically how to treat children who experience it and how schools should respond to those children—is of no interest to anyone. Paradoxically, they insist it dominated the attention of a few of their busy faculty, as well as a chair, vice-chair, and dean. Yet this debate is precisely

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[1] Under this Court's order, Dr. Josephson could file up to 300 pages of responsive briefing. Order at 2 ¶ 5, Doc. 54, Oct. 7, 2021 (six responses of 50 pages each). In the interest of judicial economy, he has elected to file one response, using less than 25% of the pages available to him, as explained in his motion for a page extension. *See* Pl.'s Unopposed Mot. for Page Extension, Doc. 70, Nov. 18, 2021.

[2] This brief will cite Defendants' summary judgment briefs in similar fashion (*e.g.*, "Woods Br.").

why higher education and academic medicine exist. And the First Amendment explicitly condemns Defendants' efforts to silence one side of it. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[T]he First Amendment . . . does not tolerate [actions] that cast a pall of orthodoxy over the classroom" or interfere with the "wide exposure to that robust exchange of ideas which discovers truth of out of a multitude of tongues rather than through any idea of authoritative selection.").

On the facts and the law, Defendants are wrong. Dr. Josephson has presented more than enough facts for this Court to find as a matter of law that Defendants demoted, harassed, and terminated him because he expressed his views on how best to treat children with gender dysphoria. As Defendant Carter admitted: "Had that video [of Dr. Josephson's speech] not been observed by some people who expressed concern with it, . . . none of these events probably would have occurred."[3] Defendants' motions should be denied and Plaintiff's granted. At a minimum, this case should go to trial.

RESPONSE TO DEFENDANTS' STATEMENTS OF FACTS

I. Defendants rely on assertions that contradict undisputed evidence.

Defendants insist the facts are undisputed, but, ironically, their assertions contradict their own e-mails, documents, and testimony. Their story (often based on after-the-fact deposition testimony) contradicts statements they made at the time they mistreated Dr. Josephson. This is not enough even to create an issue of fact. *See Brooks v. Am. Broad. Co.*, 999 F.2d 167, 172 (6th Cir. 1993) (finding courts are "not required to accept unsupported, self-serving testimony as evidence sufficient to create a jury question" when it contradicts undisputed evidence at the time of the relevant events). Similarly, they rely on isolated and self-serving portions of their depositions when they admit elsewhere in those same depositions that they acted because of Dr. Josephson's speech. Again, this cannot even create a disputed fact. *Bush v. Compass Group USA, Inc.*, 683 F. App'x 440, 449 (6th Cir. 2017).

[3] Carter Dep. 156:23–157:4.

Hence, none of their assertions impede Dr. Josephson from receiving summary judgment. But they do prevent Defendants from receiving it. After all, their contemporaneous statements or more incriminating testimony are more persuasive.

A. The evidence shows that the immediate reaction to Dr. Josephson's Heritage Foundation remarks included Defendants.

Defendants suggest only non-parties objected to Dr. Josephson's Heritage Foundation remarks. Woods Br. at 3; Carter Br. at 3; Boland Br. at 3. The facts refute this.

The immediate reaction began in the LGBT Center, which then alerted Dr. Brady, a psychologist in Dr. Josephson's Division. Pl.'s Br. at 5. Within two hours, Brady recounted how she approached Defendant Carter, who became "very concerned," did "not want this to go unaddressed," and suggested meeting before contacting Defendant Ganzel.[4] Why was he concerned? Because of "the content of the video" and how Dr. Josephson disagreed "with the perspective of other faculty members."[5]

The meeting Carter suggested led to Buford e-mailing Ganzel.[6] Pl.'s Br. at 5–6. Within hours, Ganzel said she was "so sorry to hear this" and that Dr. Josephson's speech "clearly doesn't reflect the culture we are trying so hard to promote"—an unsurprising response from the "LGBT Center's Ally of the Year (2016)." *Id.* at 7. Defendant Woods then mentioned "concerning conversations" about the same remarks.[7]

Perhaps to distract from this, Carter says he had received inquiries from outside the Division about Dr. Josephson's remarks. Carter Br. at 3. These constituted two or three phone calls and comments from a handful of University doctors.[8] They were no big deal. *See* Ganzel Br. at 3 (noting the medical school has 850 faculty). Any reasonable person would have responded that Dr. Josephson is entitled to his views and

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4 Pl.'s Dep. Ex. 107 at 1.
5 Carter Dep. 119:24–120:24.
6 Pl.'s Dep. Ex. 109 at 1 (noting meeting of Brady, Kingery, Steinbock, Buford); Pl.'s Dep. Ex. 110 (thanking Mr. Buford "for joining us this morning"); Steinbock Dep. 95:20–24 (testifying they decided Buford would e-mail Ganzel); Pl.'s Dep. Ex. 110 (Steinbock collecting information to send to Ganzel).
7 Pl.'s Dep. Ex. 3 at 1.
8 Carter Dep. 33:21–34:10; *accord* Steinbock Dep. 16:23–17:6 (noting she heard about the Heritage Foundation presentation from three to five people).

moved on. They certainly did not justify the doomsday predictions Carter then sent to Woods and others to push for Dr. Josephson's demotion.[9]

So within fifteen days after Dr. Josephson spoke, at least three Defendants had objected to his views and were advocating for something to be done. Undisputed facts show that the immediate reaction to Dr. Josephson's speech included parties.

B. The evidence shows that Dr. Josephson's Heritage Foundation remarks were not highly publicized, as Defendants knew.

Defendants dub Dr. Josephson's Heritage Foundation remarks "highly publicized." Lohr Br. at 2. But they knew by November 15, 2017, that this was not true. On that day, Woods' staff asked how much media coverage these remarks had received.[10] The media team listed nine English-language websites, including *The Daily Signal* (*i.e.*, the Heritage Foundation[11]) and two apparent reprints.[12] Over a month had passed, an eternity in today's news cycle, and it included a mass shooting in Las Vegas, the Harvey Weinstein scandal, and Trump administration drama.[13] In fact, Dr. Josephson's remarks had attracted little attention off campus.

C. The evidence shows that Defendants knew of Dr. Josephson's expert testimony on gender dysphoria and wanted to take action.

Ganzel insists she knew nothing about Dr. Josephson's expert testimony on the proper treatment of children with gender dysphoria until her deposition. Ganzel Br. at 9. The facts prove otherwise.

As Ganzel admits, she met with various officials on about November 7—including Woods, Steinbock, and Buford[14]—to discuss Dr. Josephson's Heritage Foundation remarks. Ganzel Br. at 8.[15] By then, Lamba Legal had already called Brady to let her

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9 *See, e.g.*, Pl.'s Dep. Ex. 7 at 3 (emailing Woods); Pl.'s Dep. Ex. 7 at 2 (emailing Wintergerst).
10 Pl.'s Ex. 181 at 2.
11 Daily Signal, *About The Daily Signal*, https://dailysign.al/3ELoNQO (last visited Nov. 19, 2021) ("The Heritage Foundation created . . . The Daily Signal.").
12 Pl.'s Ex. 181 at 1; *accord* Brady Dep. 90:5–7 (describing how she found "maybe five" websites).
13 Jane Pauley, *A Look Back: Top News Stories of 2017 Month-by-Month*, CBS News (Dec. 31, 2017), https://cbsn.ws/2XDNMVk (last visited Nov. 19, 2021).
14 Ganzel Dep. 25:5–26:11, 99:23–100:4 (noting meeting included Buford, Steinbock, and Woods).
15 Pl.'s Dep. Ex. 45 at 1 (attaching "Ganzel meeting 11-7-17.docx"); Woods Dep. 149:1–4, 150:20–25 (noting he prepared this before a meeting with Ganzel); Ganzel Dep. 99:23–100:4 (admitting meeting with Woods around Nov. 7); Ganzel Dep. 45:5–16 (noting she met with Woods 2–3 times pre-demotion).

know Dr. Josephson was an expert in one of its cases, and she told Carter. Pl.'s Br. at 7. On October 30, they briefed Woods.[16] By then, Steinbock had already alerted Buford.[17] Woods had already concluded Dr. Josephson's "ability to lead the Division . . . may be in jeopardy over this issue."[18] Steinbock had declared his expert witness service "SO ugly" and "very concerning."[19] And in preparing for the meeting, Woods observed, in remarks aimed at Dr. Josephson: "If you really see this work [gender dysphoria] as your personal calling, you will be at odds enough with your Divisional colleagues that you will not be able to continue to lead them." Pl.'s Br. at 9.

Ganzel insists these officials just wanted to talk with Dr. Josephson about inclusiveness. Ganzel Br. at 9. Not only had Woods already decided that Dr. Josephson must choose between his position and his speech, but even after the demotion, Steinbock coordinated more complaints against Dr. Josephson (that Woods circulated) because she was upset that he "was still seeing patients and still teaching."[20] Pl.'s Br. at 13. She wanted Woods to clamp down more on Dr. Josephson's speech.[21]

Hence, Ganzel heard about Dr. Josephson's expert testimony on gender dysphoria in November 2017 from the three people in the room that were upset about it.

D. The evidence shows that the initial reaction to Dr. Josephson's speech was based on his views.

Defendants claim that concerns about Dr. Josephson's speech centered on whether his views would be attributed to the Division, Carter Br. at 3–4; Le Br. at 6, and their impact on others, Ganzel Br. at 8–9. Not so, and this is still viewpoint-based.

Carters' recent version is that he was concerned Dr. Josephson's views would be

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16 Pl.'s Dep. Ex. 6 at 1 (noting discussion of "case in Jacksonville[,] FL re transgender" and how "Allan J = expert in case defense."; *accord* Woods Dep. 119:21–120:14 (interpreting his notes as referencing Heritage Foundation and *Adams* expert testimony).

17 Pl.'s Dep. Ex. 115 at 1 (describing Lambda Legal's call to Brady).

18 Pl.'s Dep. Ex. 42.

19 Pl.'s Dep. Ex. 151; Steinbock Dep. 139:6–24, 140:10–141:15 (explaining these comments by saying she "was personally rooting for that young transgender student" and "personally advocating for the young person"); Steinbock Dep. 28:20–29:5 (testifying her "personal convictions" aligned with Lambda Legal and her "primary concern was just that Dr. Josephson was testifying for . . . the other side").

20 Steinbock Dep. 170:2–6; *accord* Steinbock Dep. 47:10–48:10.

21 Pl.'s Dep. Ex. 156 at 1.

attributed to the Division, based on the few inquiries he had received. Carter Br. at 3–4. But at the time it occurred, Carter told a different story. His "strong concerns" focused on Dr. Josephson's "recent presentation to the Heritage Foundation on his position on transgender issues" and his expert testimony,[22] and he objected not to a perception, but to "Allan's highly conservative position."[23] So he and others (including Defendant Le) demanded "that Allan must cease and desist in these activities in his role as our division chief and UofL faculty member."[24] Especially in the latter role, there was no risk of errant attribution, illustrating how Carter and the others objected to Dr. Josephson's views themselves.

Ganzel now claims she worried about students feeling "devalued." Ganzel Br. at 8–9. Yet she was responding to Buford's e-mail, objecting to Dr. Josephson's "anti-transgender beliefs" and describing them as "den[ying] transgender identity"[25]—a demonstrably false assertion. Pl.'s Br. at 5–6. It mentioned "students" once, referring to a student's 2016 complaint that Dr. Josephson did not use "preferred pronouns" and had remarked how gender dysphoric children often later come to peace with their biological sex.[26] The student was not "devalued"; he just opposed Dr. Josephson's views. Woods quickly shared the complaint with Dr. Josephson, saying nothing further was needed.[27] After all, government cannot force citizens, including professors, to use identity-based terms. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *United States v. Thomason*, 991 F.3d 910 (8th Cir. 2021); *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020). And Dr. Josephson was right on the science, as Le and Carter concede.[28] Weeks later, Woods awarded Dr. Josephson his third perfect 400 in a row

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[22] Pl.'s Dep. Ex. 7 at 1; Brady Dep. 110:8–14, 127:8–11 (testifying "another event" on Pl.'s Dep. Ex. 7 at 1 refers to the "expert witness testimony").
[23] Pl.'s Dep. Ex. 7 at 1–2.
[24] Pl.'s Dep. Ex. 8 at 2.
[25] Pl.'s Dep. Ex. 3 at 2.
[26] Pl.'s Dep. Ex. 4 at 4; *accord* Pl.'s Dep. Ex. 149 at 1 (noting the complaint filed on December 2, 2016 involved an incident occurring between June 27 and July 1, 2016).
[27] Pl.'s Dep. Ex. 38 at 1–2; Woods Dep. 95:22–24; Woods Dep. 105:16–21 (inferring that the complaint in Pl.'s Dep. Ex. 4 was the one he forwarded, as he knew of no others); Josephson 2d Decl. ¶¶ 4–5.
[28] Cantor Rep't [Pl.'s Ex. 176] ¶ 103; Cantor Dep. 49:18–23 (noting "majority of children . . . who

on his annual review, underscoring how this was no big deal.[29] Nine months later, it resurfaced only because University officials objected to Dr. Josephson's speech.

When Ganzel bemoaned how Dr. Josephson's presentation "doesn't reflect the culture we are trying so hard to promote," Pl.'s Br. at 7, she was not referring to students' feelings but Buford's charge that Dr. Josephson's teaching was "at odds with the incredible work of the eQuality team and our national reputation as a leader in teaching medical students to be competent providers of care to LGBT patients."[30] This unfounded accusation[31] simply reflected Buford's ideological disagreement with Dr. Josephson's views, one Ganzel shared.[32]

Ganzel tries to recast her "culture" comment as referring to an environment where no one's feelings get hurt.[33] But this type of environment is contrary to the university's mission as "the marketplace of ideas," *Healy v. James*, 408 U.S. 169, 180 (1972), and the "highest[ ] purpose" of free speech protections, *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949). Even in high school, the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is no excuse for restricting speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). This remains true in higher education, where the First Amendment "does not tolerate [actions] that cast a pall of orthodoxy" or interfere with the "wide exposure to that robust exchange of ideas which discovers truth of out of a multitude of tongues

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feel gender dysphoric cease to feel gender dysphoric by puberty"); Cantor Dep. 52:14–15 ("[W]e know that roughly 80 percent of these children are going to cease feeling dysphoric[.]"); Le Dep. 28:18–22 (noting the desistance rate is 80%); Carter Dep. 58:10–18 (admitting a "substantial proportion" desist).

[29] Pl.'s Dep. Ex. 39 at 1–2; Woods Dep. 96:13–19 (authenticating document and signature).

[30] Pl.'s Dep. Ex. 3 at 2.

[31] Buford Dep. 26:13–16, 70:25–71:1 (testifying he first met Dr. Josephson at his deposition); Steinbock Dep. 56:8–10 (testifying she never met with Dr. Josephson); Buford Dep. 41:1–5, 56:6–8, 56:18–20 (not recalling or knowing what Dr. Josephson did to stray from the eQuality program); Buford Dep. 73:9–11, 73:22–24 (not knowing and not recalling how Dr. Josephson visited his beliefs on patients and students in hurtful ways); Steinbock Dep. 103:14–104:5 (admitting she had no interaction with Dr. Josephson's patients, knew of no patient care concerns, and could not recall how his teaching conflicted with eQuality); Buford Dep. 77:4–20 (testifying he never saw Dr. Josephson teach and failing to identify any problematic teaching practices); *accord* Brady Dep. 101:20–102:14 (not knowing what Buford referenced); Carter Dep. 134:4–136:7 (not knowing of problematic teaching practices).

[32] Buford Dep. 57:1–6 (attributing his comment to Dr. Josephson's Heritage Foundation remarks and the eQuality program "being out of alignment with each other").

[33] Ganzel Dep. 85:2–87:10.

rather than through any idea of authoritative selection." *Keyishian*, 385 U.S. at 603.

Plus, any perception- or impact-related objections are objections to Dr. Josephson's *views*. No one would be worried about having Dr. Josephson's views attributed to the Division unless that person first objected to those views themselves. No one would feel devalued by Dr. Josephson's remarks unless that person first objected to those remarks. And the fact that an official might target multiple viewpoints simultaneously for these reasons just exacerbates the viewpoint discrimination. *See*, *e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823 (1995).

In sum, the facts demonstrate that Dr. Josephson's views were at least a substantial factor in Defendants' initial reaction to his speech.

E. The evidence shows that Defendants took action against Dr. Josephson because of his views.

Next, Defendants assert that they did nothing to Dr. Josephson based on the views he expressed. But again, this is an attempt to rewrite the facts.

Ganzel claims she took no actions, leaving that for Woods and others. Ganzel Br. at 9. But within hours of learning of Dr. Josephson's speech, she declared it "doesn't reflect the culture we are trying so hard to promote" and called for a meeting.[34] This sent an unmistakable message to her subordinates, who quickly acted on it. Woods alluded to "concerning conversations" and never mentioned how he had resolved the months-old complaint Buford resurfaced.[35] Days later, Woods said Dr. Josephson's "ability to lead the Division . . . may be in jeopardy over this issue."[36] Preparing to meet with Ganzel, he penned words aimed at Dr. Josephson: "If you really see this work [gender dysphoria] as your personal calling, you will be at odds enough with your Divisional faculty that you will not be able to continue to lead them." Pl.'s Br. at 9.

Le similarly claims she took no actions based on Dr. Josephson's views. Le Br. at

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[34] Pl.'s Dep. Ex. 3 at 1–2.

[35] Pl.'s Dep. Ex. 3 at 1; Woods Dep. 98:1–99:5 (testifying the "concerning conversations" involved two or three faculty discussing Dr. Josephson's "testimony" and perhaps Heritage Foundation presentation); *see supra* note 27–29 and accompanying text.

[36] Pl.'s Dep. Ex. 42.

4. Yet she was one of multiple faculty who demanded "that Allan must cease and desist in these activities in his role as our division chief and UofL faculty member."[37] She demanded that Dr. Josephson either apologize for his views or issue a disclaimer if he wanted to retain his position. Pl.'s Br. at 9. As the agitation continued, Le told Defendant Boland she "would be interested in being interim Division chief."[38] Then Le started her "Allan tracking document,"[39] which Defendants used to compile (but never investigate) complaints about him for the remainder of his time at the University, Pl.'s Br. at 14–15, 18, 21 and forwarded complaints about him to Boland.[40] As co-chief, she minimized Dr. Josephson's role and took away his teaching duties because of his views, Pl.'s Br. at 11–12; tracked complaints she never investigated, *id.* at 13–15; participated in meetings where he was attacked for asking questions, *id.* at 16–17; and discussed terminating him just months after the demotion, *id.* at 17. Six months after the demotion, she was still upset at his expert testimony on gender dysphoria. *Id.* at 18. She circulated information about him that she knew was unreliable, reduced it to writing, did not seek Dr. Josephson's perspective, and then never met with him again for over six months—until it was time to terminate him. *Id.* at 18–22. And she ignored his improved productivity. *Id.* at 23.

Carter claims he did not act on Brady's concerns about Dr. Josephson's views. Carter Br. at 3. Yet he e-mailed Woods at least four times about them, shared them, impugned Dr. Josephson's honesty, and concealed Dr. Josephson's clarification.[41]

Woods implies that his November 2 meeting with Dr. Josephson contained no hint of adverse action. Woods Br. at 3. Yet Woods chided Dr. Josephson for his remarks

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37 Pl.'s Dep. Ex. 8 at 2.
38 Pl.'s Dep. Ex. 17 at 2.
39 Josephson 2d Decl. ¶ 34; Pl.'s Dep. Ex. 134 at 1.
40 Pl.'s Dep. Ex. 78 at 2–3 ("When we met, you asked me to send you any new information that related to Allan. . . . I feel sort of dirty tell you all of this, however I know that it is important. Please let me know if there is anything else that you need."); Boland Dep. 85:12–25; Le Dep. 102:17–21, 103:8–12 (adding she had never been asked to do this for other faculty).
41 Pl.'s Dep. Ex. 6 at 2; Pl.'s Dep. Ex. 8 at 2; Pl.'s Dep. Ex. 9 at 1; Pl.'s Dep. Ex. 10 at 1; Pl.'s Dep. Ex. 13 at 3; Pl.'s Dep. Ex. 49; Woods Dep. 170:16–18 (noting Carter never shared this e-mail in Pl.'s Dep. Ex. 49).

about gender dysphoria and warned him about being "promoted" "by those on the religious right.[42] Woods recorded how some of his faculty and others "at the University level" were already upset about his "views and statements" and his "national activities"[43] (*i.e.*, his "expert witness role in Florida and the Heritage Foundation").[44] Thus, Woods had already concluded that Dr. Josephson's "ability to lead the Division . . . may be in jeopardy over this issue."[45]

Despite Defendants' belated attempts to claim otherwise, the facts clearly prove that Dr. Josephson's speech was a substantial factor in these Defendants' actions.

F. The evidence shows that a handful of faculty openly criticized Dr. Josephson's views in a faculty meeting in mid-November 2017.

Defendants next insist the objections a few faculty expressed at the November 15, 2017, faculty meeting had nothing to do with Dr. Josephson's views. Woods Br. at 4; Carter Br. at 5–6; Le Br. at 4–6. For this, they rely on testimony Dr. Josephson gave just hours after he learned of his demotion—before he had a chance to process anything or reflect even for a few minutes on what led to Defendants' rash decision.[46]

This allegation is contrary to Defendants' own documents and testimony which show Brady,[47] Le,[48] and Stocker[49] objected to Dr. Josephson's views, expressed at the Heritage Foundation and in expert testimony.[50] Stocker, Le, and Carter demanded that Dr. Josephson apologize for his remarks or issue a disclaimer via University

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42 Pl.'s Dep. Ex. 42.
43 Pl.'s Dep. Ex. 42.
44 Woods Dep. 133:6–11.
45 Pl.'s Dep. Ex. 42.
46 Pl.'s Dep. Ex. 160 at 34 (noting time of lunch break); Pl.'s Dep. Ex. 57 at 1 (noting Dr. Josephson picked up Woods' letter demanding his resignation about a half hour after receiving the text); Josephson Dep. 42:18–22, 45:11–15 (describing how he got the letter during lunch break).
47 Brady Dep. 148:4–9 (objected to Dr. Josephson serving on the Diversity Committee because she "didn't feel his views represented inclusion or respect for LGBT minority groups"); Brady Dep. 40:7–22 (admitting her objections arose from Dr. Josephson's "expert testimony and the Heritage Foundation" presentation, plus his "views" that she considered "discriminatory").
48 Le Dep. 35:5–9 (admitting Dr. Josephson's expert testimony contributed to her agreeing with Brady).
49 Carter Dep. 78:5–8 (noting Stocker "was definitely not in agreement with Allan's perspective"); *accord* Carter Dep. 82:17–19 (recalling Stocker's objection to Brietbart.com due to his disagreement with it); Lee Dep. 25:7–26:15; Brady Dep. 64:13–65:3 (adding that Stocker did not agree with Breitbart.com); Le Dep. 40:10–19 (adding that Stocker viewed Brietbart.com as a "far right organization" not consistent "with what most of the clinicians in our division and department are . . . aligned with").
50 Carter Dep. 81:14–20 (noting several faculty raised concern at the Heritage Foundation remarks).

public relations if he wanted to keep his position. Pl.'s Br. at 9. Le admitted the "gestalt of the conversation" was objecting to his views. *Id.* at 9 & n.78. Brady recalled "[m]any people were upset . . . [because they] did not agree with the views that were presented in the Heritage Foundation speech and the expert testimony."[51] Woods said these few faculty objected to his views and expressed "a general sense of disagreement" with his expert testimony.[52]

Le tries first to minimize her role in the meeting, Le Br. at 5; then to claim the peacemaker's mantle, *id.* at 6; and then to remove herself entirely from the controversy, *id.* at 7. But she admits that she objected to Dr. Josephson serving on the Diversity Committee[53] and later demanded either the apology or the disclaimer.[54] And within days, she told Boland that she wanted Dr. Josephson's job.[55]

In short, Defendants' own testimony shows that the few faculty who agitated at the November 15 faculty meeting objected to Dr. Josephson's views and expression.

G. Defendants admit they demoted Dr. Josephson due to his speech.

Defendants claim Dr. Josephson's views, as expressed at the Heritage Foundation and in expert testimony, played no role in his demotion. Woods Br. at 7; Carter Br. at 6; Ganzel Br. at 4–5; Le Br. at 7; Boland Br. at 5. They seek to deny their own words.

Woods' letter demoting Dr. Josephson clearly links this decision to Dr. Josephson's views. Woods claimed a majority of faculty "disagrees with your approach to management of children and adolescents with gender dysphoria,"[56] a remark he admitted referenced Dr. Josephson's "expert testimony" and "Heritage Foundation remarks."[57] In the letter, he concedes that disagreements about treatment plans are "common among physicians of all disciplines," but he arbitrarily decided Dr. Josephson still

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51 Brady Dep. 66:3–9.
52 Woods Dep. 43:16–44:9, 45:5–9, 46:7–10.
53 Le Dep. 34:5–6 (admitting she agreed with Brady); Le Dep. 35:5–9 (admitting Dr. Josephson's expert testimony contributed to her objection).
54 Le Dep. 37:19–38:5.
55 Pl.'s Dep. Ex. 17 at 2.
56 Pl.'s Dep. Ex. 56 at 1.
57 Woods Dep. 192:7–14.

had to go because of the "ratio of those on either side of a particular issue" and because Dr. Josephson was "in a decidedly small minority."[58] So he ordered Dr. Josephson to resign or be removed due to "the nature of this area of disagreement and your increasingly public promotion of your approach as an expert witness." Pl.'s Br. at 10.

Defendants obfuscate by saying Dr. Josephson lost the ability to lead or was divisive. Ganzel Br. at 4; Woods Br. at 7; Carter Br. at 6; Le Br. at 6–7. But Woods' letter makes clear what caused the "limited confidence . . . in your leadership": "[T]he nature of this area of disagreement and your increasingly public promotion of your approach as an expert witness."[59] Boland concurred.[60] Woods' letter also diagnoses the divisiveness: Dr. Josephson's views put him "in a decidedly small minority."[61] After all, no one had any concerns about his leadership before he spoke.[62] And Woods gave him perfect marks three years in a row for his leadership. Pl.'s Br. at 4.

Many Defendants also try to disclaim any role in the demotion. Carter Br. at 6; Lohr Br. at 3; Le Br. at 7–8, Boland Br. at 5. Yet Carter had e-mailed Woods again and again, demanding that action be taken. Pl.'s Br. at 7–9.[63] He told Woods that he and others (including Le) "agree that Allan must cease and desist in these activities in his role as our division chief and UofL faculty member." Pl.'s Br. at 9. He and Le

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58 Pl.'s Dep. Ex. 56 at 1.
59 Pl.'s Dep. Ex. 56 at 1.
60 Pl.'s Dep. Ex. 81 at 1 ("I explained this is primarily because he lost the confidence of his division members *especially around his treatment and talk about the LGBT patients*." (emphasis added)); Boland Dep. 99:6–16 (referencing Dr. Josephson's views on gender dysphoria).
61 Pl.'s Dep. Ex. 56 at 1.
62 Woods Dep. 24:24–25:8 (not recalling anyone raising concerns about Dr. Josephson's expert testimony before Oct. 2017); Lohr Dep. 24:10–12 (same); Ganzel Dep. 31:9–12 (similar); Le Dep. 23:24–24:2 (admitting she raised no concerns about expert testimony before Oct. 2017); Steinbock Dep. 29:6–15 (same); Carter Dep. 44:16–18 (same); Woods Dep. 37:4–19 (not recalling anyone expressing concerns about Dr. Josephson before Sept. 2017 or before faculty learned of his expert testimony); Ganzel Dep. 24:16–19, 62:6–8 (similar); Woods Dep. 112:1–16 (not recalling Brady or Carter raising any concern about Dr. Josephson before Sept. or Oct. 2017); Boland Dep. 52:7–9 (same as to Carter); Boland Dep. 76:8–12 (admitting no one raised concerns about Dr. Josephson before fall 2017); Buford Dep. 92:6–11 (same); Le Dep. 51:6–52:5, 100:3–6, 101:25–102:4 (admitting she raised no concerns about Dr. Josephson before Oct. 2017); Ganzel Dep. 39:14–17, 62:6–8 (admitting no one mentioned lost confidence before Oct. 2017); Brady Dep. 42:6–12 (testifying she had no concerns about Dr. Josephson before learning of the Heritage Foundation event).
63 *Accord* Pl.'s Dep. Ex. 6 at 2 (seeking urgent meeting); Pl.'s Dep. Ex. 7 at 1–2 (previewing urgent meeting and proclaiming he would not let Dr. Josephson's "highly conservative position" and "activities go unchallenged"); Pl.'s Dep. Ex. 10 at 1–2 (planning with Woods to confront Dr. Josephson, having enlisted other faculty in the effort); Pl.'s Dep. Ex. 13 at 3–4 (renewing complaints).

demanded either an apology or disclaimer from Dr. Josephson. *Id.* at 9. He demanded that Woods remove Dr. Josephson,[64] repeating this to Boland.[65] Woods talked with Le, Lohr, and Carter to assess faculty support for Dr. Josephson, all of whom objected to his views.[66] At Carter's recommendation,[67] Boland met with Le and others, where Le expressed interest "in being interim Division chief"[68] and where Boland told her to send along any complaints against Dr. Josephson.[69] Boland admits supporting the demotion. Boland Br. at 5. This is the agitation Woods' demotion letter referenced.[70]

The facts clearly show that each Defendant played a role in demoting Dr. Josephson and that his speech was a substantial factor in that decision.

H. The evidence shows that Defendants changed Dr. Josephson's duties in ways the demotion did not require to punish him for his speech.

Defendants claim that changes to Dr. Josephson's duties were just an effect of the demotion. Woods Br. at 8; Carter Br. at 7–8; Le Br. at 8. This Court already rejected this claim. Order at 6–7, Doc. 23, Mar. 24, 2020. The undisputed facts contradict it.

As this Court already observed, Woods' demotion letter detailed the demotion's effects. *Id.* at 7. It says nothing about the many additional restrictions Defendants imposed: banning Dr. Josephson from faculty meetings, Pl.'s Br. at 12, 15; stripping him of teaching duties, *id.* at 12 & n.109; stopping him from meeting with fellows alone, *id.* at 11 & n.105; and ostracizing him, *id.* at 31–32. Nor does the letter ban him from treating LGBTQ patients, *id.* at 12 & n.107, 15 & n.159, a restriction the University imposed on Dr. Josephson and no other professor.[71] Woods' letter required

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64 Pl.'s Dep. Ex. 13 at 1.
65 Pl.'s Dep. Ex. 77 at 2; Carter Dep. 195:2–13; Carter Dep. 194:15–21 (testifying this response was "new leadership in the division").
66 Woods Dep. 46:11–47:11, 174:3–175:5; *accord* Lohr Dep. 54:5–55:1 (admitting he did not support Dr. Josephson).
67 Pl.'s Dep. Ex. 77 at 1–2; Boland Dep. 73:19–22 (admitting Woods viewed events more accurately).
68 Pl.'s Dep. Ex. 17 at 2.
69 Pl.'s Dep. Ex. 78 at 2–3 ("When we met, you asked me to send you any new information that related to Allan. . . . I feel sort of dirty tell you all of this, however I know that it is important. Please let me know if there is anything else that you need."); Boland Dep. 85:12–25; Le Dep. 102:17–21, 103:8–12 (adding she had never been asked to do this for other faculty).
70 Pl.'s Dep. Ex. 56 at 1.
71 Boland Dep. 106:19–22; Le Dep. 136:10–12; Lohr Dep. 79:18–21.

him to open an additional "half day of clinical work per week,"[72] or 4 hours per week,[73] but Defendants increased his clinical duties by 30%,[74] or 15 hours.[75] This had nothing to do with the demotion. They were upset that "his stance on LGBTQ patients is inconsistent with that of our division." Pl.'s Br. at 12.

Defendants also insist that Dr. Josephson's duties were no different than other professors. Woods Br. at 8; Carter Br. at 8; Ganzel Br. at 5; Le Br. at 9; Boland Br. at 6. But Defendants' own documents—which Defendants did not produce until after Dr. Josephson's deposition—show that each faculty member's duties are unique.[76]

Undisputed facts show that Defendants went beyond the effects of the demotion to punish Dr. Josephson for his views.

I. The evidence shows that all Defendants participated in creating a hostile work environment for Dr. Josephson.

Next, various Defendants try to minimize their role in the hostile environment Dr. Josephson endured. The undisputed facts show that each contributed to it.

First, they blame Carter, Le, and Lohr for Dr. Josephson's post-demotion work assignment, Carter Br. at 7; Le Br. at 9; Boland Br. at 6, though Woods and Boland were deeply involved. In mid-December 2017, Lohr asked to meet with Woods and Boland to discuss Dr. Josephson's "roles and expectations post-transition" so Lohr Carter, and Le could "meet with him . . . to discuss his work assignment."[77] A month later the co-chiefs met with Woods and Boland to "come up with a work assignment" for Dr. Josephson.[78] Boland described this assignment as "still a work in progress."[79] In February, Woods approved increasing Dr. Josephson's clinical duties by 15 hours, not the 4 he initially indicated.[80] In March, the co-chiefs briefed Woods and Boland

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72 Pl.'s Dep. Ex. 56 at 2.
73 Josephson 2d Decl. ¶ 29.
74 *Compare* Pl.'s Dep. Ex. 120 at 1 (noting Dr. Josephson's clinical duties in 2017 were 40%), *with* Pl.'s Dep. Ex. 127 at 1 (noting Dr. Josephson's clinical duties in 2018 were 70%).
75 Josephson Decl. ¶ 35 (noting 1 clinical hour equals 2% of work assignment's allocation).
76 Pl.'s Ex. 279 at 1.
77 Pl.'s Dep. Ex. 86 at 3.
78 Pl.'s Dep. Ex. 28 at 1–2 (cleaned up).
79 Pl.'s Ex. 196 at 1.
80 Pl.'s Ex. 127 at 2; *see supra* notes 72–75 and accompanying text.

on their meeting with Dr. Josephson,[81] whose "work" was still on Woods' agenda.[82] In July, they coordinated with Boland, Pl.'s Br. at 17–19, who instructed them to meet with Dr. Josephson[83] and supported them in sending the July warning letter.[84]

Second, Defendants insist Woods and Ganzel had nothing to do with the hostile environment. Woods Br. at 8; Ganzel Br. at 8. But days after the demotion, Woods knew that Le, Lohr, and Carter were still upset about Dr. Josephson's views because they discussed imposing additional restrictions, including banning him from addressing LGBT issues at work and from treating LGBT patients, mandating he use identity-based terms, and gagging him from discussing gender dysphoria with students—all because "his stance on LGBTQ patients is inconsistent with that of our division." Pl.'s Br. at 11–12. Responding to Carter (who critiqued Dr. Josephson's testimony), Woods banned Dr. Josephson from faculty meetings. *Id.* at 12. Then he ordered Dr. Josephson to flag instances where he differed from a curriculum that did not exist, *id.* at 12–13; collected and circulated complaints no one verified, *id.* at 13–14; stood by while Boland accused him of lying, *id.* at 15; and refused to investigate well-documented instances of misconduct towards him, *id.* at 15–16. He increased Dr. Josephson's clinical duties by 15 hours, not the 4 he initially indicated.[85] In April 2018, he was still refusing to meet with Dr. Josephson, contributing to his ostracization.[86]

Likewise, Ganzel green-lighted the hostile environment from the outset, when she declared that Dr. Josephson's presentation "doesn't reflect the culture we are trying so hard to promote," Pl.'s Br. at 7, and when she blessed the demotion.[87] Ganzel Br. at 4 (noting she knew about the demotion in advance and supported it). Ganzel met with Boland monthly and, of all the 850 faculty under her supervision, she repeatedly

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81 Pl.'s Dep. Ex. 122 at 26.
82 Pl.'s Dep. Ex. 90 at 3.
83 Pl.'s Dep. Ex. 94 at 1.
84 Pl.'s Dep. Ex. 106 at 1.
85 Pl.'s Dep. Ex. 127 at 2; *see supra* notes 72–75 and accompanying text.
86 Pl.'s Ex. 295.
87 Woods Dep. 64:16–22, 70:16–22; Ganzel Dep. 43:1–44:6; *accord* Ganzel Dep. 45:5–16 (noting she met with Woods two or three times pre-demotion).

asked about one. Ganzel Br. at 6; Boland Br. at 7. So when Le, Carter, and Lohr sent Dr. Josephson the July letter (with all of its unreliable information) and Carter was urging everyone to generate "strong documentation" to "avoid Allan's reappointment," Ganzel assured them via Boland that they were doing the right thing: "the Dean is supportive of what we and you are doing." Pl.'s Br. at 19–20. And after this, in these monthly meetings, Ganzel ignored Dr. Josephson's consistently improving productivity. *Id.* at 23. Nor did she insist that those under her follow the normal procedures (*e.g.*, a performance improvement plan, followed by probation) before terminating such a senior and experienced professor. *Id.* at 20; Ganzel Br. at 7–8 (noting she just wanted Boland to inform Dr. Josephson of the termination in person).

Third, Defendants insist Lohr's "childish, narcissistic, and flippant" comment had nothing to do with Dr. Josephson's expression. Lohr Br. at 4–5. But Lohr admitted that he said this because he was frustrated at Dr. Josephson's questions,[88] questions that—according to Defendants' own contemporaneous notes—focused on "the events leading to his being asked to step down as chief."[89] This is inextricably related to his speech, per Woods' own words. *See supra* Facts I.G; Pl.'s Br. at 9–10 & n.77.

Fourth, Defendants dismiss Lohr's refusal to meet with Dr. Josephson as not required and not related to his speech. Lohr Br. at 6. But Defendants promised to work with Dr. Josephson "in a collaborative fashion."[90] Plus, Lohr admitted he refused because of Dr. Josephson's demotion-related questions.[91] He now says he was concerned about Dr. Josephson seeking legal counsel. Lohr Br. at 6. But at the time, he knew Dr. Josephson was "talking to lawyers" about "'fraudulent' activities" that he, Le, and Carter thought referred to Brady,[92] not claims against them or the University. Woods

88 Lohr Dep. 52:21–53:5, 53:20–54:1, 99:12–20.
89 Pl.'s Dep. Ex. 122 at 26; Le Dep. 163:5–10 (admitting Dr. Josephson asked about the "timeline of events" of the demotion).
90 Pl.'s Dep. Ex. 93 at 3.
91 Lohr Dep. 96:17–97:8; Le Dep. 158:24–159:16 (admitting they were "all weary" of his questions).
92 Pl.'s Dep. Ex. 122 at 26.

already knew about this, having seen the correspondence about the leaking of the news of demotion. Pl.'s Br. at 16 & n.167–69. At depositions, they admitted Dr. Josephson's concerns about this were reasonable. *Id.* at 17 & n.180.

Simply put, each of these Defendants participated in creating a hostile environment for Dr. Josephson, and his expression was a substantial factor in their actions.

J. The evidence shows that after the demotion, Defendants took action against Dr. Josephson based on the complaints they tracked but never investigated.

Defendants claim they did nothing based on Carter's complaints about Dr. Josephson's conversations and faculty meeting attendance. Carter Br. at 9; Le Br. at 10. Yet Le included the former in her "Allan Tracking document"[93] and sent it to Woods and Boland.[94] The faculty meeting issue reappears in their information for Boland,[95] the July 14 letter,[96] and Defendants' briefs, Woods Br. at 8; Carter Br. at 9; Lohr Br. at 7; Le Br. at 10–11, Ganzel Br. at 6; Boland Br. at 7. Yet it lacked any factual basis,[97] as Le knew.[98] So Defendants did act on this, contributing to the hostile environment.

K. The evidence shows that Defendants faulted Dr. Josephson for doing things they told him he could do.

Defendants fault Dr. Josephson for trying to explain to a social worker how his views had been mischaracterized. Carter Br. at 8–9. But Woods had allowed this. Pl.'s Br. at 14.[99] When finally told to stop, he did.[100] Defendants wrongly faulted Dr. Josephson for doing what they authorized, adding to the hostile environment.

L. The evidence shows that Defendants began discussing terminating Dr. Josephson by March 2018, only months after the demotion.

Defendants claim they began discussing terminating Dr. Josephson in the fall of 2018. Boland Br. at 7–8; Ganzel Br. at 7. Yet Le stated in March, "We will likely be

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93 Pl.'s Dep. Ex. 55 at 1 (referencing Feb. 27, 2018 entry); *accord* Pl.'s Dep. Ex. 134 at 1 (describing spreadsheet as "my Allan tracking document").
94 Pl.'s Dep. Ex. 122 at 18–19.
95 Pl.'s Dep. Ex. 95 at 3; Pl.'s Dep. Ex. 96 at 1, 4.
96 Pl.'s Dep. Ex. 95 at 3; Pl.'s Dep. Ex. 96 at 1, 4; Pl.'s Dep. Ex. 93 at 2.
97 Josephson Decl. ¶¶ 97–98.
98 Pl.'s Dep. Ex. 96 at 1 ("Want to verify . . . before including in anything."); Pl.'s Dep. Ex. 96 at 3 ("Want to clean up before using in anything.").
99 Pl.'s Ex. 193; Pl.'s Dep. Ex 86 at 1; Pl.'s Dep. Ex. 89b at 1–2.
100 Josephson 2d Decl. ¶ 30.

losing . . . Allan [Josephson] . . . this year," referring to "whether or not Dr. Josephson's contract would be renewed." *Id.* Le said this again in May, and Lohr admitted they discussed terminating Dr. Josephson before the July 2018 meeting with him. *Id.* at 17 & n.183. Just after that meeting, Carter urged everyone to generate "strong documentation" to "avoid Allan's reappointment." *Id.* at 20. Boland assured them: "the Dean is supportive of what we and you are doing." *Id.* The facts show that Defendants began planning Dr. Josephson's termination long before the fall of 2018.

M. The evidence shows that Defendants reduced Dr. Josephson's clinical hours at most twice—because he was doing additional work.

Defendants claim they reduced Dr. Josephson's clinical responsibilities at least three times. Le Br. at 9. At most, they did so only twice—first in March,[101] again in July[102] (because of his additional telepsychiatry[103]). But per Dr. Josephson, in March they just asked him to see more patients.[104] This is two reductions, with one disputed.

N. The evidence shows that through June 2018, Defendants targeted only (and inaccurately) Dr. Josephson's performance.

Defendants insist Dr. Josephson did not perform adequately the first half of 2018. Ganzel Br. at 5; Carter Br. at 8–10; Lohr Br. at 7; Le Br. at 9–11; Boland Br. at 6–7. Yet their own records show that at least six other professors were also underperforming at that time, including one whose figures were so poor that they removed her from the Division's averages. Pl.'s Br. at 19 & n.203–04. But Defendants were so focused on Dr. Josephson they could not even recall this at depositions, *id.* at 19 & n.205, and deny it still, Le Br. at 12. Given such widespread failure to meet minimum clinical hours requirements, Dr. Josephson's figures are hardly "surprising," Carter Br. at 8; Le Br. at 10, especially after a traumatic demotion and amid Defendants' ostracizing.

Other alleged flaws are illusory. Defendants' July 2018 letter faulted his telepsy-

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101 Pl.'s Dep. Ex. 96 at 1 ("3/23/18—Dr. Josephson was directed to open . . . 12 hours for scheduling outpatient referrals."); Pl.'s Ex. 93 at 1 (similar).
102 Pl.'s Dep. Ex. 93 at 2 ("Bingham Outpatient: . . . 8 hours/week of scheduled time. . . .").
103 Josephson Decl. ¶ 26.
104 Josephson Decl. ¶ 24.

chiatry figures, but they admitted later those figures were "pretty solid" and reduced his clinical duties because of them. Pl.'s Br. at 19 & n.206–07. Nor did they account for no-shows and cancellations.[105] They said he did not get leave approved, but they knew this was not his fault. Pl.'s Br. at 19 & n.208. They said he went weeks without patients, but their own documents show he was on leave. *Id.* at 19 & n.209. They said he had unexcused absences from faculty meetings,[106] but they counted cancelled meetings and did not acknowledge absences that had cause (*e.g.*, sickness, emergency patient, professional meeting, leave).[107] He had already addressed their concerns about self-paying patients, an arrangement that benefited the Division, not himself.[108]

Defendants also insist that their July 9 meeting and July 14 letter had nothing to do with his speech. Lohr Br. at 7. Yet less than a month earlier, while they were compiling information for "Boland before our meeting with him," Carter was still objecting to Dr. Josephson's views regarding gender dysphoria, and Le "definately [sic] agree[d]" with Carter.[109] And the day before they sent the letter, Carter urged them to generate "strong documentation" to "avoid Allan's reappointment." Pl.'s Br. at 20.

Defendants' own words and records show they targeted Dr. Josephson's performance due to his views, treating him differently than other underperforming faculty.

O. The evidence shows that after mid-July 2018, Defendants never met with Dr. Josephson to discuss their supposed concerns, in stark contrast to their standard procedures.

Defendants even blame Dr. Josephson for the fact that they did not meet with him in the seven months from July 11, 2018, until they announced his termination. Carter Br. at 10; Lohr Br. at 7; Le Br. at 11. Yet no employee is expected to mind-read and initiate interim performance reviews. Defendants' letter promised to work with him

105 Josephson Decl. ¶ 84.
106 Pl.'s Dep. Ex. 93 at 2; Pl.'s Dep. Ex. 96 at 4.
107 Josephson Decl. ¶ 98.
108 Josephson 2d Dec. ¶¶ 28, 31–33.
109 Pl.'s Ex. 209 at 1 (Carter objecting to Dr. Josephson "literally going against the scientific and ethical position of the profession . . . and getting paid to do it").

"in a collaborative fashion."[110] Seven months of silence falls well short of this promise, especially when his performance steadily improved during this time. *Id.* at 23. Even for an administrative assistant or a more junior professor, Defendants would use a performance improvement plan, followed by probation, *id.* at 20 & n.219–20, tools that required more meetings and more feedback.[111] Boland said she would meet with Dr. Josephson after Le, Lohr, and Carter did and discuss "a timeline for a Performance Improvement Plan," but she never did. *Id.* at 20 & n. 217–18. No plan was ever implemented, *id.* at 20 & n.218, and Ganzel admitted no one even discussed probation for him. *Id.* at 20 & n.221. In late 2018, Le even e-mailed him about his 2019 assignment, without saying anything about his performance.[112] Defendants had the obligation to meet with Dr. Josephson during this time, not the other way around.

P. The evidence shows that after July 2018, Defendants ignored Dr. Josephson's improved productivity in their push to terminate him.

Trying to justify Dr. Josephson's termination, Defendants return to the performance refrain, this time claiming he fell short after July 2018. Ganzel Br. at 5–6; Le Br. at 12–13; Boland Br. at 7. Yet again, they contradict undisputed facts.

Defendants' own records show that Dr. Josephson's productivity figures consistently improved after July 2018, regardless of the measure used.[113] As his duties had not changed during this time, this could only mean that his hours had likewise increased.[114] And Defendants took no action against the professors whose productivity—unlike Dr. Josephson's—declined in 2018.[115]

Defendants say he failed to perform competently, Ganzel Br. at 6; Le Br. at 13, but this was based on a single complaint from Carter that no one investigated or

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110 Pl.'s Dep. Ex. 93 at 3.
111 Univ. of Louisville Hum. Res., *Improvement Plans*, https://bit.ly/3aFsoSF (last visited Nov. 19, 2021) (requiring performance improvement plans to include "a plan for providing feedback, with dates and times of future meetings").
112 Pl.'s Dep. Ex. 129 at 1–2.
113 Josephson Decl. ¶¶ 27, 61–63, 73–74; Pl.'s Ex. 274 at 1; Pl.'s Ex. 276 at 1.
114 Josephson 2d Decl. ¶ 36.
115 Josephson Decl. ¶¶ 57, 65–70, 75–80.

verified. Pl.'s Br. at 21–22 & n.244, 247. Just months earlier, Woods had praised Dr. Josephson as "an excellent clinical pediatric psych[iatrist]" and reminded everyone of how he had been "named a Master Clinician four years in a row." *Id.* at 21–22 & n.245–46. They point to his telepsychiatry, faculty meeting attendance, and absences. Ganzel Br. at 6; Boland Br. at 7. But he opened 16–17 hours for this on his schedule, as directed.[116] *See supra* Facts I.N. Their own records show he missed no faculty meetings and had no unapproved absences after July.[117]

Next, Defendants allege Le wanted Dr. Josephson to stay. Le Br. at 12. Yet overwhelming evidence contradicts this bald assertion. Le demanded that Dr. Josephson apologize or issue a disclaimer regarding his speech. Pl.'s Br. at 9. She wanted his job.[118] She began gathering and tracking his every infraction (real or imagined, but none investigated) in November 2017. Pl.'s Br. at 13–15. Within days of the demotion, she drafted a work assignment that banned him from addressing LGBT issues, stopped him from treating LGBT patients (something done to no one else), and gagged him from discussing gender dysphoria with students—all because of his views.[119] Pl.'s Br. at 11–12. She resisted meeting with him, resented his questions, allowed her co-chiefs to attack him, and ignored well-documented misconduct against him. *Id.* at 16–18. By the spring, she was discussing his termination. *Id.* at 17. By the summer, she was "sleuthing" to find negative information to relay to Boland, decrying his views on gender dysphoria, and working to generate "strong documentation" to "avoid [his] reappointment." *Id.* at 17–20. In the fall, she kept tracking, but not investigating, complaints. *Id.* at 21. She ignored his improved productivity. *Id.* at 22 & n.251. Then she participated in the rushed "ambush" termination meeting. *Id.* at 22.

In short, Defendants wanted Dr. Josephson gone because they disliked his views,

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116 Josephson Decl. ¶ 83.
117 Pl.'s Dep. Ex. 96 at 4 (listing last alleged missed faculty meeting as June 6 and last allegedly unexcused absence June 22); Josephson Decl. ¶ 99.
118 Pl.'s Dep. Ex. 17 at 2.
119 Le Dep. 135:7–136:9 (admitting she drafted Pl.'s Dep. Ex. 63 at 4–5).

not because of any performance issues that they exaggerated.

Q. The evidence shows that Defendants terminated Dr. Josephson because of the views he had expressed.

Le and Ganzel insist that their supervising and terminating of Dr. Josephson had nothing to do with his speech. Ganzel Br. at 8; Le Br. at 12. Yet Le was one of the few professors who voiced opposition to Dr. Josephson's views. Pl.'s Br. at 9; Woods Br. at 4 (admitting only four professors voiced opposition); Carter Br. at 5 (same); Le Br. at 4 (same). She then played an instrumental role in creating the hostile environment,[120] and this was because she disliked his views. That is why she drafted an assignment that silenced him on gender dysphoria issues. Pl.'s Br. at 11–12. That is why she still resented his expert witness work six months after the demotion while digging up negative information to relay to Boland. *Id.* at 18.[121] That is why she helped generate "strong documentation" to "avoid Allan's reappointment." Pl.'s Br. at 20.

Defendants then admit that Le's information contributed to Ganzel's decision to terminate Dr. Josephson. Le Br. at 12. This is unsurprising. Ganzel had signaled that Dr. Josephson's views should not be tolerated from the outset, blessed the demotion, and (through Boland) assured the co-chiefs that their efforts to generate "strong documentation" to "avoid Allan's reappointment" had her support. Pl.'s Br. at 20.

So Le's information—tainted by her objections to Dr. Josephson's speech—impacted Ganzel's decision to terminate him, a decision perfectly consistent with Ganzel's own opposition to his views.

R. The evidence shows that demoting and terminating Dr. Josephson were both rare acts, not a default action taken for no reason.

Defendants insist that demoting a division chief or terminating a professor after 15 years of stellar performance is almost routine. Ganzel Br. at 5, 7. Yet, Carter could recall only two or three demotions in 36 years, some of which may have been volun-

[120] *See supra* note 118 and accompanying paragraph.
[121] Pl.'s Ex. 209 at 1 (Carter objecting to Dr. Josephson "literally going against the scientific and ethical position of the profession . . . and getting paid to do it").

tary. Pl.'s Br. at 10 n.86. Woods could recall three, *id.*, and Brady, Steinbock, and Buford could recall none. *Id.* Boland could recall none involving faculty of Dr. Josephson's seniority. *Id.* Even Ganzel's figure of four or five per year qualifies as rare, as she supervises 23 departments, one of which has 22 divisions. Ganzel Br. at 2–3.

As to terminations, Woods could not recall any involving a current or former division chief; Carter could recall six in 36 years (some voluntary and none involving a professor of Dr. Josephson's rank or longevity); and Boehm (the provost), Lohr, and others could not recall any. Pl.'s Br. at 23 n.262–63. Ganzel estimated that six or seven occur per year, with those involving a full professor of 14 or more years of experience being the most unusual. *Id.* Even the figure she uses now, 7–10 per year, qualifies as rare, seeing as the medical school has 850 faculty. Ganzel Br. at 3. And she admitted that non-renewals are never automatic or arbitrary. Pl.'s Br. at 23 & n.264.

Thus, the facts prove that Defendants demoted and then terminated Dr. Josephson, two rare actions, because they did not like his speech.

S. The evidence shows that each Defendant played a role in terminating Dr. Josephson because of his speech.

Last, Defendants try to minimize their respective roles in Dr. Josephson's termination. In each instance, undisputed facts show they contributed to it.

Woods, Carter, and Lohr insist they had no role in it. Woods Br. at 8; Carter Br. at 10; Lohr Br. at 4. Yet from the moment Ganzel condemned Dr. Josephson's remarks, Woods was on board with targeting him. He said nothing about how he had already fully resolved the 2016 complaint that Buford circulated. Rather, he darkly alluded to some "concerning conversations." *See supra* Facts I.E. Within days, he knew that Carter was upset at Dr. Josephson's expert testimony, and he encouraged Carter's repeated e-mails complaining about Dr. Josephson's views. *See supra* Facts I.A–B, I.G & n.41. Because of those views, he demoted Dr. Josephson, effectively placing a target on his back going forward. *See supra* Facts I.G. And after the demotion,

he knew that Carter, Le, and Lohr were creating a hostile environment, and he participated in it. *See supra* Facts I.I. All of this laid the foundation for the termination.

Carter's agitation led to the demotion. Pl.'s Br. at 7–9. Then he participated in banning Dr. Josephson from treating LGBT patients and stripping him of his teaching duties. *Id*. at 11–12. He participated in gathering and circulating complaints. In fact, he acknowledged that his tenacity in this "makes it look like I am intentionally looking for things to target Allan." *Id.* at 13–14. He objected to Dr. Josephson's productivity before a new assignment even existed. *Id.* at 15. He helped increase Dr. Josephson's clinical duties by 15 hours, not the 4 detailed in the demotion letter.[122] He accused Dr. Josephson of lying, being deceptive, and withholding information when Dr. Josephson simply inquired about what led to the demotion. *Id.* at 16–17. He was part of the March 2018 conversations about Dr. Josephson's potential termination. *Id.* at 17. That summer, he rejoiced at the "excellent sleuthing" that would be "valuable for Kim [Boland]" and objected again to Dr. Josephson's expert witness work. *Id*. at 18. Days later, he urged everyone to generate "strong documentation" to "avoid Allan's reappointment." *Id.* at 20. Even after leaving his co-chief role, Carter coached students on what to say in their complaints against Dr. Josephson, mocked him, and accused "a Master Clinician" of rapid-onset incompetence. *Id*. at 21–22.

Lohr not only contributed to the hostile environment, *see supra* Facts I.I, but he volunteered to review Dr. Josephson's productivity in the fall of 2018. Pl.'s Br. at 22. Even though he was aware of Dr. Josephson's improvement, *id.* at 23, he ignored it and provided selective facts that Le then passed along to Boland and Ganzel. Defendants cannot have it both ways. They cannot say they terminated Dr. Josephson for low productivity but then insist that the man who performed the productivity analysis played no role in the termination.

Ganzel cannot decide whether she was involved. Sometimes, she admits she de-

[122] *See supra* notes 72–75 and accompanying text.

cided to terminate Dr. Josephson, Ganzel Br. at 1, 6, 8; other times, she tries to pass the buck to Boland, *id.* at 1, 3–4, 7. Unsurprisingly, Boland lays the decision squarely at Ganzel's feet. Boland Br. at 8. Regardless, Ganzel's termination letter settles the matter: "I have accepted Dr. Boland's recommendation. . . ."[123] She did not have to do this, as she admits. Ganzel Br. at 7 (noting she could have overruled Boland).[124] And she admitted non-renewals are something department chairs recommend but she must affirm.[125] She claims she did not get "granular" or "micromanage" Dr. Josephson's performance, Ganzel Br. at 6, 7, but she also says Boland told her how Dr. Josephson "was not meeting his performance metrics, fulfilling clinical expectations, or satisfying the terms of his work assignment," as well as how there were "growing concerns about [his] competence," *id.* at 6—all of which is granular and unfounded. *See supra* Facts I.P. Taking the rare act of terminating a professor of Dr. Josephson's seniority is *per se* "getting further involved." Ganzel Br. at 6.

In short, the record proves each Defendant played a role in terminating Dr. Josephson because of his speech.

II. Defendants rely on assertions that are not material but are disputed.

A. The evidence shows that Dr. Josephson spoke in his personal capacity at the Heritage Foundation.

Defendants insist that Dr. Josephson somehow spoke for the University at the Heritage Foundation based solely on how he described his duties. Woods Br. at 2–3; Carter Br. at 1–2; Le Br. at 3; Boland Br. at 2–3. This entire inquiry is immaterial, as *Garcetti's* "official duties" test does not apply to faculty speech "related to scholarship or teaching," speech like Dr. Josephson's presentation. Pl.'s Br. at 26–27; *see infra* Argument I.A.1.a. Even so, the facts are at best disputed. Dr. Josephson spoke on his own time; the University did not even cover his expenses.[126] The Heritage

[123] Pl.'s Dep. Ex. 142.
[124] Ganzel Dep. 64:5–9.
[125] Ganzel Dep. 57:10–17
[126] Josephson Dep. 13:8–14:23.

Foundation invited him because of his expert testimony on gender dysphoria, work Woods insisted be done on his own time.[127] And he explicitly spoke for himself, not the University.[128] So it is clear that Dr. Josephson spoke in his personal capacity.

B. The evidence shows that any concerns about Dr. Josephson's plans for treating gender dysphoria in his Division were due to his views.

Defendants point to some plans Dr. Josephson discussed with Brady about treating gender dysphoric children in the Division. Carter Br. at 2–4. None of this changes the fact that Defendants' opposition to his views was a substantial factor in his mistreatment. *See supra* Facts I.D–Q; Pl.'s Br. at 36–41. But their account is disputed.

First off, Carter did not approach Woods due to Brady's concerns. Carter. Br. at 4. Within two hours of learning about the Heritage Foundation presentation, Brady reported that she approached Carter, who became "very concerned" and did "not want this to go unaddressed" because of Dr. Josephson's views. *See supra* Facts I.A. Ron Paul (head of faculty affairs) suggested that Carter and Brady meet with Woods, a recommendation Steinbock conveyed[129] and Carter followed.[130] Brady admitted Dr. Josephson's Heritage Foundation remarks sparked Carter's request.[131]

Second, Defendants blatantly mischaracterize Dr. Josephson's motives and interactions with Brady. Carter Br. at 2–3. Well before the Heritage Foundation presentation, he scheduled a time to shadow Brady at the endocrinology department's gender clinic because she wanted to do more work there and, as her supervisor, he wanted to understand better what that entailed so he could support her.[132] What he saw—a gender dysphoric youth with a severe anxiety disorder from a dysfunctional family receiving injections after her second visit—concerned him.[133] So he considered how

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[127] Pl.'s Dep. Ex. 36 at 1.
[128] Pl.'s Ex. 175 at 4:21–24 ("And I'll just add that each is speaking in his or her individual capacity; they're not speaking on behalf of any organization.").
[129] Pl.'s Dep. Ex. 115 at 1–2.
[130] Pl.'s Dep. Ex. 6 at 2.
[131] Brady Dep. 110:4–7.
[132] Josephson 2d Decl. ¶¶ 6–8; Brady Dep. 18:24–19:15 (testifying that Dr. Josephson proposed the visit "to learn more" about the clinic).
[133] Josephson Decl. ¶¶ 9–12; Pl.'s Dep. Ex. 160 at 52–53 (describing his concerns); Pl.'s Dep. Ex. 20 at 4 (confirming the patient was there on her second visit and did receive injections); Brady Dep. 174:5–

his Division might offer gender dysphoria care, and he asked Brady to design and lead the effort.[134] She gave him no answer.[135] Her concerns with these plans arose because she disagreed with Dr. Josephson's views on the proper treatment of children with gender dysphoria.[136] Instead, Brady went to Dr. Wintergerst,[137] head of endocrinology,[138] who viewed these plans as competition,[139] likely because they might lessen demand for the lucrative long-term hormone treatments he offered. But even Carter knew Wintergerst would object due to Dr. Josephson's views.[140] This is why he sounded off to Wintergerst about Dr. Josephson's "highly conservative position."[141]

Defendants imply Dr. Josephson was pressuring Brady. Carter Br. at 2–3. But Brady admitted he simply asked if she would accept the leadership role he offered her, as she had not answered.[142] When she finally declined, he did not raise the issue again.[143] There was no need to brief anyone, as these remained preliminary ideas.[144]

In sum, Defendants' objections were overblown and viewpoint-based.

C. The evidence shows that the University tried to create a welcoming environment only for its preferred viewpoints.

Defendants insist they were trying to create "an inclusive and welcoming environment." Ganzel Br. at 9. Yet Ganzel declared that Dr. Josephson's speech "clearly

175:4 (testifying the patient received instructions on how to administer at-home hormone injections).

134 Pl.'s Dep. Ex. 2 at 1 ("You and I will take as much time as needed to plan for the future of transgender services in the [Bingham] Clinic [part of the Division]. I want you to think about how you would want to structure it and present that plan to me."); *accord* Brady Dep. 58:18–59:15; Woods Dep. 39:5–18; Carter Dep. 88:21–89:6, 91:25–92:2, 128:15–21.

135 Brady Dep. 98:21–25, 99:21–100:8 (testifying she had not answered by Oct. 31).

136 Brady Dep. 96:14–21, 97:15–17 (testifying her concerns with Dr. Josephson's plans stemmed only from "his expert testimony and his Heritage Foundation presentation," views that "differed from [hers] significantly").

137 Carter Dep. 150:18–25.

138 Pl.'s Dep. Ex. 6 at 2; Woods Dep. 113:1–2; Carter Dep. 126:1–2.

139 Brady Dep. 60:16–24 (describing how she and Carter feared it "could damage our relationship with endocrinology to have a competing clinic").

140 Pl.'s Dep. Ex. 8 at 2 ("Allan's claim that these are psychiatric disorders that need to be treated by psychiatrists and psychologists, not endocrinologists . . . would incense Dr. Wintergerst. . . ."); Woods Dep. 114:9–115:16 (noting Wintergerst disagreed with Dr. Josephson).

141 Pl.'s Dep. Ex. 7 at 1.

142 Brady Dep. 131:4–21.

143 Brady Dep. 149:3–8.

144 Brady Dep. 59:16–60:9 (testifying repeatedly she never discussed logistics with Dr. Josephson); Brady Dep. 146:17–22 (confirming these plans were "a proposal"); Woods Dep. 39:15–18 (same); Carter Dep. 88:21–89:2, 91:25–92:2 (same).

doesn't reflect the culture we are trying so hard to promote"[145]—without even watching it. Pl.'s Br. at 7 & n.59. While Woods understood that inclusion required the University not to punish a professor for "being an outlier in one area or another, while superb everywhere else," he still concluded that Dr. Josephson's views disqualified him from leadership.[146] Then Woods demoted him because his faculty disliked his views, a decision Ganzel blessed. Pl.'s Br. at 9–10 & n.88; *see supra* Facts I.E, G. Defendants then minimized Dr. Josephson's role because of his views, Pl.'s Br. at 11–12; required him to flag when he differed from an illusory curriculum, *id.* at 12–13; tracked complaints against him, *id.* at 13–15; ignored misconduct against him, *id.* at 15–16; attacked him, *id.* at 16–17; planned his termination within months of his demotion, *id.* at 17; conducted "sleuthing" operations against him while objecting to his expert testimony, *id.* at 17–18; refused to use the same performance review procedures for him they used for anyone else, *id.* at 19–20; urged each other to generate "strong documentation" to "avoid [his] reappointment," *id.* at 20; and coached students on what to include in complaints against him, *id.* at 21. Thus, Defendants created a hostile environment because of Dr. Josephson's views.

D. The evidence shows that Woods began thinking about demoting Dr. Josephson by at least November 2, 2017.

Defendants claim Woods began thinking of demoting Dr. Josephson after the November 15 faculty meeting. Woods Br. at 6. This is immaterial because it does not change why Woods demoted him (*i.e.*, his views). But Defendants' account is disputed.

In actuality, demotion was on Woods' mind two weeks earlier when he noted: "[Dr. Josephson's] ability to lead the Division . . . may be in jeopardy over this issue."[147] Five days later, nothing had changed: "If you really see this work [gender dysphoria] as your personal calling, you will be at odds enough with your Divisional faculty that

[145] Pl.'s Dep. Ex. 3 at 1.
[146] Pl.'s Dep. Ex. 45 at 3.
[147] Pl.'s Dep. Ex. 42.

you will not be able to continue to lead them."[148]

Defendants also claim that Woods was trying repair Division relationships. Woods Br. 5; Boland Br. at 4–5. Not at all. He encouraged Carter's continued complaints,[149] planned with him how to confront Josephson (though opting to remain behind the scenes),[150] and promised action.[151] Without even hearing Dr. Josephson's side of the faculty meeting, he planned to replace Dr. Josephson with Carter and either Le or Lohr.[152] When they met on November 16, Woods had concluded that even if Dr. Josephson followed all the new restrictions, he still could not remain Division Chief.[153] Then he told Dr. Josephson to go fix everything, Woods Br. at 5 (instructing him to speak with others and regain confidence), only to decide to demote him six days later (though he delayed informing Dr. Josephson, "not want[ing] to officially pull the plug the day before Thanksgiving"[154]). Never once did he tell Carter, or other faculty, to compromise and seek harmony with Dr. Josephson.

E. The evidence shows that Defendants generated complaints against Dr. Josephson to cloak their push for his demotion and termination.

Defendants reference various complaints against Dr. Josephson. None are material because, even if they had merit, they would not change the fact that Dr. Josephson's speech on gender dysphoria was a substantial factor in their mistreatment of him. *See supra* Facts I.D–Q; Pl.'s Br. at 36–41. But the evidence shows that all these complaints arose only after Defendants learned of his speech on gender dysphoria.

Defendants cite Carter's insistence that Dr. Josephson address the "tension" in the Division. Carter Br. at 4. Of course, this "tension" arose only because of the views Dr. Josephson expressed at the Heritage Foundation and in his expert testimony. By

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148 Pl.'s Dep. Ex. 45 at 3.
149 *See, e.g.*, Pl.'s Dep. Ex. 40 at 1.
150 Pl.'s Dep. Ex. 10 at 1–2; Woods Dep. 144:21–146:6; Carter Dep. 175:4–8.
151 Pl.'s Dep. Ex. 48 at 1; Boland Dep. 58:18–21 (admitting "Kim" refers to her).
152 Pl.'s Dep. Ex. 50 ("interim co-role BC + DL or JL"); Woods Dep. 171:3–19 (referring to Carter, Lohr, Le).
153 Pl.'s Dep. Ex. 51 (noting Woods' "personal conclusion that, if you continue to pursue your extra-university testimonies, *even in compliance with the above policies*, your ability to lead your Division will be severely compromised" (emphasis added)).
154 Pl.'s Dep. Ex. 54 at 3.

this point, Carter, Le, Brady, and two others had "agree[d] that Allan must cease and desist in these activities in his role as division chief and UofL faculty member."[155]

Defendants point to complaints about Dr. Josephson using his office to meet with attorneys, being away from the office, and how he allocated Brady's time. Carter Br. at 4; Le Br. at 7. But Carter admits he did not know whether Dr. Josephson was meeting with attorneys regarding gender dysphoria cases and had no access to his calendar.[156] Dr. Josephson never did so.[157] But Carter's complaint is curious, seeing as he used his office and office equipment (as did others) to complain about Dr. Josephson's views.[158] Nor did he or Le know why Dr. Josephson was away.[159] And while Carter complained about how Brady's time was allocated[160] and even accused Dr. Josephson of being dishonest about this,[161] he had no direct knowledge,[162] and he concealed Dr. Josephson's e-mail clarifying the matter.[163]

Defendants blame Dr. Josephson for the November 15 faculty meeting's tension. Woods Br. at 4; Carter Br. at 5; Le Br. at 5–6. But Le admitted that some of the faculty intended all along to attack him[164] and that he felt attacked. Le Br. at 6. These attacks were due to his views. *See supra* Facts I.F. Brady admitted the morale problem she referenced arose only during this meeting.[165] It is unreasonable to blame tension arising from the faculty's attack on the victim of their attacks.[166]

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155 Pl.'s Dep. Ex. 8 at 2.
156 Carter Dep. 165:17–20, 182:19–183:4.
157 Josephson Decl. ¶¶ 13–15.
158 Brady Dep. 26:9–18, 74:23–75:7, 168:20–169:7, 170:20–171:4, 178:4–11, 179:2–5 (testifying she communicated with Lambda Legal and Carter about Dr. Josephson in her office, over the office phone, using University e-mail, on University time); Carter Dep. 210:15–18 (admitting University printers were the only ones available for printing Dr. Josephson's *Adams* deposition he annotated for Woods).
159 Josephson Decl. ¶ 24; Carter Dep. 165:17–20, 182:19–183:4; Brady Dep. 76:7–8, 77:8–17 (admitting she did not know why Dr. Josephson was gone and did not ask him); Woods Dep. 166:11–167:9 (admitting he never investigated Carter's claim or asked Dr. Josephson about it); Le Dep. 169:3–13.
160 Pl.'s Dep. Ex. 8 at 2.
161 Pl.'s Dep. Ex. 13 at 3; Carter Dep. 185:22–186:2; Woods Dep. 168:9–11 (admitting never investigating).
162 Carter Dep. 168:11–21, 170:14–17 (admitting he never discussed these plans with Dr. Josephson, who never made statements about Wintergerst Carter attributed to him in Pl.'s Dep. Ex. 8).
163 Pl.'s Dep. Ex. 49; Woods Dep. 170:16–18 (noting Carter never shared this e-mail).
164 Le Dep. 42:21–43:6 (admitting the meeting was tense and attacking Dr. Josephson "may have been the intent of some of the people").
165 Brady Dep. 70:25–11
166 Josephson Decl. ¶¶ 16–19.

Defendants point to Carter's and Brady's accusation of gender bias. Carter Br. at 6; Boland Br. at 5. Yet, Carter admitted from the outset that this concern arose only "[s]ince the faculty have become aware of Allan's activities,"[167] meaning his Heritage Foundation presentation and expert testimony.[168] Even at depositions, Defendants and others admitted they had no concerns about Dr. Josephson before he expressed his views.[169] Boland only became concerned when Carter sent her the same e-mail,[170] and later she admitted Carter was exaggerating.[171] When Woods heard Carter's and Brady's accusations, he saw the situation as "implicit bias" at most.[172] At deposition, he recalled a concern about Le's salary, but admitted Dr. Josephson had "not . . . made a conscious decision" about this and had not objected to Woods' increase of Le's salary.[173] Even Le admitted she was several years junior to the comparators.[174]

At Carter's suggestion,[175] Boland met with Le, Brady, and other female faculty. Boland Br. at 4. Again, these professors raised complaints that none had mentioned before Dr. Josephson expressed his views—not once in his fifteen years at the University.[176] They claimed he would "yell in meetings,"[177] only later to admit this happened once at most.[178] They accused him of plagiarizing notes, Boland Br. at 4, when this was a common practice since the advent of electronic records.[179] They complained about his views of the black family, Boland Br. at 4, but he simply commented on the impact of the breakdown of the family[180]—hardly surprising for a family thera-

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167 Pl.'s Dep. Ex. 13 at 1.
168 Brady Dep. 147:11–14 (testifying "Allan's activities" refers to the Heritage Foundation remarks).
169 *See supra* note 62 and accompanying text.
170 Pl.'s Dep. Ex. 77 at 1–2.
171 Boland Dep. 73:19–22 (admitting Woods viewed events more accurately).
172 Pl.'s Dep. Ex. 14 at 1; Brady Dep. 151:18–152:11 (identifying the two as Carter and herself).
173 Woods Dep. 180:5–7, 181:25–182:2.
174 Le Dep. 93:10–22.
175 Pl.'s Dep. Ex. 77 at 1–2; Boland Dep. 73:19–22 (admitting Woods viewed events more accurately).
176 Boland Dep. 76:8–12 (admitting female faculty never raised concerns before fall 2017); Le Dep. 35:16–36:4, 100:3–5, 101:25–102:3; Brady Dep. 165:10–12; *accord supra* note 62 and accompanying text.
177 Pl.'s Dep. Ex. 17 at 1. *But see* Josephson 2d Decl. ¶¶ 16–19.
178 Brady Dep. 152:1–4.
179 Josephson 2d Decl. ¶ 23.
180 Josephson 2d Decl. ¶ 25.

pist[181]—and Lohr, who heard remarks that sparked a similar complaint, recalled no racial remarks and admitted he said nothing problematic.[182] Any morale issue was just an after-effect of the faculty meeting.[183]

Despite what they claim, they could not identify any faculty who declined an offer or left the University due to Dr. Josephson's remarks. Pl.'s Br. at 8 n.67. Notably, Boland and Woods neither investigated nor gave Dr. Josephson a chance to respond,[184] as he could have.[185] But these faculty repeated a consistent drumbeat (*i.e.*, objecting to Dr. Josephson's views)[186] with a transparent goal (*i.e.*, his removal).[187]

Defendants then claim that Dr. Josephson would not look at or talk to Carter after the demotion. Carter Br. at 9; Le Br. at 10. This represents the essence of projection, as it was Carter who assiduously avoided interacting with Dr. Josephson, to the point of hiding in his office as Dr. Josephson packed up his office on his last day.[188]

In sum, these complaints say more about Defendants' animosity towards Dr. Josephson's views than they do about him, and they confirm his speech was a substantial factor in his mistreatment.

F. The evidence shows that after the mid-November 2017 faculty meeting, Woods decided Dr. Josephson's views and speech disqualified him from leadership, placed him in a catch-22, and then demoted him before he could do anything.

In recounting Woods' meetings with Dr. Josephson after the November 15 faculty meeting, Defendants attempt to revise history. Regarding his November 16 meeting

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181 Compl. ¶ 70.
182 Pl.'s Dep. Ex. 16 at 1; Lohr Dep. 70:25–71:2, 72:13–18 (not recalling Dr. Josephson raising racial issues and admitting his remarks were not problematic); Pl.'s Dep. Ex. 16 at 2 ("The people around me, mostly doctors, did not have a strong opinion on his presentation.").
183 Brady Dep. 70:25–11.
184 Boland Dep. 76:24–77:17, 78:1–4, 78:23–79:4, 79:8–18, 81:17–19, 82:20–83:20.
185 Josephson 2d Decl. ¶¶ 20–26.
186 Pl.'s Dep. Ex. 17 at 1–2 (noting they pulled "[t]rainees . . . from didactics with [him] because of his controversial beliefs about transgender issues" and kept "fellows and residents away from him" for the same reason); Brady Dep. 158:21–23 (noting Carter pulled the trainees); Boland Dep. 78:5–11 (same); Le Dep. 98:5–10 (attributing this to Carter or Threlkeld); Brady Dep. 159:22–160:7 (noting "controversial beliefs" refers to "the views [Dr. Josephson] outlined at the Heritage Foundation and in his expert testimony").
187 Pl.'s Dep. Ex. 17 at 2 ("Dr. Le would be interested in being interim Division chief with Dr. Carter.").
188 Josephson 2d Decl. ¶ 35.

with Dr. Josephson, Woods now faults Dr. Josephson for not appreciating the scope of faculty frustration. Woods Br. at 5. Yet Defendants insist only four professors objected. *Id.* at 4; Carter Br. at 5. And they objected because of Dr. Josephson's views. *See supra* Facts I.F. Even so, Dr. Josephson said he would develop a plan to resolve matters, as he had done before in his 30 plus years of leading faculty.[189] What else could he say less than 24 hours after the event? Yet, Woods demoted him without allowing him sufficient time to resolve the situation.

Curiously, none of Woods' notes record these remarks.[190] But they do record how he imposed four new restrictions on Dr. Josephson because of his views, and how he thought "disagreement on a single issue that is of such importance to the rest of the Division members" could disqualify Dr. Josephson from leadership.[191] Thus, it was Woods' "personal conclusion that, if you continue to pursue your extra-university testimonies, *even in compliance with the above policies*, your ability to lead your Division will be severely compromised."[192]

Next, Woods admits he told Dr. Josephson to meet with the faculty, only to fault him on the same page for having those conversations. Woods Br. at 5. And Woods also blames him for being perceptive, *id.* (faulting him for viewing faculty as attacking him), seeing as Le admitted attacking him was the intent of at least some faculty.[193]

Woods' account of his November 22 meeting with Dr. Josephson is disputed. It would be completely understandable if Dr. Josephson were upset that a week earlier his faculty had demanded that he apologize or issue a disclaimer for his views, with the intent of attacking him. But in fact, this meeting, which Woods insisted on having the day before Thanksgiving,[194] was perfectly cordial, where Dr. Josephson again as-

[189] Compl. ¶¶ 196–97; Josephson Dep. 30:15–31:1, 37:6–14; Woods Dep. 60:6–12.
[190] Pl.'s Dep. Ex. 14; Pl.'s Dep. Ex. 51.
[191] Pl.'s Dep. Ex. 51.
[192] Pl.'s Dep. Ex. 51 (emphasis added).
[193] Le Dep. 42:21–43:6 (admitting attacking Dr. Josephson "may have been the intent of some of the people").
[194] Pl.'s Ex. 183 at 1; Compl. ¶ 199; Josephson Dep. 32:22–33:24 (describing "fairly urgent call" from Woods' assistant to schedule meeting without giving information as to its topic).

sured Woods he would address the faculty's discontent.[195] Any concern that the faculty would continue to agitate is just a heckler's veto.[196] Dr. Josephson immediately agreed to stop his private pay arrangement, which benefited only the Division.[197] But Woods had decided by this time to demote Dr. Josephson, though he concealed this, "not want[ing] to officially pull the plug the day before Thanksgiving."[198]

In short, Woods held Dr. Josephson's views against him and set Dr. Josephson up for failure, by allowing the animosity against him to build for six weeks but then demoting him before allowing him adequate time to address the concerns.

ARGUMENT

The undisputed evidence shows that after Dr. Josephson publicly expressed his views about diagnosis and treatment of children with gender dysphoria, each Defendant expressed their opposition to his views. They called for his demotion. They restricted his practice and teaching in ways done to no one else. They kept a running tally of complaints (without confirming the veracity of any) against him, in a campaign to produce "strong documentation" in order "to avoid Allan's reappointment," a campaign for which the Dean conveyed her full support. Then, ignoring his sustained productivity increase, they did what they set out to do: terminated his employment.

Defendants now move for summary judgment. But summary judgment is only appropriate where, "viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 526 (6th Cir. 2014). Defendants fall far short of this burden as they rely on testimony or inferences that directly contradict documentary evidence created at the time of the relevant events. The undisputed evidence cuts deci-

[195] Josephson 2d Decl. ¶¶ 27–28; Josephson Dep. 33:25–36:21 (describing meeting and how it covered "nothing substantively new"); Josephson Dep. 37:6–14 (describing experience-based confidence at surmounting faculty concerns).
[196] Woods Dep. 140:3–143:24 (describing Woods' perceived threat of hostile environment suits).
[197] Josephson 2d Decl. ¶¶ 28, 31–33.
[198] Pl.'s Dep. Ex. 54 at 3.

sively in favor of Dr. Josephson. Thus, this Court should deny Defendants' motions.

I. The undisputed material evidence supports Dr. Josephson's claims against each Defendant.

Here, the evidence points in only one direction: Defendants unconstitutionally retaliated against Dr. Josephson, and in so doing imposed content- and viewpoint-based unconstitutional conditions upon him and breached his rights to due process and equal protection of law. This Court should deny Defendants' motions.

A. Defendants violated Dr. Josephson's rights by creating a hostile work environment and eventually ending his appointment at the University because of his protected speech.

Defendants orchestrated a campaign of opposition to Dr. Josephson because of his speech, creating a hostile work environment and culminating in his termination, violated his rights. To prevail on this claim, Dr. Josephson must show "(1) that . . . he engaged in a constitutionally protected activity, (2) that the defendant's adverse action . . . would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to" Dr. Josephson's speech. *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998). This framework applies to any adverse actions by the Defendants, whether in creating the hostile work environment or in orchestrating Dr. Josephson's termination because "[t]his standard is amenable to all retaliation claims." *Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999).

1. Dr. Josephson engaged in constitutionally protected speech.

Undisputed evidence shows that Dr. Josephson engaged in constitutionally protected speech through his presentation at the Heritage Foundation and as an expert witness because he spoke as a citizen on matters of public concern and his interest in speaking outweighs any interests Defendants claim in restricting his speech. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568–73 (1968).

a. Dr. Josephson spoke as a citizen when he discussed how best to treat gender dysphoria in children.

Generally, for a public employee's speech to be protected, he must speak "as a

citizen." *Id.* at 568. Defendants claim Dr. Josephson's Heritage Foundation remarks are not protected as he spoke "pursuant to his official duties." Carter Br. at 20.[199]

Defendants' argument is wrong for two reasons. First, it misses the protection that extends to public *university* faculty engaged in "scholarship or teaching." *See Meriwether*, 992 F.3d at 504 (quoting *Garcetti v. Ceballos*, 547 U.S. 411, 425 (2006)). As *Meriwether* makes clear, the protection government employees receive while speaking "as a citizen" extends to university professors *even while carrying out their official duties*, so long as they are executing "core academic functions, such as teaching and scholarship." *Id.* at 505. *Meriwether* specifically found that *Garcetti*'s "official duties" rule did not bar a professor's free speech claim for *in-class* speech—speech that is unquestionably a part of a professor's "official duties." *See id.* at 504–07. And *Meriwether* simply builds on *Hardy*, which held that the notion that professors "have no First Amendment rights when teaching . . . is totally unpersuasive." *Hardy*, 260 F.3d at 680. In all 132 pages of their six motions, Defendants do not cite *Meriwether* a single time or address *Hardy's* application of *Pickering* to a professor's in-class speech. *Meriwether* squarely holds that it does not matter whether Dr. Josephson's official duties involved giving off-campus presentations; what matters is whether he was "engaged in core academic functions, such as teaching and scholarship" when he gave them. *Meriwether*, 992 F.3d at 505. Defendants cannot and do not contest the scholarly and didactic nature of the Heritage Foundation presentation.

Second, Defendants misapprehend the way the "official duties" test works when it applies. Speech is part of one's official duties when it:

- "owes its existence to a public employee's professional responsibilities";
- is "commissioned or created" by the employer;
- "is part of what [the employee] was employed to do";
- is a task the employee "was paid to perform"; and

[199] Each Defendant adopts Defendant Carter's position on this issue. Ganzel Br. at 14–15 & n.81–82; Boland Br. at 16–17 & n.123; Woods Br. at 14 n.104; Le Br. at 18 n. 129–30; Lohr Br. at 9 n.6, 16 n.7.

- "[has] no relevant analogue to speech by citizens who are not government employees."

Garcetti, 547 U.S. at 421–24. Defendants make much of Dr. Josephson's general description of his position as the "face" of the Division involving public presentations, but identify no part of his work assignment that *required* such activities, no part of his compensation that was related to speaking, and no University policy that "commissioned" this kind of speech. *See* Carter Br. at 20–21. But Dr. Josephson's Heritage presentation "owe[d] its existence," *Garcetti*, 547 U.S. at 421–22, to his work as an expert witness,[200] which Defendants concede *was not* a part of his official duties. *See* Carter Br. at 22 ("Dr. Josephson's service as an expert witness was not part of his job duties at the University of Louisville."); *see also supra* Facts II.A.

In sum, all of Dr. Josephson's activities related to scholarship and teaching, regardless of their relation to his official duties, is protected under *Hardy* and *Meriwether*, and his Heritage presentation was not a part of his official duties in any event. So he spoke "as a citizen," and his speech qualifies for protection under *Pickering*.

b. Dr. Josephson's speech addressed matters of public concern.

Undisputed evidence shows Dr. Josephson's Heritage Foundation remarks and expert testimony addressed matters of public concern. "When speech relates 'to any matter of political, social, or other concern to the community,' it addresses a public concern." *Meriwether*, 992 F.3d at 508 (quoting *Connick v. Meyers*, 461 U.S. 138, 146 (1983)). So a professor's mode of address, including his refusal to use identity-based terms rather than terms consistent with a student's biological sex, implicated "a hotly contested matter of public concern." *Meriwether*, 992 F.3d at 506. Dr. Josephson's speech addresses the same matter of public concern, "his views on gender identity," as Dr. Meriwether's. *Id.* Dr. Josephson also brought his medical expertise to bear and commented on the diagnosis and treatment of gender dysphoria in children—another matter of public concern all on its own that has engendered a national public policy

[200] Josephson Dep. 13:8–14:23.

debate. *See* Pl.'s Br. at 1 & n.1–2.[201]

Defendants deploy a bait-and-switch in contending that Dr. Josephson's speech was entirely unprotected. They argue that his Heritage Foundation presentation was unprotected as part of his "official duties" (wisely conceding that it addressed matters of public concern). Then they admit his expert testimony was *not* part of his "official duties" but contend it is still unprotected because *it* did not address a matter of public concern (despite addressing the *same* matters as the Heritage Foundation presentation—gender dysphoria in children). *Compare* Carter Br. at 19–22 *with id.* at 22–24. Speech given at the lectern that addresses a matter of public concern does not become unprotected when similar speech is offered from the witness stand. Rather, the question is whether "[t]he *content* of . . . the testimony . . . involves a matter of public concern." *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (emphasis added). And the Supreme Court has said gender dysphoria is one such question. *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018).

The *Lane* Court found that testimony involving "corruption in a public program and misuse of state funds . . . obviously involves a matter of significant public concern." *Lane*, 134 S. Ct. at 2380. The case in which Dr. Josephson testified involved a school bathroom policy's compliance with federal statutory and constitutional law, a matter of urgent public concern there and throughout the country. Pl.'s Br. at 7.[202] Dr. Josephson's testimony about the medical diagnosis and treatment of children with gender dysphoria informed the legal dispute in that case, and the public debate generally, since the nature and gravity of harm to students of different public policy decisions is a relevant consideration in both the courtroom and the legislature.

Defendants cite other cases that focused on personal disputes, not public policy. Carter Br. at 23. One involved testimony as a character witness "in support of his

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[201] *Accord* Hannah Natanson, *Loudoun School Board Reaches Settlement with Teacher Who Sued over Transgender Policy*, WASH. POST (Nov. 15, 2021), https://wapo.st/30GxNaM (last visited Nov. 19, 2021).
[202] *See supra* note 201.

sister-in-law during a personal dispute with her ex-husband over the custody of their child" where there was "no indication that this testimony was of interest or concern to the community at large." *Butler v. Bd. of Cnty. Comm'rs for San Miguel Cnty.*, 920 F.3d 651, 664 (10th Cir. 2019). The other addressed testimony solely "to secure custody of her granddaughter—a matter of personal interest, not one of public concern." *Bard v. Hamilton Cnty. Dep't of Job & Fam. Servs.*, 809 F. App'x 308, 311 (6th Cir. 2020). In contrast, Dr. Josephson's expert testimony addressed a matter of public concern because courts consider expert testimony when assessing the strength of a state interest when its policy faces a constitutional challenge. *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1299–1301 (11th Cir. 2020) (relying partly on expert testimony to assess the strength of the state's interest). Thus, Dr. Josephson's Heritage Foundation speech and expert testimony addressed matters of public concern.

c. *Pickering* balancing weighs in favor of Dr. Josephson.

When an employee speaks as a citizen, the government cannot restrict that speech unless its interest "in promoting the efficiency of the public services it performs through its employees" outweighs the employee's "in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568. Defendants contend that Dr. Josephson's interest in speaking was low and that the University's interest in restricting his speech was high. Carter Br. at 25–29. That is backwards. *See* Pl.'s Br. at 28–30.

Defendants claim that Dr. Josephson's speech only "pertained to psychiatric treatment of a particular patient population," "w[as] not core political speech," and, therefore "does not garner a high level of protection." *Id.* at 25. But speech need not be "core political speech" in order to qualify for heightened protection in the *Pickering* balancing test. Indeed, non-political *academic* speech, so long as it addresses a matter of public concern, "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Hardy*, 260 F.3d at 678 (quoting *Connick*, 461 U.S. at 145)). This is because, even where the "speech does not itself constitute

pure public debate," the "essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.'" *Id.* at 679. Dr. Josephson's discussion about "psychiatric treatment of a particular patient population," Carter Br. at 25, informs ongoing public policy debates that deal with public health, education, accommodations, national defense and more. Therefore, Dr. Josephson's speech "occupies the highest rung" of constitutional values and "is entitled to special protection" in the *Pickering* balancing. *Hardy*, 260 F.3d at 678 (quotation omitted).

Neither do Defendants have any substantial interest in restricting Dr. Josephson's speech. They contend "harmony" was "disrupted because of Josephson's speech," Carter Br. at 26, but cite no cases finding that a threat to "harmony" in the *academic* context justifies restricting a professor's speech. And the Sixth Circuit has already rejected this argument. When a professor used concededly offensive language in class that "*did* have the effect of creating disharmony between [him] and the College administrators," the Court still found that the speech was protected since there was no *material* disturbance. *Hardy*, 260 F.3d at 681 (emphasis added). Rather, the "circumstances surrounding Hardy's termination appear to present a classic illustration of 'undifferentiated fear' of disturbance on the part of the College's academic administrators." *Id.* So too here: each Defendant testified that no classes, meetings, or other services were canceled or disrupted due to Dr. Josephson's speech (no material disruption), and Ganzel could point to no disruption other than disagreeing with faculty, *see* Pl.'s Br. at 29 & n.286–88; *id.* 4–5 & n. 26, 34. Now, Defendants claim a generalized "harmony" in "the wider University community" was "disrupted" without identifying any material disruption of services. Carter Br. at 26. The result here should mirror *Hardy*: "On balance, [Josephson's] rights to free speech and academic freedom outweigh the [University]'s interest in limiting that speech." *Hardy*, 260 F.3d at 682.

Defendants next claim that Dr. Josephson's allegation that there was "a 'hostile

work environment'" proves that his own speech was disruptive enough to justify actions against him. Carter Br. at 26–27. But Dr. Josephson has alleged that Defendants' reaction to his speech *created* the hostile work environment. *See* Pl.'s Br. at 30–32. Defendants' theory—that public officials could create a hostile environment in response to another employee's views, terminate the employee, then rely on the hostile environment to say the employee's speech is unprotected under *Pickering*—is a pure heckler's veto, something which the Sixth Circuit has clearly rejected. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("The heckler's veto is precisely that type of odious viewpoint discrimination.").

Defendants also contend that Dr. Josephson's speech disrupted the workplace by "prompting a 'nonstop conversation' among coworkers." Carter Br. at 27. But they cite no authority that this type of impact actually constitutes a disruption in the *academic* context. And for good reason—the academic endeavor itself is described as "the Great Conversation." *See generally* THE GREAT CONVERSATION (GREAT BOOKS OF THE WESTERN WORLD) (Robert M. Hutchins ed., 1952). Academic speech is designed to provoke conversation. A power to silence speech merely because it provokes "nonstop conversation" in the academic context would be an "alarming power to compel ideological conformity," and "[t]hat cannot be." *Meriwether*, 992 F.3d at 506.

Dr. Josephson has strong constitutional interests in speaking as a citizen on matters of public concern through his Heritage presentation and his expert testimony and Defendants have no legitimate interests in restricting that expression. Therefore, Dr. Josephson engaged in constitutionally protected speech.

2. Defendants took adverse actions against Dr. Josephson.

The Constitution prohibits public employers from taking adverse actions against employees because of their exercise of constitutional liberty. An action qualifies as an "adverse action" where "it would likely chill a person of ordinary firmness from continuing to engage in [constitutionally protected] activity. *Bloch*, 156 F.3d at 678. De-

fendants took two actions that meet this standard: creating a hostile work environment and terminating Dr. Josephson's employment.

a. Defendants created a hostile environment for Dr. Josephson.

Dr. Josephson may assert a hostile work environment claim under § 1983 because the standard for adverse action—whether the action would deter a person of ordinary firmness from engaging in constitutionally protected activity—is "amenable to all retaliation claims," including claims that describe "an entire campaign of harassment" that, though "'trivial in detail,' . . . 'may have been substantial in gross.'" *Thaddeus-X*, 175 F.3d at 398 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)). "Like the definition of protected conduct, . . . the definition of adverse action is not static across contexts" and is "capable of being tailored to the different circumstances in which retaliation claims arise." *Id.* at 398. The constitutional "threshold is intended to weed out only inconsequential actions, and is not a means whereby solely egregious retaliatory acts are allowed to proceed past summary judgment." *Id.* Therefore, retaliation in any form "is actionable if it is capable of deterring a person of ordinary firmness from exercising his or her right." *Id.*

Defendants claim the "Sixth Circuit has not recognized Josephson's theory of an adverse employment action and doing so here makes little sense." Boland Br. at 14. But Defendants do not dispute the standard for adverse action adopted in *Thaddeus-X*, *see* Lohr Br. at 9, and instead argue that (1) a hostile work environment claim must be raised against the employer as an entity and (2) the threshold for a hostile work environment must be the same as in Title VII claims. Both contentions are incorrect.

First, Defendants point out that "[h]ostile work environment claims *arising under Title VII or other civil rights statutes* impute liability against an individual's *employer*." Boland Br. at 14 (emphasis added); *accord* Woods Br. at 15; Carter Br. at 18; Le Br. at 18. Just so. But Congress wrote "Title VII or other civil rights statutes" to extend to private conduct and had a free hand in deciding where to impose liability

or not. But Congress's decisions about where to impose liability when writing statutes that extend to private discrimination say nothing about government officials' responsibility under the Constitution. The "standard . . . amenable to *all* retaliation claims" under the First Amendment is that *officials* may not take action against a citizen that would deter a person of ordinary firmness from exercising a constitutionally protected liberty, even actions that represent a "campaign of harassment" that might be "trivial in detail." *Thaddeus-X*, 175 F.3d at 397–98 (emphasis added, cleaned up).

Second, the same reasoning explains why the threshold for liability comes from First Amendment law, not Title VII. Defendants claim a "hostile work environment only exists where 'the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment and create an abusive working environment." Woods' Br. at 15 (quotation omitted); *accord* Carter Br. at 17–19, 31–34; Ganzel Br. at 15 n.83; Le Br. at 18; Boland Br. at 14–15. But Congress's decision about where to draw the line for liability under its own statutes does not affect the threshold for adverse action by government officials under the Constitution. Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). Under the Constitution, "any action that would deter a person of ordinary firmness from exercising protected conduct will suffice, which may include harassment." *Fritz v. Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010). Therefore, Dr. Josephson may raise his hostile work environment claim against each Defendant and the Court should evaluate his claims under the constitutional standard, not the Title VII standard.

b. Defendants terminated Dr. Josephson's employment.

Defendants' decision not to renew Dr. Josephson's contract was an adverse action. In the employment context, adverse actions "include discharge, demotions, refusal to hire, nonrenewal of contracts, and failure to promote." *Thaddeus-X*, 175 F.3d at 396.

This includes term contracts for public employment that are typically subject to discretionary renewal. *Littlejohn v. Rose*, 768 F.2d 765, 769–70 (6th Cir. 1985) ("[A] person's involvement in activity shielded by . . . constitutionally protected rights . . . constitutes an impermissible reason for" refusing to renew a term teaching contract).

3. Each Defendant took adverse actions against Dr. Josephson because of his constitutionally protected speech.

Defendants created a hostile work environment and ultimately terminated Dr. Josephson's employment at the University because of his constitutionally protected speech. On causation, Defendants contend that no acts attributable to any individual Defendant could have created a hostile environment and that any retaliatory motive against Dr. Josephson because of his speech did not ultimately infect Defendant Ganzel's decision not to renew Dr. Josephson's contract. Both arguments fail.

a. A hostile environment exists based on the cumulative effects of acts, and Defendants are liable for each personal contribution to the hostile environment.

Defendants' contentions about the hostile environment are incorrect because they misapprehend the nature of the claim. A hostile environment differs from a discrete adverse action, like a termination. Instead, a hostile environment becomes actionable when it rises to the level of an adverse action (*i.e.*, deterring a person of ordinary firmness from exercising a constitutional liberty) "based on the *cumulative effect* of individual acts" which "may not be actionable on [their] own." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).[203] So Defendants misunderstand how an official's personal conduct gives rise to liability for creating a hostile environment. The unlawful acts contributing to a hostile work environment "may not be actionable on [their] own," *Morgan*, 536 U.S. at 115, and may even be "trivial in detail." *Thaddeus-X*, 175 F.3d at 398 (quotation omitted). But, if in the aggregate, the hostile acts

[203] While this Court should not apply the Title VII *liability* standard, *see supra* Argument I.A.2.a, it may look to Title VII cases on other elements of the retaliation analysis, including causation. *See Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 306 (6th Cir. 2012) (citing Title VII case in analyzing temporal proximity). Title VII cases like *Morgan* are instructive on hostile environment components, though they do not set the threshold for when a hostile environment becomes an adverse action under § 1983.

become "substantial in gross" such that the environment "is capable of deterring a person of ordinary firmness from exercising his or her right," then it is actionable. *Id.*

Therefore, while Defendants are only liable for their "own individual actions" or misconduct they "either encouraged . . . or in some other way directly participated in," Le Br. at 17; Ganzel Br. at 17; Woods Br. at 13–14; Carter Br. at 17; Lohr Br. at 8–9, no Defendant must individually contribute to the hostile environment so much that their contribution is "actionable on its own." *Morgan*, 536 U.S. at 115. Here, every Defendant personally engaged in conduct contributing to the hostile environment against Dr. Josephson due to his speech, and the *environment* was ultimately sufficient to deter a person of ordinary firmness, like Dr. Josephson, from exercising his constitutional rights. That renders each Defendant personally responsible.

The same reasoning explains why the Court should consider all of Defendants' actions when evaluating causation. Just as no individual Defendant's contribution has to be "actionable on its own," the hostile environment "cannot be said to occur on any particular day" and instead "occurs over a series of days or perhaps years." *Id.* Due to the hostile environment's cumulative nature, courts are not limited in the actions they consider by the applicable statute of limitations. Rather, the "entire time period of the hostile environment may be considered by a court for the purposes of determining liability" so long as "an act *contributing* to the claim occurs within the filing period." *Id.* at 117 (emphasis added). Thus, when evaluating causation and each Defendant's responsibility, this Court may consider any acts Defendants personally committed that "contribut[e]" to the hostile environment, *id.*, and should hold them liable because the entire "campaign of harassment" amounted to an "adverse action" under the constitutional standard. *Thaddeus-X*, 175 F.3d at 398 (quotation omitted).

b. Each Defendant is liable for his or her role in terminating Dr. Josephson's employment.

Defendants try to avoid liability for the termination on the causation issue by ar-

guing that any Defendants with a retaliatory motive against Dr. Josephson had no decision-making power with respect to the renewal of his contract, and that Ganzel's decision was insulated from any retaliatory motive. "However, the Sixth Circuit has expressly held that an 'influential recommender' sued in his or her individual capacity may be liable for a First Amendment retaliation claim, despite the fact that the individual may not be a final decision-maker." *Williams v. City of Franklin*, 586 F. Supp. 2d 890, 896 (M.D. Tenn. 2008) (citing *Ward v. Athens City Bd. of Educ.*, 1999 WL 623730, at *8–9 (6th Cir. Aug. 11, 1999)); *accord Nailon v. Univ. of Cincinnati*, 715 F. App'x 509, 515 (6th Cir. 2017). Therefore, this Court should consider evidence of the retaliatory motives of Woods, Boland, Le, Carter, and Lohr.

As to Defendant Ganzel, undisputed evidence shows her own retaliatory motive. *See supra* Facts I.A, I.D, I.Q, I.S. But her claim to have acted solely on Boland's recommendation would not save her in any event. "When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability." *Arendale v. City of Memphis*, 519 F.3d 587, 604 n.13 (6th Cir. 2008). No party disputes that Ganzel intended to cause Dr. Josephson's termination. And since Ganzel cannot avail herself of a "a strategic option . . . to evade liability . . . through willful blindness as to the source of reports and recommendations," she is liable for implementing the retaliatory recommendation of her subordinates. *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 486 (10th Cir. 2006).

c. Each Defendant personally participated in the adverse actions against Dr. Josephson.

i. Ganzel took adverse actions against Dr. Josephson.

Ganzel is responsible for terminating Dr. Josephson's appointment at the University. *See supra* Facts I.S. She is liable for this adverse action whether she acted out of her own retaliatory motive or whether she simply implemented the retaliatory mo-

tive of subordinates making the influential recommendation. *See supra* Argument I.A.3.b. But the evidence shows that Ganzel *did* terminate Dr. Josephson's employment because of his speech. Ganzel immediately expressed her personal opposition to Dr. Josephson's viewpoint the moment it was relayed to her through Buford. Pl.'s Br. at 6–7; *see supra* Facts I.A, I.D, I.Q; *Dye*, 702 F.3d at 308 (citing "the testimony concerning the political atmosphere of the [employer] leading up to" the adverse action as evidence of causation); *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 744 (9th Cir. 2001) (noting "evidence that his employer expressed opposition to his speech, either to him or to others" is evidence of causation). Then, she conveyed (through Boland) that she was "supportive of what [the other Defendants] [we]re doing"—which was gathering "strong documentation" in order "to avoid Allan's reappointment"—even before Dr. Josephson had been given any formal productivity warning. *See supra* Facts I.I. All Defendants waged a campaign to drive Dr. Josephson out of the University because of his speech. Ganzel christened the campaign and saw it through. *See supra* Facts I.A, I.I, I.S.

ii. Woods took adverse actions against Dr. Josephson.

Woods took action as part of the campaign to remove Dr. Josephson and to create the hostile work environment during the remainder of Dr. Josephson's term. Once Ganzel expressly condemned (what she understood to be) Dr. Josephson's comments, Woods joined the efforts against him. *See supra* Facts I.A, I.E., I.S. While Woods claims he had nothing to do with the termination, pointing to the fact that he left the University in the late spring of 2018, Woods Br. at 8, Defendants were already discussing ending Dr. Josephson's appointment by March 2018, *see supra* Facts I.L, and Ganzel was supportive of the effort to "avoid [his] reappointment" by July, *see supra* Facts I.S. Woods's role in demoting Dr. Josephson, ostracizing him, and subjecting him to discriminatory work requirements and practice constraints laid the foundation for his eventual termination, *see supra* Facts I.S, and he qualifies as an "influential

recommender." *Ward*, 1999 WL 623730, at *8.

Woods personally contributed to the hostile environment against Dr. Josephson because of his speech by ostracizing Dr. Josephson through his orders not to attend faculty meetings or to meet with faculty to discuss the events surrounding his demotion, and his personal refusal to meet with Dr. Josephson without multiple requests and substantial delay. *See supra* Facts I.I; Pl.'s Br. at 11–12, 15–16, 31–32; *see also Waldo v. Consumers Energy Co.*, 726 F.3d 802, 818 (6th Cir. 2013) ("ignoring and ostracizing a coworker . . . contributes to a hostile work environment"); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565–66 (6th Cir. 1999).

Woods also contributed to the hostile environment by subjecting Dr. Josephson to content and viewpoint-based discriminatory requirements when he ordered Dr. Josephson to give a disclaimer whenever he discussed his views on gender dysphoria. Pl.'s Br. at 11–13, 32–33; *Jordan v. City of Cleveland*, 464 F.3d 584, 594–98 (6th Cir. 2006) (finding "disparate discipline" contributes to "an abusive work environment").

Woods also contributed to the hostile environment by participating in the open-ended investigation against Dr. Josephson, in which Defendants constantly rustled-up complaints, not to investigate their veracity or to resolve any conflict, but simply to hold them against Dr. Josephson. *See supra* Facts I.I–J, II.E; Pl.'s Br. at 13–14; *see also Kallenberg v. Knox Cnty. Bd. of Educ.*, 2008 WL 3823732, at *5 (E.D. Tenn. Aug. 12, 2008) (a "retaliatory investigation . . . could also be considered an adverse employment action"); *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) ("bad faith investigation and legal harassment" in response to speech is unlawful (cleaned up)).

Finally, Woods personally contributed to the hostile environment by refusing to investigate Dr. Josephson's well-founded complaints of retaliatory conduct against him. Dr. Josephson obtained evidence that a University official had leaked confidential information about his impending demotion with opposing counsel in a case in which he was testifying, in a direct effort to damage his testimony and his career. *See*

supra Facts I.I; Pl.'s Br. at 15–17, 34. But when Dr. Josephson tried to get University officials to investigate, Woods gave him the run-around: referring Dr. Josephson to Paul and University counsel, who referred Dr. Josephson back to Woods, who did nothing. Pl.'s Br. at 16. Refusal to investigate mistreatment contributes to a hostile environment. *See Hawkins v. Anheuser Busch, Inc.*, 517 F.3d 321, 341 (6th Cir. 2008); *Lee v. Cleveland Clinic Found.*, 676 F. App'x 488, 496 (6th Cir. 2017).

Woods need not have singlehandedly created a hostile environment. Rather, he is responsible if he personally contributed to an environment that, on the whole, would deter an ordinary person from continuing to exercise constitutional rights and so long as any act giving rise to that environment occurred within the statute of limitations. *See supra* Argument I.A.2.a, I.A.3.a. The evidence conclusively demonstrates that Woods took adverse acts against Dr. Josephson because of his speech.

iii. Boland took adverse actions against Dr. Josephson.

Boland also personally took adverse action against Dr. Josephson. Ganzel and Boland both acknowledge that Ganzel ended Dr. Josephson's appointment based on Boland's recommendation. Ganzel Br. at 6–7; Boland Br. at 1. Thus, Boland is an "influential recommender," and is liable if she made her recommendation in retaliation for Dr. Josephson's speech. *Ward*, 1999 WL 623730, at *8. The record shows that she did, since she supported the campaign to collect "strong documentation" in order to "avoid Allan's reappointment" by July 2018, even before Dr. Josephson received any formal productivity warning. *See supra* Facts I.I, I.Q, I.S.

Boland also personally contributed to the hostile environment. She expressed direct opposition to the viewpoint of Dr. Josephson's expression. Pl.'s Br. at 38. She contributed to the retaliatory inquisition against Dr. Josephson, assuring Le, Carter, and Lohr that their "sleuthing" was "a huge help." *Id.* at 18. She approved the imposition of discriminatory work requirements for Dr. Josephson when he was deprived of his teaching duties, a move that was not required by Dr. Josephson's demotion as

Division Chief. *See* Pl.'s Br. at 12; *Jordan*, 464 F.3d at 594–98 (finding "assignment of details with a significant loss of responsibility" contributes to "an abusive work environment"). Therefore, the record demonstrates that Boland was personally involved in adverse actions against Dr. Josephson because of his speech.

iv. Le took adverse actions against Dr. Josephson.

Le also acknowledges that Ganzel's decision to end Dr. Josephson's appointment was based on information she provided. Le Br. at 12 ("Dr. Le provided" the "information [that] ultimately contributed to the decision not to renew Dr. Josephson's expiring faculty appointment."). The record demonstrates that Le collected this information about Dr. Josephson because of his speech. Along with Carter and Lohr, Le began collecting (but not investigating) complaints about Dr. Josephson in November 2017—after learning about his Heritage presentation but before any allegations of unproductivity. *See supra* Facts I.E; Pl.'s Br. at 14–15. Le discussed Dr. Josephson's likelihood of no longer holding an appointment in March 2018. *See supra* Facts I.L. She was part of the effort to collect "strong documentation" to "avoid Allan's reappointment" in the summer of 2018. *See supra* Facts I.P. She approved a new assignment in November 2018 and neither acknowledged Dr. Josephson's improved productivity nor conveyed any dissatisfaction with his progress. Pl.'s Br. at 41. Then she set up the hurried subterfuge where Dr. Josephson learned of his termination—a meeting that she later admitted seemed like an "ambush," which is a reasonable description given her recent approval of a new work assignment. *See supra* Facts I.P. All this renders Le liable as an "influential recommender." *Ward*, 1999 WL 623730, at *8.

Le also personally contributed to Dr. Josephson's hostile work environment. As interim co-chief, she approved the discriminatory removal of Dr. Josephson's teaching duties. Pl.'s Br. at 12. She played a key role in the retaliatory investigation against Dr. Josephson, maintaining the "Allan Tracking document" of unconfirmed allegations and discriminatory charges (as many faulted Dr. Josephson for acts Defendants

excused or personally engaged in). *See supra* Facts I.E, I.I–J, II.E. The evidence shows Le personally contributed to an environment that, on the whole, would deter any ordinary person from continuing to engage in constitutionally protected conduct.

v. Carter took adverse actions against Dr. Josephson.

Carter is responsible for the adverse action of ending Dr. Josephson's employment. He is the one who gave a name to what all Defendants were doing: working "to avoid Allan's reappointment." *See supra* Facts I.Q, I.S. He also catalogued, and even *solicited* and *edited*, some of the complaints against Dr. Josephson that Defendants hoped would serve as "strong documentation" in support of their objective. *See supra* Facts I.S; Pl.'s Br. at 21. Because Ganzel ultimately granted their wish, based on the information Carter collected and relayed in retaliation for Dr. Josephson's speech, Carter is liable as an "influential recommender." *Ward*, 1999 WL 623730, at *8.

Carter also personally contributed to the hostile environment against Dr. Josephson. He subjected Dr. Josephson to discriminatory, reduced work responsibility by removing all psychology trainees from his tutelage. *See supra* Facts II.E & n.186. He insulted Dr. Josephson by accusing him of lying, being deceptive, and withholding information. Pl.'s Br. at 17. Carter also participated in ostracizing Dr. Josephson and helped conduct the retaliatory, open-ended investigation against him. *See supra* Facts I.H–J. Therefore, the evidence shows that Carter personally participated in the adverse actions against Dr. Josephson.

vi. Lohr took adverse actions against Dr. Josephson.

Lohr also personally participated in the adverse actions against Dr. Josephson. He personally produced the files that Carter hoped would serve as the "strong documentation" in support of their campaign to "avoid Allan's reappointment," Pl.'s Br. at 18 & n.198, documents which inaccurately reported Dr. Josephson's alleged unexcused absences, faulted him even though his productivity was increasing, and failed to address comparable productivity shortfalls in other faculty. *Id.* at 19, 23; *see supra*

Facts I.N, I.P. And he volunteered to review Dr. Josephson's productivity, a review Defendants contend led to the termination. *See supra* Facts I.S; Pl.'s Br. at 22. Thus, Lohr is liable as an "influential recommender." *Ward*, 1999 WL 623730, at *8.

Lohr also contributed to the hostile work environment. He insulted Dr. Josephson to his face. *See supra* Facts I.I. He contributed to Dr. Josephson's ostracization by avoiding speaking or meeting with him. Pl.'s Br. at 16, 32. He subjected Dr. Josephson to discriminatory work constraints by keeping him from meeting with fellows in the Division alone. *Id.* at 11, 33. Lohr joined the retaliatory, open-ended investigation of Dr. Josephson immediately after his demotion. *See supra* Facts I.J; Pl.'s Br. at 33.

4. Defendants would not have taken the same action against Dr. Josephson in the absence of his protected speech.

Evidence of each Defendant's adverse actions against Dr. Josephson is sufficient to establish that each one violated his rights, so the Court should deny their motions.

What's more, the Court should grant Dr. Josephson's motion for summary judgment. In a First Amendment retaliation case, once the plaintiff makes such a showing, the burden shifts to the Defendants to "show, by a preponderance of the evidence, that they would have taken the same action[s] even in the absence of the protected conduct." *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001). And "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element . . . on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Because undisputed evidence shows that Defendants would not have treated Dr. Josephson the same way in the absence of his speech and Defendants bear the burden on that issue at trial, the Court should also grant Dr. Josephson's motion for summary judgment. *Id.*

There are at least three reasons Defendants cannot show they would have treated Dr. Josephson the same way absent his speech. *First*, undisputed evidence shows they

deployed measures short of summary termination in other cases. Their own documents show they would use a performance improvement plan or a probationary period including multiple meetings and opportunities for improvement to address productivity concerns, even for employees far below Dr. Josephson's rank or level of seniority. *See supra* Facts I.O; Pl.'s Br. at 20. They even promised the same to Dr. Josephson, concluding their only formal productivity warning to him by pledging to move forward with him "in a collaborative fashion." *See supra* Facts I.O. Instead, they never met with him to discuss productivity after July 2018. They approved a new work assignment for him in November 2018 (expressing no reservations about his productivity at the time), then summarily and deceptively notified him of his termination in February 2018. *See supra* Facts I.P; Pl.'s Br. at 41.

Second, undisputed facts also rebut Defendants' repeated claims that they only decided to end Dr. Josephson's employment due to productivity issues. They say that "[b]y *fall of 2018*, it was clear that Josephson would not *improve* or fulfil the obligations of his work assignment. He had not increased his clinical service and, in fact, was averaging 3.5 hours per week seeing patients in the clinic." Boland Br. at 7 (emphasis added). But they only cite the *July* 2018 letter. *Id.* at 7 n.64–65. Across their six briefs, Defendants cite no productivity data after July 2018. And no wonder: it was immediately *after* July 2018 (when Dr. Josephson received the only formal productivity warning of his career) that undisputed evidence shows Dr. Josephson's productivity *did* improve. *See supra* Facts I.P–Q; Pl.'s Br. at 41–42. On top of that, other faculty members had productivity shortfalls during the same period, some not even meeting their work assignment at all, and none of them were terminated, or even disciplined. *See supra* Facts I.N, I.P–Q; Pl.'s Br. at 41–42.

Third, Defendants offer no evidence to indicate that any of the adverse actions giving rise to the hostile environment would have been taken against Dr. Josephson absent his speech. Their ostracization, insults, retaliatory investigations against him,

refusal to investigate other misconduct toward him, and imposition of discriminatory restrictions on his practice and teaching were all (1) independent of the demotion from Division Chief, (2) not the sort of action that would be taken against any faculty member, and (3) all because of his speech. *See supra* Argument I.A.3.c. It would be implausible to find that Defendants just treat other faculty members this way or would have done the same to Dr. Josephson absent his speech. Indeed, Dr. Josephson worked at the University for fifteen years and never experienced such treatment, until right after his speech at the Heritage Foundation presentation became known.

As Defendants bear the burden of showing they would have treated Dr. Josephson the same way absent his speech and the undisputed evidence is to the contrary, this Court should deny Defendants' motions for summary judgment and grant Dr. Josephson's. *Celotex*, 477 U.S. at 322–23.

5. Defendants' retaliation against Dr. Josephson amounts to an unconstitutional condition and content- and viewpoint-discrimination.

The Court should also deny Defendants' motion for summary judgment on the unconstitutional conditions claim. Under this doctrine, "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." *Amelkin v. McCluer*, 330 F.3d 822, 827–28 (6th Cir. 2003) (quotation omitted). This rule prohibits termination of at-will employment or refusing to extend a contract. Thus, however this Court evaluates the nature of Defendants' actions toward Dr. Josephson, the Constitution prohibits them from *basing* any decision on Dr. Josephson's exercise of a constitutional right or refusal to surrender that right. *Id.* As a result, the same evidence supporting Dr. Josephson's free speech retaliation claims supports his unconstitutional conditions claim, and the Court should therefore deny Defendants' motions on this claim.

The First Amendment also prohibits state action restricting speech that is content- or viewpoint-based. "Government regulation of speech is content based if a law

applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Viewpoint discrimination exists where one viewpoint on a subject, or an "entire class of viewpoints," is excluded by the government's action. *Rosenberger*, 515 U.S. at 831. Here, Defendants operationalize their content and viewpoint discrimination through their adverse employment actions against Dr. Josephson. But they were ultimately establishing a practice of prohibiting faculty from speaking in any way that would deviate from the "culture" the University was promoting. Pl.'s Br. at 7. As Carter argued, Dr. Josephson's comments "created a perception of anti-transgender bias undermining the public perception sought through the University's eQuality initiative." Carter Br. at 28. While this "public perception" was inaccurate—Dr. Josephson's comments were not "anti-transgender" and were supported by the best evidence in the field[204]—the University's decision to take action based on their assessment of public perception is content and viewpoint-based discrimination. Since substantial evidence supports Dr. Josephson's claims, the Court should deny Defendants' motion for summary judgment.

B. Defendants violated Dr. Josephson's right to due process of law.

Governmental regulation can be vague in two ways: it may "den[y] fair notice of the standard of conduct to which a citizen is held accountable" or it may amount to an "unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183–84 (6th Cir. 1995) (quotation omitted). In this case, Defendants subjected Dr. Josephson to inconsistent and changing work expectations, and improperly relied on the fact that "non-renewals are not tied to cause," Ganzel Br. at 7, as a license to end his employment for a "discriminatory" reason. *Dambrot*, 55 F.3d at 1184. Because all of Defendants' assertions rest on (at best) disputed facts, this Court should deny their motions

[204] Cantor Rep't [Pl.'s Ex. 176] ¶¶ 105, 108; Cantor Dep. 69:5–16, 71:1–4.

on Dr. Josephson's due process claim.

C. Defendants' violated Dr. Josephson's right to equal protection.

"The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 681–82 (6th Cir. 2011). The evidence shows that Defendants took adverse action against Dr. Josephson because of his speech, *see supra* Argument I.A.2–3, and that they would not have taken the same actions absent his speech, *see supra* Argument I.A.4, so Defendants' actions certainly "burden[ed] a fundamental right." *Rondigo*, 641 F.3d at 682. In addition, Dr. Josephson has produced evidence that Defendants treated him differently from other "similarly situated" faculty by uniquely taking action against him for alleged productivity shortfalls while ignoring productivity shortfalls by other faculty during the same period. *See supra* Facts I.N, I.P; Pl.'s Br. at 19–20. As Defendants can offer no basis (rational or otherwise) for treating their employees differently, the Court should deny their motions on Dr. Josephson's equal protection claim.

II. Each Defendant is liable for violating Dr. Josephson's rights.

This Court should deny Defendants' motions because substantial evidence supports the conclusion that each Defendant personally participated in unconstitutional acts against Dr. Josephson. *See supra* Argument I.A.2–3. It should also deny the motions because each Defendant is liable in both official and individual capacities and not entitled to qualified immunity.

A. Each Defendants is liable in his or her official capacity

Defendants claim they are immune from claims against them in their official capacity due to sovereign immunity. Carter Br. at 39–40; Lohr Br. at 18–20; Ganzel Br. at 19–20; Le Br. at 20; Boland Br. at 19–20. They acknowledge that *Ex parte Young* authorizes suits against them in their official capacity for prospective or declaratory

relief. *See*, *e.g.*, Ganzel Br. at 20; Carter Br. at 40. But they bluntly assert that "there is no ongoing violation of federal law, and the suit primarily seeks damages, not prospective relief." *See, e.g.*, Carter Br. at 40; Ganzel Br. at 20 (same text).

Not so. Dr. Josephson has raised claims for declaratory relief. *See* Am Compl. at 47. And he raised claims for injunctive relief in the form of reinstatement and the correction of records relating to the retaliatory nonrenewal of his contract. *Id.* The Sixth Circuit "previously has held that claims for reinstatement are prospective in nature and appropriate subjects for *Ex parte Young* actions." *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002) (citing *Turker v. Ohio Dep't of Rehab. & Corrs.*, 157 F.3d 453, 459 (6th Cir. 1998)). Therefore, the Court should reject their sovereign immunity arguments and allow the official capacity claims to proceed.

B. Each Defendant is liable in his or her individual capacity.

Defendants claim they are not liable in their individual capacity. But their arguments are not based on a disputed legal standard. They say "[a]ssertions of wrongdoing against other cannot be attributed or imputed" to a particular Defendant. Boland Br. at 13–14; Carter Br. at 16 (same text). But Dr. Josephson does not seek to attribute one Defendant's acts to another; he has identified ways that each Defendant has personally taken adverse actions against him. *See supra* Argument I.A.2–3.

Defendants also argue against *respondeat superior* liability. *See*, *e.g.*, Carter Br. at 15–16; Le Br. at 16–17. But Dr. Josephson does not advance this theory. Rather, his claims employ the legal standard Defendants acknowledge: Defendants are liable because they "'actively engaged in unconstitutional behavior.'" Le Br. at 17 (quoting *Gregory v. City of Louisville*, 444 F.3d 725, 751–52 (6th Cir. 2006)). Dr. Josephson has shown through undisputed, documentary evidence how each Defendant personally engaged in the adverse actions against him by (1) creating a hostile work environment and (2) either recommending or consummating the termination of his appointment. *See* Facts I.I, I.Q; Argument I.A.2–3. Therefore, the Court should reject De-

fendants' arguments and allow the individual capacity claims to proceed.

C. No Defendant is entitled to qualified immunity.

Defendants invoke qualified immunity against all of Dr. Josephson's claims. Woods Br. at 18–19; Carter Br. at 37–38; Lohr Br. at 16–18; Ganzel Br. at 18–19; Le Br. at 20; Boland Br. at 18–19. As before, they assert this immunity by importing their account of the facts, not by identifying the absence of any clearly established law on retaliating against a professor for his speech on a matter of public concern.

This is because the law *is* clearly established on every element of Dr. Josephson's claims. The rule against retaliation against public employees for their speech generally is clearly established under *Pickering*. The rule applying a broad conception of public concern to a professor's speech has been clearly established in the Sixth Circuit since 1995. *See Dambrot*, 55 F.3d at 1189; *see also Hardy*, 260 F.3d at 680–83 (relying on *Dambrot* when denying qualified immunity on the public concern issue to officials who retaliated against a professor who used offensive language in class). The rule setting the threshold of "adverse action" at deterring a person of ordinary firmness from exercising constitutional liberty has been clearly established in the Sixth Circuit since 1999. *See Thaddeus-X*, 175 F.3d at 397–98. This rule's application to a hostile environment theory has been clearly established since 1999, *see id.* (describing application to a "campaign of harassment"), or at least since 2010. *See Fritz*, 592 F.3d at 724 (citing *Thaddeus-X* for the proposition that "this Circuit has held that any action that would deter a person of ordinary firmness from exercising protected conduct will suffice, which may include harassment"). As the Sixth Circuit said in 2001, "*For decades* it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom." *Hardy*, 260 F.3d at 682 (emphasis added). It is clearly established law that university officials may not take adverse action against a professor because of his speech on matters of public concern.

Defendants try to evade this simple truth with creative descriptions of the "rule" that Dr. Josephson's claims must invoke. For example, Ganzel casts the "rule" as whether her "decision to rely on accurate information from Dr. Boland to accept her recommendation not to renew Dr. Josephson's faculty appointment" violated Dr. Josephson's rights. Ganzel Br. at 18. Of course, no such rule exists. But that's because whether (1) the information from Boland was accurate and (2) whether Ganzel merely relied on this or acted on the basis Dr. Josephson's speech are matters of fact that are, at a minimum, in dispute. As the evidence indicates, Ganzel acted out of her own retaliation (or unlawfully implemented a retaliatory recommendation) and the information from Dr. Boland was *not* accurate. *See supra* Facts I.N, I.P–Q, I.S.

The Sixth Circuit addressed and rejected an identical argument in *Hardy*. The defendants there claimed that their reliance on "legitimate pedagogical interests" (like the "accurate information" here) for adverse action against the professor meant they did not violate clearly established law. *Hardy*, 260 F.3d at 683. The court easily disposed of this: "[t]hey fail to acknowledge, however, that whether these factors entered into their decision not to renew Hardy's contract remain in dispute. Hardy has alleged that it was purely his classroom speech that motivated the employment decision." *Id.* at 683. If the latter point was correct, then "such conduct was, as a matter of law, objectively unreasonable." *Id.*

The same is true here. The *rules* governing liability are all clearly established. If Defendants are liable, they also have no qualified immunity. And Defendants are liable. The undisputed evidence shows that Defendants terminated Dr. Josephson's appointment and created a hostile environment against him because of his speech, *see supra* Argument I.A.2–3, and that Defendants would not have taken these same actions in the absence of his speech, *see supra* Argument I.A.4. That "conduct was, as a matter of law, objectively unreasonable." *Hardy*, 260 F.3d at 683.

CONCLUSION

Defendants' six summary judgment motions rely on attempts to change the facts on the ground when the violations occurred by recasting their story after the fact. Plus, they ignore the clear and long-established constitutional protections for Dr. Josephson's speech, principles that deprive them of qualified immunity. Hence, Defendants' motions should be denied, and Plaintiff's should be granted.[205]

Respectfully submitted this 19th day of November, 2021.

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[205] At a minimum, if this Court countenances Defendants' attempts to change the facts after the events in question occurred, and finds such facts material, this case should go to a jury.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2021, I filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to the following attorneys of record:

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