

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

ALLAN M. JOSEPHSON,

Plaintiff,

v.

TONI M. GANZEL, Interim Executive Dean of Health Affairs and Dean of the School of Medicine at the University of Louisville, in her official and individual capacities; **KIMBERLY A. BOLAND**, Interim Chair of the Department of Pediatrics at the University of Louisville, in her official and individual capacities; **CHARLES R. WOODS**, former Chair of the Department of Pediatrics at the University of Louisville, in his individual capacity; **JENNIFER F. LE**, former Interim Division Co-Chief of the Division of Child and Adolescent Psychiatry and Psychology and current Chief of the Division of Child and Adolescent Psychiatry and Psychology at the University of Louisville, in her official and individual capacities; **BRYAN D. CARTER**, former Interim Division Co-Chief of the Division of Child and Adolescent Psychiatry and Psychology and Chief of the Division of Psychology at the University of Louisville, in his official and individual capacities; **WILLIAM D. LOHR**, former Interim Division Co-Chief of the Division of Child and Adolescent Psychiatry and Psychology at the University of Louisville, in his official and individual capacities,

Defendants.

Case No: 3:19-cv-00230-RGJ-CHL

**THE HONORABLE
REBECCA GRADY JENNINGS**

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In our culture, what it means to be male or female is being hotly debated. So is how to treat children who experience gender dysphoria. The University insists doctors should accept a child's discomfort with his sex and put him on a conveyor belt towards puberty-blocking drugs, cross-sex hormones, and possible surgery. Others—including Dr. Josephson, prominent transgender surgeons¹, and an increasing number of those who have experienced the transition process²—think doctors should first address the underlying psychological issues causing the discomfort, especially since the child will usually regain comfort with his sex.

This Court cannot resolve this debate. But in the case of Dr. Josephson, the Defendants, officials at the University, ended it by punishing Dr. Josephson for expressing his views, on his time, 600 miles away from campus. They did so despite admitting that, aside from disagreeing with a few colleagues on this one issue, Dr. Josephson was “superb” and that if such disagreements were “a disqualifier from the faculty, then many of our faculty won’t be here.”³

Defendants’ retribution violated Dr. Josephson’s clearly established rights. He spoke as a citizen, expressing his own views on his own time, and addressed a matter of public concern (proper treatment of gender dysphoric children) without disrupting University services. In direct response to his speech, Defendants created a hostile environment and terminated his employment. 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.”⁴

When government punishes people for expressing differing views, it violates the

¹ Abigail Shrier, *Top Trans Doctors Blow the Whistle on “Sloppy” Care*, COMMON SENSE WITH BARI WEISS (Oct. 4, 2021), <https://bit.ly/2YCDsNY> (last visited Oct. 28, 2021).

² Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, ARCHIVES OF SEXUAL BEHAVIOR (2021), <https://bit.ly/3GkOkkQ> (last visited Oct. 28, 2021) (55% of participants “felt that they did not receive an adequate evaluation from a doctor or mental health professional before starting transition”).

³ Pl.’s Dep. Ex. 45 at 3.

⁴ Carter Dep. 156:23–157:4.

“fixed star in our constitutional constellation” that “no official, high or petty, can prescribe what shall be orthodox in . . . in matters of opinion or force citizens to confess by word or act their faith therein.” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This principle applies with full force to professors, like Dr. Josephson, who engage in the gender identity debates. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). The evidence in this case points to only one conclusion—Dr. Josephson did not ascribe to Defendants’ orthodoxy on gender issues, and they terminated him for it. Dr. Josephson is entitled to summary judgment.

STATEMENT OF FACTS

I. Dr. Josephson had a national reputation as a distinguished scholar, skilled clinician, and excellent leader.

Dr. Josephson’s career as a child psychiatrist spans four decades.⁵ He held positions at the University of Minnesota and the Medical College of Georgia, where he rose to full professor and division chief.⁶ He is a distinguished life fellow for the American Academy of Child & Adolescent Psychiatry and American Psychiatric Association,⁷ as well as a prolific author and speaker on family therapy, psychiatric education, and religion and psychiatry.⁸

In 2003, the University of Louisville hired him as a psychiatry professor and Chief of its Division of Child & Adolescent Psychiatry.⁹ The Division was struggling, with just six full-time faculty who rarely made national presentations or published scholarship, a struggling residency, a poor clinical reputation, and unstable finances.¹⁰

Dr. Josephson turned it around. He doubled the faculty, helping them earn a national reputation.¹¹ He balanced the budget, partly by securing grants.¹² He launched,

⁵ Compl. ¶ 55, Compl. Ex. 1 at 1, 3.

⁶ Compl. ¶¶ 57–58, Comp. Ex. 1 at 1–2.

⁷ Compl. ¶¶ 60–62; Compl. Ex. 1 at 3–4.

⁸ Compl. ¶¶ 68–70; Compl. Ex. 1 at 12–40.

⁹ Compl. ¶ 72; Pl.’s Ex. 173 at 2; Josephson Dep. 4:25–5:7, 6:13–15.

¹⁰ Compl. ¶ 73; Josephson Dep. 8:18–9:10.

¹¹ Compl. ¶ 75; Compl. Ex. 2 at 1; Pl.’s Ex. 173 at 2 (Woods summarizing changes).

¹² Compl. ¶ 75; Compl. Ex. 2 at 1; Compl. Ex. 1 at 10–11.

re-launched, and expanded its programs and doubled (or more) its patient-load.¹³

During this time, Dr. Josephson maintained a rigorous clinical schedule, taught at the medical school, gave 88 presentations to different professional groups, and authored or contributed to at least 21 scholarly articles and 12 books or chapters.¹⁴ One article earned him the American Academy of Child & Adolescent Psychiatry's Presidential Achievement Award,¹⁵ and another was one of its top ten papers of the year.¹⁶

Achievements brought accolades. The American Psychiatric Association gave him one of its highest awards, the Oskar Pfister Award.¹⁷ The American Academy of Child & Adolescent Psychiatry named him Master Clinician four years in a row.¹⁸ And the Society of Professors of Child & Adolescent Psychiatry (now the American Association of Directors of Child & Adolescent Psychiatry) asked him thirteen times to teach other division chiefs how to lead their divisions.¹⁹

II. Dr. Josephson publicly discussed gender dysphoria in children.

Around 2014, Dr. Josephson became concerned with how doctors and others treated gender dysphoric children.²⁰ Instead of treating the psychiatric issues that often contribute to this confusion, they accepted the child's claimed gender identity and prescribed puberty-blocking and later cross-sex hormones, setting the stage for surgery.

In 2016 and 2017, Dr. Josephson served as an expert witness in several cases on the subject.²¹ He outlined his views about human sexuality, the causes of gender dysphoria, and a developmentally-based treatment, applying techniques used for many childhood psychiatric issues.²² He highlighted how children are not equipped to make

¹³ Compl. ¶ 75; Compl. Ex. 2 at 1; Pl.'s Ex. 173 at 2.

¹⁴ Compl. ¶ 76; Compl. Ex. 2 at 1–2; Josephson Dep. 10:12–12:4 (describing presentations).

¹⁵ Compl. Ex. 1 at 4 (2007 award for *Practice Parameter for the Assessment of the Family*); Pl.'s Ex. 173 at 2 (Woods praising same).

¹⁶ Compl. Ex. 2 at 2; Compl. Ex. 1 at 36 (referencing *The Reinvention of Family Therapy*); Pl.'s Ex. 173 at 2 (Woods praising same).

¹⁷ Compl. ¶ 76; Compl. Ex. 2 at 3; Compl. Ex. 1 at 4.

¹⁸ Pl.'s Ex. 173 at 2.

¹⁹ Compl. Ex. 1 at 21–22; Josephson Decl. ¶ 100.

²⁰ Compl. ¶¶ 85–87.

²¹ Compl. ¶¶ 85–93.

²² Compl. ¶ 91.

far-reaching life decisions, how trying to change one's sex poses medical and other consequences that one cannot fully appreciate until adulthood, and how most gender dysphoric children cease to experience it by late adolescence.²³

When Dr. Josephson informed his superiors, Defendant Woods (then his vice chair) said these cases “don't require prior approval.”²⁴ When he mentioned his “legal consultation to the Alliance Defending Freedom,” his chair readily gave “permission to pursue [it].”²⁵ On campus, this work disrupted nothing,²⁶ like his other testimony.²⁷

During this time, Dr. Josephson's annual evaluations improved from 350 and 370 in 2012 and 2013 to a perfect 400 the next three years.²⁸ In each of those three years, Woods praised Dr. Josephson's skill in serving his patients in the clinic, in mentoring and recruiting faculty, and in leading the Division.²⁹

In October 2017, Dr. Josephson, on his own time, participated in a Heritage Foundation panel in Washington, D.C., entitled *Gender Dysphoria in Children: Understanding the Science and the Medicine*.³⁰ Dr. Josephson, speaking for himself,³¹ discussed how gender dysphoria is a socio-cultural, psychological phenomenon that cannot be fully addressed with drugs and surgery. Thus, doctors and others should explore what causes this confusion and help the child learn how to meet this develop-

²³ Compl. ¶ 92.

²⁴ Pl.'s Dep. Ex. 36 at 1; Woods Dep. 94:5–7.

²⁵ Pl.'s Dep. Ex. 37; Woods Dep. 94:24–95:1; Josephson Dep. 17:24–18:18.

²⁶ Compl. ¶¶ 97–98; Buford Dep. 22:20–23 (not aware of any University events cancelled or postponed due to Dr. Josephson's expert testimony); Steinbock Dep. 30:17–21 (same); Woods Dep. 26:5–27:6 (same); Le Dep. 24:19–22 (same); Lohr Dep. 24:21–24 (same); Ganzel Dep. 32:3–6 (same); Carter Dep. 46:13–17 (same); Brady Dep. 55:12–56:2 (same for *Adams* subpoena); Boehm Dep. 13:3–6 (never hearing about Dr. Josephson's expert testimony); Steinbock Dep. 29:11–15, 37:16–21 (testifying she did not know (and raised no concerns) about Dr. Josephson's expert testimony before *Adams*); Woods Dep. 24:24–25:8 (recalling no concerns about Dr. Josephson's expert testimony before Oct. 2017); Ganzel Dep. 31:9–12 (similar); Lohr Dep. 14:16–19, 24:10–12 (similar); Le Dep. 23:24–24:2 (raising no concerns about expert testimony before Oct. 2017); Carter Dep. 44:16–18 (same).

²⁷ Compl. ¶¶ 81 (noting service as expert witness in over 50 cases while Division Chief); Pl.'s Ex. 174; Le Dep. 18:7–19:4 (testifying she had “known forever” that Dr. Josephson served as an expert witness); Lohr Dep. 13:21–14:13 (similar).

²⁸ Pl.'s Dep. Ex. 34 at 3; Pl.'s Dep. Ex. 35 at 4; Pl.'s Dep. Ex. 39 at 1.

²⁹ Pl.'s Dep. Ex. 34; Pl.'s Dep. Ex. 35; Pl.'s Dep. Ex. 39; Woods Dep. 92:25–93:2, 93:17–19, 96:13–19.

³⁰ Compl. ¶¶ 99–103; Answer ¶ 103; *accord* Pl.'s Ex. 175.

³¹ Pl.'s Ex. 175 at 4:21–24; Compl. ¶¶ 104–05; Answer ¶ 104.

mental challenge.³² The Heritage Foundation promptly published this event on-line.³³

Dr. Josephson's remarks, delivered over 600 miles away, had no impact on campus operations,³⁴ but became the most pivotal of his career. Within days, a small group of University officials would declare open season on him and trash his unblemished record as a caring clinician, a faculty mentor, and a leader of leaders using unsubstantiated accusations and orchestrated rumor-mongering. In weeks, he would be demoted and on the way to termination.

III. Once University officials learned of Dr. Josephson's Heritage Foundation remarks, they pushed for his removal as Division Chief, setting the stage for further retaliation.

A. Within five days, officials from the LGBT Center became upset about Dr. Josephson's views and alerted his dean.

The campaign against Dr. Josephson began at the University's LGBT Center. Five days after the Heritage Foundation event, news of it reached the director, Mr. Buford, via a blog called *The Slowly Boiled Frog*.³⁵ He sent it to Ms. Steinbock, head of the LGBT Center's Health Sciences Center office, and they both complained about Dr. Josephson's remarks.³⁶ But Steinbock never actually heard them, for she only watched the first 15 minutes,³⁷ and Dr. Josephson did not speak until later.³⁸

Many meetings and e-mails later, Buford e-mailed Defendant Ganzel, the medical school's dean. Curiously, he never quoted Dr. Josephson, using instead *The Slowly Boiled Frog's* "inflammatory" rhetoric (e.g., "anti-trans BS," "religious crackpot[]") and claiming Dr. Josephson "denies transgender identity"³⁹, a claim squarely refuted

³² Compl. ¶ 112; accord Pl.'s Ex. 175 at 25–36.

³³ Compl. ¶ 120; accord Heritage Found., *Gender Dysphoria in Children: Understanding the Science and the Medicine* (Oct. 11, 2017), <https://herit.ag/39r1eQi> (last visited Oct. 28, 2021).

³⁴ Compl. ¶¶ 122–23; Brady Dep. 68:8–69:8; Buford Dep. 26:22–25; Steinbock Dep. 24:25–25:4; Woods Dep. 30:3–21; Boland Dep. 16:20–17:6; Le Dep. 27:2–15; Lohr Dep. 24:25–25:3; Ganzel Dep. 30:2–5; Carter Dep. 39:17–40:6; Boehm Dep. 12:22–13:2 (noting she never heard about the presentation).

³⁵ Pl.'s Dep. Ex. 1 at 2–4; Buford Dep. 12:10–12, 13:2–4.

³⁶ Pl.'s Dep. Ex. 1 at 1–2; Steinbock Dep. 11:5–9; Steinbock Dep. 61:1–62:18 (objecting to Dr. Josephson's message extending off campus and being associated with the Heritage Foundation, a group she opposed); Steinbock Dep. 70:16–19 (explaining her negative assumptions about anyone "who holds views consistent with the Heritage Foundation"); Buford Dep. 50:10–51:5 (similar).

³⁷ Steinbock Dep. 19:15–18, 20:19–21; *id.* 51:2–5 (testifying she never watched anything more).

³⁸ Heritage Found., *supra* note 33 (Dr. Josephson's remarks begin at the 28:23 mark).

³⁹ Pl.'s Dep. Ex. 3 at 2; Buford Dep. 69:5–70:3 (testifying his concerns arose from the *The Slowly Boiled Frog's* description, despite admitting the blog was a critic); Steinbock Dep. 78:18–24 (admitting

by Dr. Josephson’s actual comments and those of other panelists.⁴⁰

Buford complained about Dr. Josephson’s patient care and “teaching practices.”⁴¹ But he and Steinbock had never met Dr. Josephson⁴² or observed his work.⁴³ He also “suspect[ed]” Dr. Josephson “might be violating the ethical standards for psychiatry.”⁴⁴ Buford admitted he was “not an expert,”⁴⁵ and he did no research before saying this.⁴⁶ Neither he nor Steinbock could identify what Dr. Josephson said that was problematic⁴⁷ or a single standard he ever violated.⁴⁸ They alluded to non-binding guidelines from professional groups⁴⁹ but never identified the ones he allegedly violated.⁵⁰ Two of these groups had given Dr. Josephson distinguished awards.⁵¹

When Dr. Cantor, Plaintiff’s unrebutted expert witness and director of the Toronto Sexuality Center,⁵² reviewed statements from eight professional associations,⁵³ he “was unable to identify any statement from Dr. Josephson that contradicted the ma-

The Slowly Boiled Frog was “not particularly professional” due to its “inflammatory” language).

⁴⁰ Pl.’s Ex. 175 at 16:5–9, 30:17–36:1.

⁴¹ Pl.’s Dep. Ex. 3 at 2.

⁴² Buford Dep. 26:13–16, 70:25–71:1 (testifying he met Dr. Josephson for the first time at his deposition); Steinbock Dep. 56:8–10 (testifying she never met with Dr. Josephson).

⁴³ 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. 57:1–6 (attributing his comment to Dr. Josephson’s Heritage Foundation remarks and the eQuality program “being out of alignment with each other”); 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).

⁴⁴ Pl.’s Dep. Ex. 3 at 2.

⁴⁵ Pl.’s Dep. Ex. 3 at 2.

⁴⁶ Buford Dep. 75:19–76:2 (testifying he had no ethical code in mind and had not reviewed one when writing this).

⁴⁷ Buford Dep. 18:17–19, 19:11–13, 23:8–13, 70:9–22, 75:4–10; Steinbock Dep. 20:8–11, 24:14–22, 28:17–19, 50:22–25, 63:11–13, 69:25–70:10, 100:20–101:21, 129:21–130:9, 132:23–133:25, 143:18–24, 168:23–169:3; accord Brady Dep. 37:16–38:7; Ganzel Dep. 20:9–21:7, 79:21–80:10, 82:19–83:2.

⁴⁸ Buford Dep. 74:17–21 (“I wouldn’t know, like, any specific standards.”); Steinbock Dep. 33:9–13 (“I cannot give you any of the exact language[.]”); accord Steinbock Dep. 104:20–106:1; Woods Dep. 29:24–30:2 (testifying he had no reason to believe Dr. Josephson’s remarks violated any ethical standards); Ganzel Dep. 21:24–22:1 (admitting she did not know what standard of care was implicated).

⁴⁹ Steinbock Dep. 17:13–23, 68:12–16, 86:1–7, 102:20–23, 129:9–20 (generally referencing “national standards” from three organizations); Steinbock Dep. 23:14–23, 105:9–12 (admitting those guidelines are recommendations); Cantor Dep. 38:12–45:3 (confirming these statements are non-binding).

⁵⁰ Steinbock Dep. 102:24–103:2 (admitting she could not “recall any details as to which provisions . . . Dr. Josephson had allegedly violated”); Steinbock Dep. 127:1–129:8 (similar); Steinbock Dep. 143:9–144:10 (similar); Buford Dep. 92:12–24 (not knowing the groups Steinbock referenced).

⁵¹ See *supra* notes 15, 16, and 17 and accompanying text.

⁵² Cantor Rep’t [Pl.’s Ex. 176] ¶ 1; Cantor Dep. 23:15–18.

⁵³ Cantor Rep’t [Pl.’s Ex. 176] ¶¶ 99–139.

major medical associations, with the exception of the [American Academy of Pediatrics], which itself contradicted all the other major medical associations.”⁵⁴

But Ganzel, the “LGBT Center’s Ally of the Year (2016),”⁵⁵ accepted Buford’s claims and was “so sorry to hear this.”⁵⁶ In a signal to others, she emphasized how Dr. Josephson’s presentation “doesn’t reflect the culture we are trying so hard to promote.”⁵⁷ Saluting, Defendant Woods (now Dr. Josephson’s chair) referenced “concerning conversations.”⁵⁸ Dr. Josephson’s superiors never watched his remarks or read his reports to learn what he thought.⁵⁹

B. In the following weeks, Defendants agitated because they objected to Dr. Josephson’s views regarding gender dysphoria.

The next day, a Lambda Legal attorney told Dr. Brady, a professor in the Division, that Dr. Josephson was an expert witness for a Florida school district in one of Lambda Legal’s cases involving a gender dysphoric student who sought to use the showers, locker rooms, and restrooms of the opposite sex.⁶⁰ Brady told Defendant Carter (another professor in the Division), who insisted on his first ever urgent meeting with Woods,⁶¹ and quickly a few faculty joined the LGBT Center’s pursuit of Dr. Josephson.

Carter claimed Dr. Josephson’s remarks as an expert and in public could “reflect

⁵⁴ Cantor Rep’t [Pl.’s Ex. 176] ¶ 105; *id.* ¶ 108 (“Dr. Josephson’s comments about the mental health of gender dysphoric children were entirely consistent with WPATH standards[.]”); *id.* ¶ 120 (“Dr. Josephson’s comments . . . are entirely consistent with the guidelines of the Pediatric Endocrine Society.”); *id.* ¶ 121 (noting Am. Acad. of Child & Adolescent Psych. has not endorsed an “affirmation-only policy”); *id.* ¶ 128 (“Dr. Josephson’s comments are entirely in line with this recommendation [from the Am. Coll. of Obstetricians & Gynecologists].”); *id.* ¶ 134 (“I could find no contradictions between Dr. Josephson’s comments and the content of these documents [from the Am. Coll. of Physicians].”)

⁵⁵ Pl.’s Ex. 177 at 18; The LGBT Ctr. at Univ. of Louisville, *Two Named 2016 Faculty/Staff Ally Award Winner*, <https://bit.ly/3EFnHpR> (last visited Oct. 28, 2021); *accord* Steinbock Dep. 98:2–7 (noting Ganzel attended a celebration of the LGBT Center the night before Buford e-mailed her).

⁵⁶ Pl.’s Dep. Ex. 3 at 1; Ganzel Dep. 76:9–11, 87:11–14 (admitting she did nothing to confirm that Buford’s characterization of Dr. Josephson’s views was accurate).

⁵⁷ Pl.’s Dep. Ex. 3 at 1; Ganzel Dep. 85:2–87:10 (describing culture as one where no one’s feelings get hurt).

⁵⁸ Pl.’s Dep. Ex. 3 at 1; Woods Dep. 98:1–99:5 (testifying “concerning conversations” involved two or three faculty discussing Dr. Josephson’s “testimony” and perhaps Heritage Foundation presentation).

⁵⁹ Woods Dep. 24:6–17, 28:14–17, 29:6, 116:4–11; Boland Dep. 16:17–19, 57:12–25; Ganzel Dep. 29:16–18, 31:23–32:2, 74:3–5; *accord* Le Dep. 21:3–23, 26:3–5; Lohr Dep. 24:3–5; Carter Dep. 44:12–15.

⁶⁰ Brady Dep. 21:24–22:18, 25:1–7; Woods Dep. 120:2–14 (interpreting notes as referencing call from attorney in *Adams*); Pl.’s Dep. Ex. 6 (“Allan J. = expert in case defense[.]”); Pl.’s Dep. Ex. 115 at 1; *see also Adams v. Sch. Bd. of St. John’s Cnty.*, 2021 WL 3722168 (11th Cir. Aug. 23, 2021).

⁶¹ Pl.’s Dep. Ex. 6 at 2; Brady Dep. 110:8–22 (testifying “another event” referred to Dr. Josephson’s expert testimony in *Adams*); Woods Dep. 119:21–120:14 (interpreting his notes as referencing Heritage Foundation and *Adams* expert testimony); Carter Dep. 153:24–154:11 (admitting he had never approached Woods on an urgent matter before).

negatively on our division, the department, the university, our training programs, . . . and . . . on the patients and families with whom we provide clinical services.”⁶² But he had no patient-care concerns⁶³ and admitted his predictions relied on a handful of brief conversations.⁶⁴ Next, he predicted “accreditation, recruitment, and retention” problems.⁶⁵ Yet, he had never heard of one professor’s remarks affecting accreditation⁶⁶ and could not name anyone who left the University or turned down an offer due to Dr. Josephson’s remarks.⁶⁷ He claimed Dr. Josephson contradicted four professional organizations.⁶⁸ But he could neither specify the objectionable remarks⁶⁹ nor identify anything from these groups Dr. Josephson violated⁷⁰—admitting he referenced non-binding guidelines,⁷¹ which he did not check before sending this e-mail.⁷²

⁶² Pl.’s Dep. Ex. 7 at 3; Carter Dep. 120:25–121:10 (admitting his concern for trainees focused on Dr. Josephson’s perceived divergence from guidelines from professional associations); Carter Dep. 157:14–159:16 (admitting his concerns focused on reaction to Dr. Josephson’s remarks and views).

⁶³ Carter Dep. 54:14–18 (admitting he had no patient care concerns before incident with Ms. Price); Carter Dep. 241:7–16 (admitting Ms. Price incident occurred in Nov. 2018); Brady Dep. 43:1–6; Brady Dep. 105:6–9 (testifying she never saw any patient care problems); Woods Dep. 107:6–9, 129:24–130:1 (same); Brady Dep. 119:16–120:23 (testifying patient care concerns came from the LGBT Center and Lambda Legal and no patients expressed concern about Dr. Josephson until after the Heritage Foundation event); Ganzel Dep. 91:7–9 (not aware of any patient care problems).

⁶⁴ Carter Dep. 33:21–34:10; *accord* Brady Dep. 119:16–120:2 (noting patient care concerns came from the LGBT Center and Lambda Legal, not patients); Steinbock Dep. 16:23–17:6 (noting she heard about the Heritage Foundation presentation from three to five people).

⁶⁵ Pl.’s Dep. Ex. 7 at 3.

⁶⁶ Carter Dep. 68:17–21; Carter Dep. 146:15–21 (admitting next accreditation visit was not until 2023); *accord* Brady Dep. 105:10–14 (admitting Dr. Josephson’s views sparked no accreditation complaints); Woods Dep. 107:10–13 (testifying he was unaware of any accreditation issue); Ganzel Dep. 91:11–18 (same); Steinbock Dep. 111:10–17 (same, adding she was aware of no instances where one professor created such issues); Buford Dep. 82:14–18 (similar).

⁶⁷ Carter Dep. 189:10–190:1; Brady Dep. 123:1–13; Steinbock Dep. 92:16–22; Lohr Dep. 64:18–65:2.

⁶⁸ Pl.’s Dep. Ex. 7 at 1.

⁶⁹ Carter Dep. 35:17–37:12 (vaguely describing two points but admitting he “can agree on those general principles”); Carter Dep. 38:1–24 (failing to identify anything objectionable from other presenters); *accord* Brady Dep. 38:8–14 (testifying Carter and Stocker did not identify objectionable Heritage Foundation remarks); Ganzel Dep. 108:20–23 (same as to Woods); Brady Dep. 27:14–19, 41:12–19, 93:9–13, 112:13–18, 140:2–4 (similar); Woods Dep. 205:15–19 (failing to identify any statement straying from curriculum); Ganzel Dep. 115:22–24 (same); Boland Dep. 34:22–24, 103:12–17 (same); Le Dep. 26:13–15 (same for Stocker); Lohr Dep. 18:15–21 (same for himself and Stocker); Carter Dep. 102:7–13 (same for himself); Lohr Dep. 24:6–9 (not recalling any expert testimony that was “problematic in any way”).

⁷⁰ Carter Dep. 24:7–15, 32:14–22, 160:21–161:5 (referencing generally five professional groups); Carter Dep. 34:23–35:7, 161:6–162:10 (failing to identify any specific guideline and citing only the “general tenor”); *accord* Brady Dep. 22:1–23:11, 33:2–10, 91:11–92:12, 173:13–25 (referencing generally guidelines from five groups without specifying which ones); Boland Dep. 39:23–40:2, 80:2–10, 110:1–10 (same for one group); Lohr Dep. 15:21–17:14 (same for two groups); Lohr Dep. 18:7–14, 23:9–11, 31:25–32:6 (not recalling anything about standards, position statements, or literature on gender dysphoria); Ganzel Dep. 108:9–19.

⁷¹ Carter Dep. 39:9–16; *accord* Lohr Dep. 22:4–23:1 (claiming Dr. Josephson’s remarks were “inconsistent with position statement,” which are not binding); Brady Dep. 46:11–47:6, 91:11–15, 112:10 (admitting the guidelines from two groups are just “strongly recommended” and “best practices”).

⁷² Carter Dep. 163:2–5 (admitting he had reviewed the guidelines a “while back” and “not in great

But Carter kept agitating, claiming “virtually all of the child psych faculty . . . share similar concerns”⁷³ and “agree that Allan must cease and desist in these activities in his role as our division chief and UofL faculty member.”⁷⁴ As Woods prepared to meet Ganzel,⁷⁵ he observed: if “being an outlier in one area or another, while superb everywhere else, is a disqualifier from the faculty, then many of our faculty won’t be here.”⁷⁶ But his notes added 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.”⁷⁷

By mid-November, after weeks of agitation by these handful of professors, a few vocal Division faculty criticized the Heritage Foundation event.⁷⁸ Defendants Le and Carter, joined by Dr. Stocker (all Division faculty) demanded Dr. Josephson apologize for his remarks⁷⁹ or issue a statement via University public relations that he had not spoken for the University,⁸⁰ a step they deemed essential to retaining his position.⁸¹ But no other professor ever issued such a statement,⁸² and professors regularly discuss controversial topics, using their affiliation, and everyone knows they are sharing their views, not those of their university.

C. About seven weeks after Dr. Josephson spoke at the Heritage Foundation, Defendants demoted him.

Almost seven weeks after the Heritage Foundation event, Woods sent Dr. Josephson a letter, claiming a majority of faculty “disagrees with your approach to the man-

detail”); *accord* Woods Dep. 160:22–161:5 (noting he had not researched gender dysphoria statements).

⁷³ Pl.’s Dep. Ex. 10 at 1.

⁷⁴ Pl.’s Dep. Ex. 8 at 2; Carter Dep. 163:7–11; Brady Dep. 129:4–9, 157:2–5.

⁷⁵ Pl.’s Dep. Ex. 45 at 1; 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).

⁷⁶ Pl.’s Dep. Ex. 45 at 3.

⁷⁷ Pl.’s Dep. Ex. 45 at 3.

⁷⁸ Carter Dep. 81:14–20 (admitting faculty expressed concern about the Heritage Foundation presentation); Brady Dep. 63:25–64:12 (noting Stocker’s concerns with the “Heritage Foundation talk and the expert testimony in the Florida case”); Le Dep. 40:6–9 (describing “gestalt of the conversation” as “Your views don’t reflect that of the clinic. We think it’s reflecting badly on our organization”); Josephson Dep. 28:14–18 (noting his “presentation at Heritage . . . was the main focus of . . . their anger”).

⁷⁹ Compl. ¶¶ 173–76; Josephson Dep. 29:2–12, 38:20–21, 89:3–13, 89:24–90:4.

⁸⁰ Compl. ¶ 176; Le Dep. 37:19–38:5; Josephson Dep. 89:18–22; Brady Dep. 71:12–72:17; Carter Dep. 76:11–77:6, 84:6–21.

⁸¹ Carter Dep. 94:4–6, 257:15–17.

⁸² Carter Dep. 77:7–14.

agement of children with gender dysphoria.”⁸³ While such disagreements “are common,” Woods claimed this one was different because of “the ratio of those on either side.”⁸⁴ So due to “the nature of this area of disagreement and your increasingly public promotion of your approach as an expert witness,” he ordered Dr. Josephson to resign or be “unilaterally remove[d],”⁸⁵ This was a rare move,⁸⁶ but one discussed extensively with Defendant Boland (his vice chair)⁸⁷ and cleared with Ganzel.⁸⁸ With no choice, Dr. Josephson resigned.⁸⁹ Carter, Le, and Lohr (another professor) took over.⁹⁰

IV. Once they demoted Dr. Josephson, Defendants created a hostile environment, looking to terminate him.

If Defendants objected only to Dr. Josephson’s leadership, demoting him would have fixed everything. But it didn’t. Instead, their animosity towards him grew. To them, someone with his views could not remain on the faculty.

A. University officials leaked news of Dr. Josephson’s demotion and worked to discredit him as an expert witness.

Steinbock announced the demotion first,⁹¹ leaking news she heard from Brady.⁹² Long upset at Dr. Josephson’s role in *Adams*,⁹³ she wanted to undermine him so the student would prevail.⁹⁴ So she duplicitously created an e-mail account for the fictitious “Joseph Josephson” and informed Lambda Legal of the demotion before it had

⁸³ Pl.’s Dep. Ex. 56 at 1; Woods Dep. 192:7–14.

⁸⁴ Pl.’s Dep. Ex. 56 at 1.

⁸⁵ Pl.’s Dep. Ex. 56 at 1–2; *accord* Pl.’s Dep. Ex. 81 at 1 (“I explained this is primarily because he has lost the confidence of his division members especially around his treatment and talk about the LGBT patients.”); Boland Dep. 99:6–16 (referencing Dr. Josephson’s views on gender dysphoria).

⁸⁶ Brady Dep. 74:7–18 (testifying she never saw anyone demoted in the Division, the medical school, or the University); Buford Dep. 47:4–6 (not recalling other division chiefs being demoted); Steinbock Dep. 51:13–15 (same); Woods Dep. 64:23–69:24 (recalling three division chief demotions, none of which involved the professor’s public comments); Boland Dep. 38:1–4 (recalling no demotions involving professors who had been at the University 14 years or more); Carter Dep. 103:4–24 (recalling two or three demotions in 36 years, some of which may have been voluntary); Josephson Dep. 104:20–25 (testifying he had “never” heard of someone being demoted for holding “disparate views on treatment plans”).

⁸⁷ Woods Dep. 35:6–21, 69:25–70:3; Boland Dep. 29:14–17, 31:19–22, 89:21–23.

⁸⁸ Woods Dep. 64:16–22, 70:16–22; Ganzel Dep. 43:1–44:6.

⁸⁹ Pl.’s Dep. Ex. 58 at 1–2; Compl. Ex. 8.

⁹⁰ Josephson Dep. 46:5–8.

⁹¹ Woods Dep. 199:25–200:3 (noting the demotion was not public on Nov. 29). Dr. Josephson, the first to disclose it publicly, did so on November 30. Pl.’s Dep. Ex. 19 at 1–2.

⁹² Steinbock Dep. 43:12–20, 159:3–6 (identifying Brady as source); Josephson Dep. 58:12–16 (testifying news of the demotion was “leaked ahead of schedule”).

⁹³ Pl.’s Dep. Ex. 151; Steinbock Dep. 139:6–24, 140:10–141:15, 28:20–29:5.

⁹⁴ Steinbock Dep. 160:7–19, 162:17–20 (testifying she sent the e-mail “to help the transgender teen in Florida” and that she knew Dr. Josephson would soon give a deposition).

been announced publicly.⁹⁵

Brady then became pen-pals with Lambda Legal, relaying news of the demotion⁹⁶ and other documents,⁹⁷ critiquing Dr. Josephson's deposition in *Adams* (the Florida case),⁹⁸ sharing it with Carter (who sent it to Le and Lohr),⁹⁹ and helping identify people to dispute his testimony.¹⁰⁰ Why? Because she “really hope[d] his expertise is called into question and this prevents him from engaging in this form of discrimination in the future.”¹⁰¹ She could not tolerate his views.

B. Defendants minimized Dr. Josephson's role due to his views.

While the demotion was being leaked to Lambda Legal but before it was formally announced, Defendants unleashed their animosity. Referencing the Division's new direction, Le remarked: they “just have to make sure that everyone gets on who wants on, or gets off if that's what they need to do.”¹⁰² Lohr threatened the “[g]loves could be coming off” when meeting with Dr. Josephson, as he was “inclined to challenge his inductive reasoning as unscientific and ask how much he's earned as an expert witness of the last 2 years on sexuality issues.”¹⁰³ Le considered “surreptitiously record[ing] the meeting,” a move she dubbed “[p]rolly not legal.”¹⁰⁴ She and Lohr decided Dr. Josephson would not meet with fellows in the Division alone.¹⁰⁵

Days later, Le, Lohr, and Carter discussed with Boland and Woods¹⁰⁶ an assign-

⁹⁵ Pl.'s Dep. Ex. 18; Steinbock Dep. 159:17–23 (admitting she sent the e-mail); Brady Dep. 165:18–24, 167:23–24 (identifying Steinbock as creating the account and sending the e-mail).

⁹⁶ Pl.'s Dep. Ex. 19 at 1, 3–8; Pl.'s Dep. Ex. 20 at 7; Brady Dep. 73:19–74:6 (testifying she did this to “update” Lambda Legal “as the case was ongoing”).

⁹⁷ Pl.'s Dep. Ex. 20 at 2; Pl.'s Dep. Ex. 21 at 1–3.

⁹⁸ Pl.'s Dep. Ex. 20 at 4–5; Brady Dep. 171:5–15, 178:4–11, 179:2–5 (admitting she was at work, unless on vacation, when she corresponded with Lambda Legal).

⁹⁹ Pl.'s Dep. Ex. 22; Brady Dep. 183:8–17 (testifying attached deposition transcript was from *Adams*).

¹⁰⁰ Pl.'s Dep. Ex. 21 at 1; Brady Dep. 182:13–20 (describing Miller as “definitely an LGBT ally and advocate” who “would have been upset” at Dr. Josephson using one of her cases to “promote anti-trans sentiments and narrative”).

¹⁰¹ Pl.'s Dep. Ex. 20 at 5; Brady Dep. 176:23–177:20 (criticizing defending sex-specific restrooms).

¹⁰² Pl.'s Dep. Ex. 130 at 3.

¹⁰³ Pl.'s Dep. Ex. 130 at 2.

¹⁰⁴ Pl.'s Dep. Ex. 130 at 1.

¹⁰⁵ Pl.'s Dep. Ex. 130 at 1 (Lohr: “I'm not sure he needs to meet with the fellows without you being there”; Le: “He will not be meeting with the fellows without me there. Don't worry.”).

¹⁰⁶ Pl.'s Dep. Ex. 84 at 1 (confirming meeting for Le, Lohr, Carter, Woods, and Boland on Dec. 6); Pl.'s Dep. Ex. 63 at 1 (“Thanks so much for the meeting today. . . . Attached are the two documents that we discussed today.”); Woods Dep. 207:3–11 (admitting notes reflect substance of discussion); Lohr

ment that banned Dr. Josephson from “pursu[ing] interests in LGBTQ advocacy” at work (though only a few faculty criticized his views there), stopped him from treating LGBTQ patients (a directive conveyed the next day¹⁰⁷), mandated he use identity-based terms (an illegal order), gagged him from discussing gender dysphoria with students, and subjected his teaching to more scrutiny.¹⁰⁸ Ultimately, they took away his teaching duties.¹⁰⁹ Why the new restrictions? “[H]is stance on LGBTQ patients is inconsistent with that of our division” and sparked “numerous complaints.”¹¹⁰

The same day, Carter gave Woods an annotated copy of Dr. Josephson’s *Adams* deposition.¹¹¹ Days later, responding to Carter,¹¹² Woods banned Dr. Josephson from attending faculty meetings.¹¹³ He had become *persona non grata*. And the reason? His views on treating children with gender dysphoria.

C. Defendants instructed Dr. Josephson to flag instances when he differed from a gender dysphoria curriculum that did not exist.

In addition to the demotion, Woods required Dr. Josephson to highlight any time he differed with the University’s gender dysphoria curriculum, and he agreed to do so.¹¹⁴ Yet, when Woods tried to find the curriculum, he failed.¹¹⁵ When Dr. Josephson asked for it, he received no response for two weeks, and even then did not receive it.¹¹⁶ When Woods’ assistant asked Steinbock if she had supplied the curriculum (though she is not a doctor and the LGBT Center is not part of the medical school¹¹⁷), Steinbock balked,¹¹⁸ and then provided over 300 pages of other professors’ views,¹¹⁹

Dep. 78:13–16 (same); Le Dep. 133:7–13 (admitting these are notes from meeting).

¹⁰⁷ Josephson Decl. ¶ 6; Pl.’s Ex. 194; Pl.’s Ex. 195.

¹⁰⁸ Pl.’s Dep. Ex. 63 at 4–5; Boland Dep. 106:19–22 (admitting other faculty were not recused from patient groups); Le Dep. 136:10–12 (same); Lohr Dep. 79:21 (same, adding not aware of others’ teaching being scrutinized).

¹⁰⁹ Boland Dep. 39:14–40:12.

¹¹⁰ Pl.’s Dep. Ex. 63 at 4–5.

¹¹¹ Pl.’s Dep. Ex. 160 at 1 (noting delivery date). *See generally id.* at 1–81.

¹¹² Pl.’s Dep. Ex. 66 at 1, 3.

¹¹³ Pl.’s Ex. 193; Josephson Dep. 53:11.

¹¹⁴ Pl.’s Dep. Ex. 51; Pl.’s Dep. Ex. 14; Pl.’s Dep. Ex. 56 at 1.

¹¹⁵ Pl.’s Dep. Ex. 53; Woods Dep. 175:20–23 (admitting he had never reviewed the curriculum).

¹¹⁶ Pl.’s Ex. 187 at 1–2.

¹¹⁷ Buford Dep. 15:1–8, 40:14–16; Le Dep. 76:22–24; Ganzel Dep. 33:18–34:2; Brady Dep. 35:19–22.

¹¹⁸ Pl.’s Dep. Ex. 59 at 1–2.

¹¹⁹ Pl.’s Dep. Ex. 61 at 1–2; Pl.’s Ex. 188 at 1–334 (including attachments); Steinbock Dep. 50:8–11 (testifying it “consisted of a series of lectures” from “many faculty”); Woods Dep. 205:12–14 (admitting

that were not formalized into a curriculum until mid-2018.¹²⁰ She claimed they aligned with four professional groups.¹²¹ She was wrong. Dr. Josephson aligned with all “major medical associations,” save one outlier.¹²² So Defendants ordered Dr. Josephson to flag any time he differed from an illusory “curriculum” from the ideologically-driven LGBT Center that did not formally exist that did not follow the science.

D. University officials continued to target Dr. Josephson, soliciting complaints they never investigated.

For weeks after the demotion, the push was on to punish Dr. Josephson more. University officials—including Le, Lohr, and Carter—“were gathering complaints and concerns” against Dr. Josephson.¹²³ On December 6 and 7, four landed in Woods’ inbox.¹²⁴ Steinbock manufactured at least three of the four complaints.¹²⁵ Despite Dr. Josephson’s demotion, she remained upset because he “was still seeing patients and still teaching.”¹²⁶ Woods circulated these complaints.¹²⁷

The same month, Le collected four more from staff and students.¹²⁸ Anonymous trainees provided others.¹²⁹ Many were vague; some could apply to any professor (*e.g.*, “Refuted empirically based literature that was in contrast to his belief system”).¹³⁰ Le just filed them away, without investigating or seeking Dr. Josephson’s perspective.¹³¹

Lohr similarly circulated a complaint he received a month earlier when Dr. Josephson discussed gender dysphoria locally.¹³² To Boland, his comments were “pretty

he never reviewed these materials); Boland Dep. 103:9–11 (same); Ganzel Dep. 115:14–16 (same); Lohr Dep. 76:13–17 (admitting he was not familiar with these materials).

¹²⁰ Josephson Dep. 40:2–6.

¹²¹ Pl.’s Dep. Ex. 61 at 1 (WPATH, Endocrine Soc’y, Am. Psychol. Ass’n, Am. Acad. of Pediatrics).

¹²² Cantor Rep’t [Pl.’s Ex. 176] ¶ 105; Cantor Dep. 69:5–16, 71:1–4 (testifying Dr. Josephson’s remarks were “consistent with the state of the science as it existed at the time” and professional guidelines).

¹²³ Lohr Dep. 85:10–20.

¹²⁴ Pl.’s Dep. Ex. 24; Pl.’s Dep. Ex. 25; Pl.’s Dep. Ex. 26; Pl.’s Dep. Ex. 27; Pl.’s Dep. Ex. 157.

¹²⁵ Steinbock Dep. 174:4–23, 178:3–16.

¹²⁶ Steinbock Dep. 170:2–6; *accord* Steinbock Dep. 47:10–48:10.

¹²⁷ Pl.’s Ex. 189 at 1.

¹²⁸ Pl.’s Dep. Ex. 55 at 1; Pl.’s Dep. Ex. 122 at 2, 3, 14; Le Dep. 116:5–13.

¹²⁹ Pl.’s Dep. Ex. 122 at 15.

¹³⁰ Pl.’s Dep. Ex. 122 at 15.

¹³¹ Le Dep. 116:23–117:1 (not investigating trainees’ complaints); Lohr Dep. 85:5–7 (not recalling anyone discussing complaint with Dr. Josephson)

¹³² Pl.’s Dep. Ex. 64 at 1–2.

concerning”;¹³³ to Woods, they were fodder for the file.¹³⁴ No one verified anything.¹³⁵

Woods delayed announcing the demotion so Dr. Josephson could “have the conversation you want to with the division first.”¹³⁶ But whenever he tried to talk with others, officials reacted,¹³⁷ and Carter complained to Woods, Boland, Le, and Lohr.¹³⁸ No one sought Dr. Josephson’s perspective.¹³⁹

Later, Le and Lohr kept squirrelling away complaints. Many were trivial (e.g., printing depositions,¹⁴⁰ leaving a bit early¹⁴¹). Carter, Le, and Lohr objected to one of his presentations.¹⁴² Others smacked of envy, as they scrutinized his tax forms,¹⁴³ though he handled the income properly.¹⁴⁴ Many involved objections to what he said.¹⁴⁵ By mid-February, Carter feared this scrutiny “makes it look like I am intentionally looking for things to target Allan,” but Le still urged him to contact Woods and Boland, likening it to “reporting to [Child Protective Services]. Let them investigate.”¹⁴⁶ But no one investigated.¹⁴⁷

In late 2017, Le began tracking the complaints.¹⁴⁸ She created a spreadsheet for

¹³³ Pl.’s Dep. Ex. 85 at 1.

¹³⁴ Pl.’s Dep. Ex. 64 at 1 (“Print and add to file.”); Woods Dep. 210:20–22 (doing nothing more).

¹³⁵ Boland Dep. 109:13–18 (admitting they did nothing but review evaluations); Lohr Dep. 81:24–82:11 (noting no concerns expressed or actions taken about another professor who expressed similar views).

¹³⁶ Pl.’s Dep. Ex. 60; *accord* Pl.’s Ex. 190 at 1; Pl.’s Ex. 191; Pl.’s Ex. 193 at 1.

¹³⁷ Pl.’s Dep. Ex. 83 at 1; Pl.’s Ex. 192 at 1.

¹³⁸ Pl.’s Dep. Ex. 66 at 1, 3; Woods Dep. 215:15–18 (not understanding why this was problematic); Pl.’s Dep. Ex. 86 at 1; Pl.’s Dep. Ex. 89b at 1–2.

¹³⁹ Boland Dep. 120:20–121:7; Carter Dep. 235:18–236:4.

¹⁴⁰ Pl.’s Dep. Ex. 55 at 1; Pl.’s Dep. Ex. 122 at 16, 21.

¹⁴¹ Pl.’s Dep. Ex. 55 at 3 (referencing incidents on Jan. 15 and Jan. 18, 2019).

¹⁴² Pl.’s Dep. Ex. 162 at 1; Pl.’s Dep. Ex. 163 at 1.

¹⁴³ Pl.’s Dep. Ex. 55 at 1, 3; Pl.’s Dep. Ex. 122 at 17, 43; Pl.’s Dep. Ex. 70 at 1; Pl.’s Ex. 197 at 1–2.

¹⁴⁴ Woods Dep. 220:4–6; Le Dep. 157:2–8; Lohr Dep. 95:23–96:1; Carter Dep. 45:23–46:12; *accord* Woods Dep. 26:1–4, 91:10–19; Le Dep. 24:3–7; Lohr Dep. 24:13–16; Ganzel Dep. 31:13–18; Steinbock Dep. 29:21–30:12; Carter Dep. 44:19–22.

¹⁴⁵ Pl.’s Dep. Ex. 55 at 1, 2, 3 (referencing events on Jan. 19, Feb. 27, Mar. 23, Oct. 12, Nov. 28, Nov. 30 of 2018); Pl.’s Dep. Ex. 122 at 37–42.

¹⁴⁶ Pl.’s Ex. 197 at 1–2.

¹⁴⁷ Woods Dep. 218:25–220:3 (not recalling any investigation of Pl.’s Dep. Ex. 70); Boland Dep. 119:10–22 (admitting she did not investigate Pl.’s Dep. Ex. 70 and could not recall Woods doing so); Le Dep. 156:14–157:1 (testifying Woods and Boland did “likely nothing” and not recalling anyone investigating Pl.’s Dep. Ex. 70); Lohr Dep. 95:16–22 (not recalling anyone investigating Pl.’s Dep. Ex. 70); Lohr Dep. 106:14–18 (admitting no one investigated anything in Pl.’s Dep. Ex. 134); Carter Dep. 233:1–16 (admitting doing nothing to verify Pl.’s Dep. Ex. 163).

¹⁴⁸ Le Dep. 104:15–17 (“I started the document . . . when we were assigned as the three division chiefs[.]”); Carter Dep. 201:2–8 (fixing start of tracking document as Nov. 27, 2017); Pl.’s Dep. Ex. 134 at 1–3 (emailing tracking document on June 19, 2018).

the dates, sources, summaries, and documentation of anything negative she, Carter, and Lohr heard.¹⁴⁹ No one had ever seen this done for any other professor.¹⁵⁰ But she shared her “Allan tracking document” so she, Lohr, and Carter could paper the file.¹⁵¹

E. Defendants faulted Dr. Josephson’s work before finalizing his role.

In early February 2018, a new line of criticism materialized: Carter claimed Dr. Josephson’s hours were low.¹⁵² But interim Division leadership had not yet finalized his new role. In mid-December, Lohr had asked to meet to discuss Dr. Josephson’s “roles and expectations post-transition” so he, Le, and Carter could “meet with him after the Holidays to discuss his work assignment.”¹⁵³ A month later, they were still trying to identify what “expectations . . . have already been set for him” and “come up with [his] work assignment.”¹⁵⁴ In late January, Boland remarked this assignment “is still a work in progress” and “should be finalized in the next few weeks.”¹⁵⁵ By March, Dr. Josephson thought he was fulfilling his assignments, but Boland now accused him of lying.¹⁵⁶ No one gave him a chance to explain.¹⁵⁷

F. Defendants never took Dr. Josephson’s concerns seriously and even resisted meeting with him.

In early December, Dr. Josephson met with Woods and Boland.¹⁵⁸ He asked about his demotion, but they gave no answers, ordered him to end any gender dysphoria cases, and banned him from faculty meetings.¹⁵⁹ Then the information flow to Dr. Josephson ended.

Dr. Josephson asked to meet with Woods before Christmas; Woods cancelled.¹⁶⁰ In

¹⁴⁹ See generally Pl.’s Dep. Ex. 55.

¹⁵⁰ Woods Dep. 190:16–191:13; Lohr Dep. 106:11–13; Carter Dep. 201:9–202:5 (not recalling any for Pediatrics professors and only one on a professor with “explosive” and “dangerous” conduct).

¹⁵¹ Pl.’s Dep. Ex. 134 at 1–3.

¹⁵² Pl.’s Dep. Ex. 89b at 2.

¹⁵³ Pl.’s Dep. Ex. 86 at 3.

¹⁵⁴ Pl.’s Dep. Ex. 28 at 2; Pl.’s Dep. Ex. 125 at 1 (providing table for Dr. Josephson’s daily assignment); Le Dep. 149:19–22 (being unsure any decisions were reached at this meeting); Lohr Dep. 90:4–14 (admitting January meeting did not clarify expectations of Dr. Josephson).

¹⁵⁵ Pl.’s Ex. 196 at 1.

¹⁵⁶ Pl.’s Dep. Ex. 75 at 1.

¹⁵⁷ Le Dep. 161:19–23.

¹⁵⁸ Pl.’s Dep. Ex. 82.

¹⁵⁹ Josephson Decl. ¶¶ 6–7; Pl.’s Ex. 195 (directing Dr. Josephson to take no more transgender patients).

¹⁶⁰ Pl.’s Dep. Ex. 87 at 2.

the new year, when he asked again, Woods dismissively quipped, “I am inclined to meet with him at some point.”¹⁶¹ Boland urged him to “chat with [Le, Lohr, and Carter] first.”¹⁶² When Dr. Josephson met briefly with Le, she took offense at his questions.¹⁶³

Later that month, Dr. Josephson reminded Woods, only to be told his request was “not forgotten.”¹⁶⁴ Finally, in mid-February, the two met to discuss his annual review.¹⁶⁵ He pointed out that his views on gender dysphoria aligned with the American Academy of Child & Adolescent Psychiatry’s most recent guidance and recent UCLA studies and questioned the rush to judgment that led to his demotion.¹⁶⁶ When he mentioned how the demotion was leaked, Woods feigned concern¹⁶⁷ and then did not respond.¹⁶⁸ When he followed up, Woods referred him to Paul and University counsel, who in turn referred him back to Woods, who did nothing.¹⁶⁹

When Dr. Josephson asked Lohr for a short meeting (first by e-mail¹⁷⁰ and later in person¹⁷¹), Lohr had to e-mail four people before responding.¹⁷² Yet Le complained that Dr. Josephson was “being so cryptic.”¹⁷³ Suspicion was the order of the day.

G. In their March 2018 meeting, Defendants attacked Dr. Josephson.

On March 23, Le, Carter, and Lohr met with Dr. Josephson,¹⁷⁴ their first since the demotion.¹⁷⁵ When he tried again to ask his questions,¹⁷⁶ Lohr labeled him “childish,

¹⁶¹ Pl.’s Dep. Ex. 87 at 1.

¹⁶² Pl.’s Dep. Ex. 87 at 1.

¹⁶³ Pl.’s Dep. Ex. 55 at 1 (noting entry for Jan. 19, 2018).

¹⁶⁴ Pl.’s Ex. 200 at 1; Pl.’s Ex. 201 at 1; *accord* Josephson Dep. 53:13–17 (describing scheduling efforts).

¹⁶⁵ Pl.’s Ex. 202.

¹⁶⁶ Josephson Decl. ¶¶ 9–10; Pl.’s Ex. 203 at 1–3.

¹⁶⁷ Josephson Decl. ¶¶ 11–12; Pl.’s Ex. 203 at 1–3 (noting Woods said, “I want this e-mail”).

¹⁶⁸ Pl.’s Ex. 204 at 1–3.

¹⁶⁹ Pl.’s Dep. Ex. 74 at 1–2; Woods Dep. 225:8–11, 226:6–9 (admitting he took no action); Josephson Decl. ¶¶ 13–15; Pl.’s Ex. 205 at 1–2; Josephson Dep. 59:9–22.

¹⁷⁰ Pl.’s Dep. Ex. 75 at 2.

¹⁷¹ Pl.’s Dep. Ex. 75 at 1–2.

¹⁷² Pl.’s Dep. Ex. 75 at 1; Lohr Dep. 96:17–97:8 (attributing his reaction to wanting to avoid demotion-related questions and concerns about Dr. Josephson consulting attorneys).

¹⁷³ Pl.’s Dep. Ex. 89a at 1; Le Dep. 158:24–159:16 (claiming they were “all weary” of his questions).

¹⁷⁴ Compl. ¶ 274; Answer ¶ 274; Pl.’s Dep. Ex. 122 at 22; Le Dep. 163:1–4 (admitting Pl.’s Dep. Ex. 128, most of which is also in Pl.’s Dep. Ex. 122 at 26, are notes from this meeting).

¹⁷⁵ Lohr Dep. 54:2–4, 55:2–6.

¹⁷⁶ Pl.’s Dep. Ex. 122 at 26 (“We also told him that he was not to talk individually to faculty or staff about issues related to the transition. . . . [T]he conversation deteriorated somewhat into the events leading to his being asked to step down as chief.”); Le Dep. 163:5–10 (admitting Dr. Josephson asked about the “timeline of event”); Lohr Dep. 52:21–53:5, 53:20–54:1, 99:12–20 (describing his frustration with Dr. Josephson’s questions).

narcissistic, and flippant,”¹⁷⁷ and Carter added lying, being deceptive, and withholding information.¹⁷⁸ When Dr. Josephson described his frustration at his demotion being leaked to Lambda Legal, they paid no attention and bemoaned the “uncomfortable meeting.”¹⁷⁹ Yet, during deposition, when confronted with the facts that they could have investigated, they admitted he reacted reasonably.¹⁸⁰ But this was after they had achieved their goal and he was long gone.

H. By March 2018, Defendants discussed terminating Dr. Josephson.

As early as March 2018, Defendants were anticipating Dr. Josephson’s exit. Faced with the prospect of losing funding if faculty “retire or resign,” Le predicted: “We will likely be losing both Allan [Josephson] and Fred [Stocker] this year,”¹⁸¹ a reference to “whether or not Dr. Josephson’s contract would be renewed.”¹⁸² Two months later, she again predicted: “Fred and possibly Allan [would be] leaving soon.”¹⁸³

Dr. Josephson had no intention of voluntarily leaving the University anytime soon,¹⁸⁴ despite the hostility he was enduring. But Defendants already knew he would be leaving one way or the other; it was just a matter of time.

I. That summer, Defendants honed their subterfuge for terminating Dr. Josephson.

That summer, Lohr focused on Dr. Josephson’s “productivity and billing” figures.¹⁸⁵ This proved difficult, as Le had to consult at least three other people, efforts Carter

¹⁷⁷ Compl. ¶ 275; Lohr Dep. 53:9–11, 55:7–11; Josephson Dep. 86:8–21.

¹⁷⁸ Compl. ¶ 279.

¹⁷⁹ Pl.’s Dep. Ex. 122 at 26; Le Dep. 163:11–22 (describing basis for her assumption Dr. Josephson referred to Brady); Le Dep. 130:7–8 (admitting deposition was “the first time I’ve seen it and connected the dots” regarding the email under the false name); Carter Dep. 236:10–237:6.

¹⁸⁰ Le Dep. 164:11–13 (“And if he thinks Chris Brady wrote that, I can understand, obviously, the anger that would go along with that.”); Carter Dep. 237:13–21 (similar); *accord* Woods Dep. 201:19–202:6 (describing e-mail as “very disturbing,” a “clear breach,” and something that displeased him); Le Dep. 130:3–7 (being “shocked” at the email, describing as “beneath professional people”); Lohr Dep. 101:7–10; Carter Dep. 205:24–206:3 (being “shocked” at this “bizarre” and “unfortunate” event).

¹⁸¹ Pl.’s Dep. Ex. 164 at 1.

¹⁸² Carter Dep. 238:1–9.

¹⁸³ Pl.’s Dep. Ex. 132 at 1; *accord* Lohr Dep. 60:2–12 (admitting Defendants discussed not renewing Dr. Josephson’s contract before their July 9th meeting with him).

¹⁸⁴ Josephson Dep. 98:12–99:3 (confirming projected retirement at end of 2026); Lohr Dep. 101:12–20 (admitting Dr. Josephson had not said anything to cause him to think he would be leaving soon).

¹⁸⁵ Pl.’s Dep. Ex. 133 at 2.

dubbed “excellent sleuthing.”¹⁸⁶ Carter exulted that this information “will be valuable for Kim [Boland] [who succeeded Woods¹⁸⁷] and Ron Paul,”¹⁸⁸ two figures instrumental in the termination.¹⁸⁹ Le added information she gleaned from “the calendar in Jan’s [Dr. Josephson’s assistant] office,” and they compiled everything for Boland.¹⁹⁰

Even six months post-demotion, the three could not contain their ill will towards Dr. Josephson and his views. Though fine with him doing “billable legal work . . . based upon accurately representing the scientific basis of our profession,”¹⁹¹ Carter took issue with Dr. Josephson “literally going against the scientific and ethical position of the profession . . . and getting paid to do it.”¹⁹² Le “definitely [sic] agree[d] with [Carter’s] position” on Dr. Josephson’s gender dysphoria remarks.¹⁹³ Later, in depositions, they would disclaim any gender dysphoria expertise and fail to identify any professional guideline he violated.¹⁹⁴ Unrebutted expert testimony shows Dr. Josephson was the one following the science.¹⁹⁵

To Boland, this “excellent sleuthing”¹⁹⁶ was “a huge help.”¹⁹⁷ It consisted of two pages detailing Dr. Josephson’s shortcomings.¹⁹⁸ No one asked him about this list,¹⁹⁹ but they circulated Le’s “Allan tracking document.”²⁰⁰ Boland sent it to her assistant twice, both times instructing her to file it and soliciting comments.²⁰¹ Even Le knew

¹⁸⁶ Pl.’s Dep. Ex. 133 at 1.

¹⁸⁷ Josephson Dep. 66:6–9.

¹⁸⁸ Pl.’s Dep. Ex. 133 at 1.

¹⁸⁹ Buford Dep. 46:11–14 (testifying Faculty Affairs handled contracts for continuing faculty); Boland Dep. 43:5–14, 43:25–44:7, 144:25–145:4 (testifying she spoke with Ganzel and Paul about the nonrenewal and recommended it to them); Ganzel Dep. 54:4–12 (same).

¹⁹⁰ Pl.’s Ex. 209 at 1–2.

¹⁹¹ Pl.’s Ex. 209 at 1.

¹⁹² Pl.’s Ex. 209 at 1.

¹⁹³ Pl.’s Ex. 209 at 1.

¹⁹⁴ See *supra* notes 69–70 and accompanying text.

¹⁹⁵ See *supra* notes 53–54 and accompanying text.

¹⁹⁶ Pl.’s Dep. Ex. 133 at 1.

¹⁹⁷ Pl.’s Dep. Ex. 94 at 1.

¹⁹⁸ Pl.’s Dep. Ex. 95 at 2–3; Lohr Dep. 104:1–17.

¹⁹⁹ Le Dep. 169:3–18. Lohr Dep. 104:18–105:11; Carter Dep. 239:7–240:4.

²⁰⁰ Pl.’s Dep. Ex. 134 at 1.

²⁰¹ Pl.’s Dep. Ex. 95 at 1 (“Take a look and then file. This is what he is currently doing.”); Pl.’s Dep. Ex. 97 at 1 (“Here is something else to add to Allen [sic] Josephson’s file. Any thoughts you might have would be appreciated.”).

it was unreliable, reminding herself to “verify . . . before including in anything.”²⁰²

And unreliable it was. While his productivity initially declined (as expected after an abrupt transition), so had five others’.²⁰³ A sixth’s was so low that they removed her from the analysis to preserve the Division’s averages.²⁰⁴ But Defendants focused only on Dr. Josephson.²⁰⁵ They faulted his telepsychiatry figures, admitting later his “productivity from the telepsych perspective was pretty solid”²⁰⁶ and they reduced his clinical duties due to his increased telepsychiatry.²⁰⁷ They faulted him for not getting leave approved, knowing his assistant was at fault.²⁰⁸ They claimed he had weeks with no patients, but most were weeks he was on leave.²⁰⁹

J. After mid-July, Defendants never met with Dr. Josephson but tracked him, mocked him, and pursued nonrenewal.

On July 9, Le, Carter, and Lohr met with Dr. Josephson as Boland instructed, where they revised his work assignment and discussed this unreliable information,²¹⁰ which they reduced to writing.²¹¹ Again, they did not ask him for his perspective.²¹² As this was only their second meeting with him, Dr. Josephson tried to ask his still unanswered questions.²¹³ Two days later, he met briefly with Le, who got irritated at his questions,²¹⁴ and tried to speak with Lohr, who curtly refused.²¹⁵

After this, Defendants never again discussed Dr. Josephson’s performance with

²⁰² Pl.’s Dep. Ex. 96 at 1; Le Dep. 171:18–22 (admitting productivity dashboards “cannot always be trusted” and “sometimes underestimates what people do”).

²⁰³ Josephson Decl. ¶¶ 49–54; Pl.’s Ex. 179; *accord* Josephson Decl. ¶¶ 65–69; Pl.’s Ex. 273; Pl.’s Ex. 274; Pl.’s Ex. 277.

²⁰⁴ Pl.’s Ex. 210 at 1.

²⁰⁵ Lohr Dep. 103:4–6 (not recalling any productivity concerns regarding other faculty); Le Dep. 72:14–16 (claiming no other psychiatrists were falling short).

²⁰⁶ Le Dep. 62:16–17.

²⁰⁷ Le Dep. 153:17–155:5; Josephson Decl. ¶ 26.

²⁰⁸ Pl.’s Dep. Ex. 95 at 2 (noting absences “are listed on a calendar logged by Jan Schoen, our Administrative Assistant so were placed either by Jan or Dr. Josephson”); Pl.’s Dep. Ex. 161 (“We can’t count on [Jan] to keep [leave recording] straight[.]”); Josephson Decl. ¶¶ 95–96.

²⁰⁹ Pl.’s Dep. Ex. 95 at 2–3; Josephson Decl. ¶¶ 93–94.

²¹⁰ Pl.’s Dep. Ex. 55 at 3 (noting entry for July 9, 2018).

²¹¹ Pl.’s Dep. Ex. 93.

²¹² Le Dep. 169:3–18, 170:1–17; Lohr Dep. 107:14–22; Boland Dep. 129:7–13.

²¹³ Josephson Decl. ¶¶ 16–18; *accord* Pl.’s Ex. 211; Pl.’s Ex. 212 at 1–2.

²¹⁴ Le Dep. 58:16–59:14 (describing meeting and how she “made sure not to meet with him individually anymore”); Josephson Decl. ¶¶ 19–20 (“Why do you keep going over and over things?”); Pl.’s Ex. 213 at 1.

²¹⁵ Josephson Decl. ¶ 21; Pl.’s Ex. 213 at 1–2; Josephson Dep. 86:8–16, 87:8–11.

him, in person or otherwise.²¹⁶ Boland had planned to “meet with him and reinforce this and talk about a timeline for a Performance Improvement Plan.”²¹⁷ No meeting occurred; no timeline was discussed; no plan was implemented.²¹⁸

For an administrative assistant, Defendants would develop a job description, wait two or three weeks, and implement a performance improvement plan. If problems persisted two or three months, they would utilize probation. If problems persisted another two or three months, the assistant would be fired.²¹⁹ A professor with productivity issues received a “process improvement plan,” followed by two or three months of probation.²²⁰ But for Dr. Josephson—a full professor, with over 35 years of experience, who led the Division almost 15 years—they did not even consider this.²²¹

Defendants sent their letter,²²² the only formal productivity warning Dr. Josephson received in his entire career,²²³ though they struggled to specify what they wanted him to do.²²⁴ They were still intent on getting rid of him, with Carter urging them to generate “strong documentation” to “avoid Allan’s reappointment.”²²⁵ Boland assured them “the Dean is supportive of what we and you are doing.”²²⁶ Ten days after the July 9 meeting, Paul gave instructions to “add [him] to [the] agenda for Personnel issues.”²²⁷

Though Defendants did not talk *to* Dr. Josephson, they talked *about* him a lot.

²¹⁶ Le Dep. 57:1–10 (admitting they met with Dr. Josephson only twice, in March and July); Le Dep. 173:9–22 (not recalling any discussion about productivity with Dr. Josephson after the July 14 letter and admitting they never met with Dr. Josephson again); Lohr Dep. 48:13–16, 108:3–6 (admitting they never met with Dr. Josephson or discussed productivity with him after July 2018); Carter 107:19–23 (not recalling any meetings after July); Josephson Decl. ¶ 27.

²¹⁷ Pl.’s Dep. Ex. 94 at 1.

²¹⁸ Boland Dep. 127:9–12, 128:7–18; Lohr Dep. 103:13–15; Ganzel Dep. 49:20–22; *accord* Univ. of Louisville Hum. Res., *Improvement Plans*, <https://bit.ly/3aFsoSF> (last visited Oct. 28, 2021).

²¹⁹ Pl.’s Dep. Ex. 28 at 3.

²²⁰ Boland Dep. 131:14–132:4; Ganzel Dep. 122:21–123:4 (agreeing performance improvement plans are “generally part of the way that the University deals with employee concerns”); Josephson Decl. ¶ 29 (noting the “normal practice” was to use “a performance improvement plan, a probationary period, or other collaborative process”).

²²¹ Ganzel Dep. 49:17–19 (not recalling any discussion of probation for Dr. Josephson); Josephson Decl. ¶¶ 27–28.

²²² Pl.’s Dep. Ex. 106 at 2.

²²³ Josephson Decl. ¶ 23.

²²⁴ Pl.’s Ex. 214 at 1 (noting difficulty of making “the hours/weeks in our expectations consistent with the 50 hour work week on the work assignment and the Peds approach to scheduling”).

²²⁵ Pl.’s Dep. Ex. 106 at 1.

²²⁶ Pl.’s Dep. Ex. 106 at 1.

²²⁷ Pl.’s Dep. Ex. 172.

That fall and winter, Le added to her “Allan tracking document,”²²⁸ and Lohr observed they needed “to continue our documentation and monitoring.”²²⁹ No one verified anything.²³⁰ They discussed his productivity.²³¹ But no one spoke with him or highlighted how his productivity had steadily improved since July.²³²

Instead, Carter, though no longer co-chief,²³³ was busy coaching students on what to include in their complaints about Dr. Josephson.²³⁴ Then he sent it to Lohr and Le,²³⁵ who added to her tracking document.²³⁶ He never talked with Dr. Josephson.²³⁷

The next day, Carter heard about some LGBT-related comments and assumed they were Dr. Josephson’s.²³⁸ Learning he was wrong, he mockingly responded: “Allan has friends.”²³⁹ To Boland, the remarks Carter referenced demanded a quick response, as her staff complained about Dr. Josephson.²⁴⁰

Later that day, Carter sent along another complaint, adding: “The AJ saga continues.”²⁴¹ Again, Le updated her log,²⁴² no one talked with Dr. Josephson.²⁴³ Still later, he re-sent one from October, adding that Dr. Josephson’s remarks “send eyes rolling virtually every week,” “his clinical judgment is atrocious,” and his “dispositions . . . were incompetent.”²⁴⁴ Just months earlier, Woods praised Dr. Josephson as “an excellent clinical pediatric psych[iatrist].”²⁴⁵ Weeks before that, he reminded

²²⁸ Pl.’s Dep. Ex. 55 at 3–4.

²²⁹ Pl.’s Dep. Ex. 122 at 37–39.

²³⁰ Le Dep. 61:18–24 (admitting she “didn’t really do anything with” complaints from Threlkeld and Carter but “put them in a folder”).

²³¹ Le Dep. 64:20–65:6, 67:4–13 (describing how she and Boland discussed Dr. Josephson monthly); Ganzel Dep. 127:19–128:8 (summarizing conversations with Boland about Dr. Josephson in Nov. 2018); Pl.’s Dep. Ex. 99 at 1; Pl.’s Ex. 215.

²³² Josephson Decl. ¶¶ 27, 61–63, 73–74; Pl.’s Ex. 274 at 1; Pl.’s Ex. 276 at 1.

²³³ Carter Dep. 19:22–24 (noting his role as co-chief ended around October 2018).

²³⁴ Pl.’s Dep. Ex. 166 at 1.

²³⁵ Pl.’s Dep. Ex. 122 at 40–41.

²³⁶ Pl.’s Dep. Ex. 55 at 3 (noting entry dated Nov. 28, 2018).

²³⁷ Carter Dep. 143:22–24, 144:23–25, 241:24–242:3.

²³⁸ Pl.’s Dep. Ex. 170 at 1–2.

²³⁹ Pl.’s Dep. Ex. 170 at 1.

²⁴⁰ Pl.’s Dep. Ex. 100 at 1.

²⁴¹ Pl.’s Dep. Ex. 122 at 42; *see also* Pl.’s Dep. Ex. 169 at 1 (thanking the student for this complaint).

²⁴² Pl.’s Dep. Ex. 55 at 3 (noting entry dated Nov. 30, 2018).

²⁴³ Carter Dep. 245:11–13.

²⁴⁴ Pl.’s Dep. Ex. 168 at 1.

²⁴⁵ Pl.’s Dep. Ex. 72 at 1.

everyone that Dr. Josephson “was named Master Clinician four years in a row by the [American Academy of Child & Adolescent Psychiatry].”²⁴⁶ But Carter did not investigate.²⁴⁷ He had a receptive audience, intent on seeing Dr. Josephson go.

Around this time, Le e-mailed Dr. Josephson about his work assignment, saying nothing about his performance.²⁴⁸ Meanwhile, Lohr, no longer a co-chief,²⁴⁹ volunteered to review Dr. Josephson’s productivity.²⁵⁰ Strangely, they did not highlight these figures, perhaps because they had consistently improved since July.²⁵¹

V. Finally, Defendants refused to renew Dr. Josephson’s contract, terminating him after sixteen and a half years at the University.

The final hammer fell in February 2019 when Defendants announced they would not renew Dr. Josephson’s contract. On February 21, Boland e-mailed Le that they had to meet with him within the week to tell him of the termination.²⁵² This surprised Le; Boland admitted she “just realized this too.”²⁵³ Neither had been involved in a termination before.²⁵⁴

Rather than forthrightly telling him that she wanted to meet, Boland instructed Le to schedule the meeting “to replace his annual review which would be the reason you should use to get this on the schedule quickly,” a ruse Le dutifully carried out.²⁵⁵

The meeting—which came “off as a little bit of an ambush”²⁵⁶—had nothing to do with his annual review,²⁵⁷ which he did not receive until over ten days later and not until he asked for it.²⁵⁸ Instead, Boland informed him Ganzel would soon send him a

²⁴⁶ Pl.’s Ex. 173 at 2.

²⁴⁷ Carter Dep. 242:5–11, 244:3–6.

²⁴⁸ Pl.’s Dep. Ex. 129 at 1–2.

²⁴⁹ Lohr Dep. 11:7–11 (admitting he resigned as co-chief effective Nov. 1, 2018); Josephson Dep. 67:7–15 (noting Le took over as division chief in late November 2018); Le Dep. 15:14–16:2, 66:2–4 (similar).

²⁵⁰ Pl.’s Ex. 216.

²⁵¹ Josephson Decl. ¶¶ 27, 61–63, 73–74; Pl.’s Ex. 274 at 1; Pl.’s Ex. 276 at 1; Pl.’s Dep. Ex. 96 at 3–4.

²⁵² Pl.’s Dep. Ex. 102 at 2.

²⁵³ Pl.’s Dep. Ex. 102 at 1 (Le: “Oh gosh, I thought it was 90 days and we had until the end of March.”).

²⁵⁴ Le Dep. 68:24–69:1; Boland Dep. 45:24–46:8.

²⁵⁵ Pl.’s Dep. Ex. 102 at 2; Pl.’s Dep. Ex. 103 at 1.

²⁵⁶ Le Dep. 175:10–11.

²⁵⁷ Compl. ¶ 298.

²⁵⁸ Josephson0002432; Pl.’s Dep. Ex. 104 at 1–2; Pl.’s Dep. Ex. 105 at 1–2.

letter informing him that his contract would not be renewed.²⁵⁹ Neither Boland nor Ganzel gave any reason for this, with Boland just saying that Defendants decided to go a “different direction,” a term she employed to communicate nothing.²⁶⁰

Afterwards, Dr. Josephson asked why his contract would not be renewed.²⁶¹ After all, this was the first he had heard about his performance in six months. Especially for professors with over 16 years of service, non-renewals were rare.²⁶² Indeed, the provost could not name one.²⁶³ Nor are they automatic or arbitrary.²⁶⁴ But Boland refused to give him a reason,²⁶⁵ though Carter shared their pretextual one with others.²⁶⁶

Years later, Defendants claimed they acted only due to Dr. Josephson’s productivity figures.²⁶⁷ Yet they did nothing to the other faculty whose productivity declined by mid-2018.²⁶⁸ And after July, Dr. Josephson’s figures had improved, and they did not check his figures for 2019.²⁶⁹ Nor did they credit him for his other non-billable services, often on urgent, complex, and sensitive cases.²⁷⁰

Meanwhile, confusion reigned. Paul repeatedly queried whether certified letters were needed “for these types of non-renewals,” instructing his staff to check multiple

²⁵⁹ Compl. ¶¶ 299–300; Pl.’s Dep. Ex. 143 at 1 (emailing Ganzel’s letter on Mar. 1); Pl.’s Dep. Ex. 142; Boland Dep. 150:5–10 (admitting she recommended nonrenewal and Ganzel made the decision).

²⁶⁰ Boland Dep. 146:15–147:8, 149:13–150:1; Le Dep. 68:19–23, 177:17–21.

²⁶¹ Pl.’s Dep. Ex. 104 at 1–2; Pl.’s Dep. Ex. 105 at 1–2.

²⁶² Boehm Dep. 15:22–16:1 (testifying non-renewals were “not super common”); Brady Dep. 84:23–85:7 (not aware of any professors in the Division, Department, or medical school not having their contracts renewed); Buford Dep. 44:19–24 (not recalling any non-renewals); Steinbock Dep. 57:19–23 (similar); Lohr Dep. 61:13–15 (similar); Josephson Dep. 105:1–8 (“not aware of any instances” where someone’s contract was not renewed “for expressing disagreement over treatment plans”); Woods Dep. 86:14–19, 88:20–89:11 (not recalling deciding to not renew any faculty contracts or any current or former division chief’s contract not being renewed); Le Dep. 68:19–70:12 (admitting she participated in only one other nonrenewal (due to a medical issue)); Ganzel Dep. 16:5–7, 59:2–15 (estimating 6–7 non-renewals per year across the 23 departments in the medical school, with those involving full professors being “less common,” and those involving full professors with over 14 years of experience “more unusual”); Carter Dep. 111:2–112:21 (recalling 6 non-renewals in 36 years, including some voluntary ones but none of a full professor or a professor with over 14 years of experience).

²⁶³ Boehm Dep. 17:13–22; *id.* 10:18–22 (noting role as provost); Ganzel Dep. 62:9–63:8 (recalling one).

²⁶⁴ Ganzel Dep. 133:10–14 (admitting non-renewals are not “lacking any basis”).

²⁶⁵ Pl.’s Ex. 218 at 1 (“[W]hen I said we were going in different directions, I mean that we were going our separate ways, nothing further.”); Pl.’s Dep. Ex. 105 at 1; Pl.’s Dep. Ex. 104 at 1.

²⁶⁶ Brady Dep. 83:22–84:10 (testifying Carter attributed non-renewal to lack of “clinical productivity”).

²⁶⁷ Boland Dep. 44:11–19; Le Dep. 67:17–68:4; Ganzel 60:25–61:13.

²⁶⁸ Josephson Decl. ¶¶ 57–58, 70, 80.

²⁶⁹ Josephson Decl. ¶¶ 27, 61–63, 73–74; Pl.’s Ex. 274 at 1; Pl.’s Ex. 276 at 1.

²⁷⁰ Josephson Decl. ¶¶ 85–92.

handbooks for the answer.²⁷¹ So not even he knew the procedures for this rare act.

After this, Defendants still papered the file. Le updated her “Allan tracking document.”²⁷² Carter contacted alumni, soliciting new complaints and detailing what they should say.²⁷³ No one contacted Dr. Josephson; some had never been reported before.²⁷⁴

In April, Defendants notified the trustees they decided not to renew Dr. Josephson’s contract.²⁷⁵ Due to the hostile environment and termination, Dr. Josephson’s national leadership was diminished, he lost teaching opportunities, and he had to stop academic projects.²⁷⁶ He also suffered financially,²⁷⁷ as their actions prevented him from obtaining a similar position at another university.²⁷⁸

ARGUMENT

Dr. Josephson is entitled to summary judgment on liability because there can be no genuine dispute that Defendants retaliated against him—subjecting him to a hostile environment and ultimately ending his employment—because of his constitutionally protected speech concerning gender dysphoria. FED. R. CIV. P. 56(c).

I. Defendants retaliated against Dr. Josephson for exercising his First Amendment rights.

Undisputed facts show Defendants engaged in First Amendment retaliation. Dr. Josephson “engaged in a constitutionally protected activity” (*i.e.*, speaking) and suffered an “adverse action” (*i.e.*, enduring a hostile environment and termination) that “was motivated at least in part as a response to the exercise of [his] constitutional rights.” *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 585–86 (6th Cir. 2008).

²⁷¹ Pl.’s Dep. Ex. 143 at 2–3.

²⁷² Pl.’s Dep. Ex. 55 at 3 (noting entry dated Mar. 29, 2019).

²⁷³ Pl.’s Dep. Ex. 171 at 1–3.

²⁷⁴ Carter Dep. 27:22–25 (noting he never reported an incident to Woods); *id.* 251:4–19 (identifying student at issue as Ms. Bifano); *id.* 251:16–23 (admitting he never discussed this with Dr. Josephson).

²⁷⁵ Pl.’s Dep. Ex. 144 at 1, 5.

²⁷⁶ Compl. ¶¶ 323–28; Josephson Dep. 68:20–71:10 (noting the loss of teaching was independent of the demotion); Josephson Dep. 82:3–85:12 (describing plans for publishing a book, how the hostile environment ended those plans, and his diminished national leadership).

²⁷⁷ Kucsma Report [Pl.’s Ex. 219] at 2 (Aug. 2, 2021); Kucsma Dep. 13:13–16; Josephson Dep. 98:12–99:3 (confirming projected retirement date); Compl. ¶ 332.

²⁷⁸ Compl. ¶¶ 333; Josephson Dep. 96:7–20; Pl.’s Ex. 220.

A. Dr. Josephson expressed views the First Amendment protects.

Dr. Josephson’s remarks on gender dysphoria are constitutionally protected because he spoke “as a citizen” on “matters of public concern,” and his interest in speaking outweighed the University’s interest “in promoting the efficiency of [its] public services.” *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017); *Meriwether*, 992 F.3d at 507–08 (using same approach).

1. Dr. Josephson spoke “as a citizen.”

Normally, when public employees speak “pursuant to their official duties,” they are “not speaking as citizens for First Amendment purposes.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). But Dr. Josephson was not speaking pursuant to his official duties, and this “official duties” test does not apply to faculty speech that is “related to scholarship or teaching.” *Id.* at 425. Either way, he spoke as a citizen.

According to *Garcetti*, 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
- “[has] no relevant analogue to speech by citizens who are not government employees.”

Id. at 421–24. None of these factors apply to Dr. Josephson’s remarks at the Heritage Foundation or his expert testimony. The University did not commission Dr. Josephson to testify on gender dysphoria or pay him for doing so. In fact, Dr. Josephson reported it as “[m]oonlighting,” emphasizing that it was “done on my own time” and did “not interfere with University duties,” and had to pay the University “taxes” on his earnings.²⁷⁹ His expert testimony led to the appearance at the Heritage Foundation, which covered all expenses for that trip to Washington, D.C.²⁸⁰ Again, this was on his own time, and he explicitly expressed his own views, not the University’s.²⁸¹

²⁷⁹ Pl.’s Dep. Ex. 36 at 1, *accord* Pl.’s Dep. Ex. 37 at 1.

²⁸⁰ Josephson Dep. 13:8–14:23.

²⁸¹ Pl.’s Ex. 175 at 4:21–24; Compl. ¶¶ 104–05; Answer ¶ 104.

The University had nothing to do with this presentation.

Merely acknowledging Dr. Josephson’s University position changes nothing. For example, a firefighter “appeared off duty, out of uniform, and at a public meeting to address the Mayor and City Council during the public comment period,” and “identified himself as a public employee.” *Westmoreland v. Sutherland*, 662 F.3d 714, 719 (6th Cir. 2011). To the Sixth Circuit, he clearly spoke as a citizen: “Nothing in the record supports the claim that plaintiff’s expression was made pursuant to a task that was within the scope of his official duties.” *Id.* If this is true for a firefighter—part of a “paramilitary organization,” *Thomas v. Whalen*, 51 F.3d 1285, 1292 (6th Cir. 1995)—it is all the more true for a professor, who “must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Simply put, none of Dr. Josephson’s speech “owe[d] its existence” to the University or was “commissioned” by it. *Garcetti*, 547 U.S. at 421–22. He spoke as a citizen.

Furthermore, *Garcetti*’s “official duties” test does not apply to faculty speech that is “related to scholarship or teaching,” *id.* at 425; *Meriwether*, 992 F.3d at 504–07. The Sixth Circuit has long “rejected as ‘totally unpersuasive’ ‘the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction.’” *Meriwether*, 992 F.3d at 505 (quoting *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001)). It just reaffirmed this holding, reiterating—like three other circuits—that “professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.” *Id.* (citing *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011); *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019); *Demers v. Austin*, 746 F.3d 402, 411–12 (9th Cir. 2014)). This affords faculty speech broad protection, *see, e.g., id.* at 507, including their remarks “intended for and directed at a national or international audience on issues of

public importance unrelated to any of [Dr. Josephson’s] assigned teaching duties at [the University].” *Adams*, 640 F.3d at 563–64 (finding op-eds, books, and speeches qualified as “related to scholarship or teaching”). So once again, Dr. Josephson spoke as a citizen, expressing his own professional opinions.

2. Dr. Josephson spoke on 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. Myers*, 461 U.S. 138, 146 (1983)). The Supreme Court has a “broad conception of ‘public concern.’” *Hardy*, 260 F.3d at 679.²⁸² “The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives.” *Meriwether*, 992 F.3d at 508 (quoting *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995)).

The Supreme Court has already recognized that “gender identity” is “undoubtedly [a] matter[] of profound value and concern to the public.” *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018) (cleaned up). In fact, when it did so, it cited an article on how to teach LGBT issues in first grade. *Id.* at 2476 n.20. If speech regarding this topic is of “profound ‘value and concern to the public,’” occupying “the highest rung of the hierarchy of First Amendment values” and meriting “special protection,” *in the first grade*, certainly it remains such at medical school and in society at large. *Id.* at 2476 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452–53 (2011)).

Even the choice of which pronouns to use for individuals experiencing gender dysphoria represents a matter of public concern. *Meriwether*, 992 F.3d at 509 (“[W]hen Meriwether waded into the pronoun debate, he waded into a matter of public concern.”). So discussing which medical treatments are best for these same individuals

²⁸² Matters of private concern are “only of personal interest,” *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 256 (6th Cir. 2006), such as “internal personnel disputes or complaints about an employer’s performance,” *Rodgers v. Banks*, 344 F.3d 587, 596 (6th Cir. 2003) (quotation omitted).

must be one as well. Professional medical and psychiatric associations have published statements on the topic.²⁸³ Transgender surgeons publicly question the merits of so-called “affirmative care,”²⁸⁴ as have courts. *See, e.g., Bell v. Tavistock & Portman NHS Found. Tr.*, [2020] EWHC (Admin.) 3274 ¶¶ 133–53 (Eng.). And research shows patients wish they had received the care Dr. Josephson recommended.²⁸⁵ He addressed “a topic which has been in the news on many occasions and ‘has become an issue of contentious political . . . debate.” *Meriwether*, 992 F.3d at 508 (quoting *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001)).

3. The *Pickering* balancing test favors Dr. Josephson.

The *Pickering* balancing test favors Dr. Josephson because his interest “in commenting on matters of public concern” outweighs the University’s interest “in promoting the efficiency of the public services it performs.” *Meriwether*, 992 F.3d at 509 (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). Under this test, “the robust tradition of academic freedom in our nation’s post-secondary schools’ . . . alone offers a strong reason to protect [Dr. Josephson’s] speech.” *Id.* (quoting *Hardy*, 260 F.3d at 680). And since he addressed public concerns, Defendants must make a “particularly strong showing that [his] speech interfered with workplace functioning before taking action.” *Cockrel*, 270 F.3d at 1053 (cleaned up).

The facts unequivocally demonstrate no such disruption here. A “[u]niversity community as a whole, is less likely to suffer a disruption in its provision of services as a result of a public conflict” than other public agencies. *Mills v. Steger*, 64 F. App’x 864, 872 (4th Cir. 2003). When a professor published “denigrating comments concerning the intelligence and social characteristics of blacks,” *Levin v. Harleston*, 966 F.2d 85, 87 (2d Cir. 1992), he so enraged students that they physically disrupted his classes to the point that the university posted security in his classroom. *Id.* at 90; *Levin v.*

²⁸³ *See, e.g., Cantor Rep’t* [Pl.’s Ex. 176] ¶¶ 99–139.

²⁸⁴ Shrier, *supra* note 1.

²⁸⁵ *See, e.g., Littman, supra* note 2.

Harleston, 770 F. Supp. 895, 902–07 (S.D.N.Y. 1991), *vacated on other grounds* 966 F.2d 85 (2d Cir. 1992). Even so, there was “no question” that his speech was protected under *Pickering*, *Levin*, 770 F. Supp. at 921, and any discipline based on his speech violated the First Amendment, *Levin*, 966 F.2d at 90. The balancing test favored him. When a professor used profanity, threats (with violent overtone), and other dehumanizing terms in the campus paper, creating disharmony with colleagues, the *Pickering* balance still favored him because “it was not necessary that [he] and the administration enjoy a close working relationship requiring trust and respect—indeed anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams.” *Bauer v. Sampson*, 261 F.3d 775, 779–81, 785 (9th Cir. 2001).

Here, the analysis is far simpler. For years, Dr. Josephson testified on gender dysphoria without any controversy.²⁸⁶ Even after the 2017 controversy, no one could point to any classes, appointments, or other events that were cancelled or postponed because of his expression.²⁸⁷ Even Ganzel, Dr. Josephson’s dean, could point to no disruption, other than disagreeing with faculty colleagues.²⁸⁸

But disagreeing faculty is a benefit and feature of university life. *Meriwether*, 992 F.3d at 510 (noting “students’ interest in hearing even contrarian views”). Were the rule otherwise, “it would allow universities to discipline professors, . . . any time their speech might cause offense. That is not the law.” *Id.* So the University’s “interest in limiting [Dr. Josephson’s] speech is not great when those public statements ‘are neither shown nor can be presumed to have in any way either impeded [his] proper performance of his daily duties in the classroom or to have interfered with the regular operation of the [University] generally.’” *Id.* at 511 (quoting *Pickering*, 391 U.S. at

²⁸⁶ See *supra* note 26 and accompanying text.

²⁸⁷ See *supra* note 34 and accompanying text.

²⁸⁸ Ganzel Dep. 97:13–98:4.

527–73). The “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is no excuse for restricting the speech of high school students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Nor does it tilt the *Pickering* balance against Dr. Josephson.

In sum, Dr. Josephson spoke as a citizen, on a public concern, without disrupting the University’s provision of services. Thus, his speech is constitutionally protected.

B. Defendants took adverse actions against Dr. Josephson.

It is also undisputed that Dr. Josephson suffered adverse actions at the hands of Defendants. *Jenkins*, 513 F.3d at 585–86. Under § 1983, these are acts that “would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity.” *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998). Defendants subjected Dr. Josephson to a hostile work environment and ultimately terminated his employment because of his constitutionally protected speech.

1. Defendants subjected Dr. Josephson to a hostile environment.

A hostile work environment amounts to an actionable adverse action “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). Under § 1983, an unconstitutional hostile environment exists where Defendants’ repeated acts “would likely chill a person of ordinary firmness from continuing to engage in” “constitutionally protected activity. *Bloch*, 156 F.3d at 678. “This standard is amenable to all retaliation claims.” *Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999). *See also id.* at 398 (citing with approval the Seventh Circuit’s holding “that an entire campaign of harassment was actionable [under this standard] because although it was trivial in detail, it may have been substantial in gross” (cleaned up)).

Because a hostile environment “cannot be said to occur on any particular day” and instead “occurs over a series of days or perhaps years,” 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.” *Morgan*, 536 U.S. at 115, 117. Defendants’ acts creating this unlawful hostile environment stretched well into the filing period, including their refusal to meet with Dr. Josephson and their discriminatory refusal to allow him to teach trainees. *See supra* Facts IV.B, F. Thus, this Court should evaluate the “entire time period of the hostile environment”— from the time they learned of his speech until they terminated his employment. *Morgan*, 536 U.S. at 117.

a. Defendants ostracized Dr. Josephson.

Intentionally ostracizing an employee can create a hostile work environment. *See 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). Defendants ostracized Dr. Josephson from the time they learned of his speech in 2017 until they pushed him out of the University entirely by terminating his employment in 2019. As soon as the LGBT Center complained, Defendant Ganzel said she was “so sorry to hear this” because his presentation “doesn’t reflect the culture we are trying so hard to promote.” *See supra* Facts III.A. Weeks later, Woods recognized that Dr. Josephson was “superb” but still concluded that his views on this one issue placed him “at odds enough with your Divisional colleagues that you will not be able to continue to lead them.” *See supra* Facts III.B.

Once Defendants took their first step against Dr. Josephson by demoting him, they continued to ostracize him until they terminated his employment. Woods initially assured Dr. Josephson that he would “have ample interactions with staff going forward to demonstrate to them that you remain a caring colleague” and that he would be allowed to “have the conversation you want to with the division” before the demotion.²⁸⁹ *See supra* Facts IV.D. But when Dr. Josephson tried to have these con-

²⁸⁹ Pl.’s Ex. 193.

versations, his meetings were interrupted or canceled entirely, and he was faulted for trying to discuss these topics informally. *See supra* Facts IV.D. He was even banned entirely from attending faculty meetings for several weeks. *See supra* Facts IV.B.

On the few occasions where Dr. Josephson met with Defendants, they refused to discuss any of the events relating to his demotion and insulted him to his face. Lohr—once a good friend of Dr. Josephson—called him “childish, narcissistic, and flippant,” and otherwise spent weeks avoiding meeting with Dr. Josephson. *See supra* Facts IV.G. Defendants assured Dr. Josephson that they wanted to “address” his alleged performance “issues in a collaborative fashion.”²⁹⁰ But they did not meet with him at all from July 2018 (the last time they expressed any dissatisfaction with his performance) until February 2019, when they deceptively scheduled a meeting to conduct an “annual review” but actually ambushed him with news of his termination. *See supra* Facts IV.J, V. Once Defendants learned of Dr. Josephson’s speech and Ganzel pronounced that it “doesn’t reflect the culture we are trying so hard to promote,” *see supra* Facts III.A, Dr. Josephson was cast out: a pariah in the Division that he had rehabilitated and led.

b. Defendants discriminated against Dr. Josephson by imposing unique requirements and depriving him of teaching duties.

Defendants created a hostile work environment by subjecting Dr. Josephson to discriminatory requirements. *See Jordan v. City of Cleveland*, 464 F.3d 584, 594–98 (6th Cir. 2006) (finding “assignment to details with a significant loss of responsibility” and “disparate discipline” contributed to “an abusive work environment”). Woods required him to offer a disclaimer when expressing ideas about gender dysphoria that differed with the University’s “curriculum,” which was not uniformly promulgated (to the point that many did not know it existed), which Woods did not even have on hand, which came from the ideologically-driven LGBT Center (hardly a neutral source of

²⁹⁰ Pl.’s Dep. Ex. 93 at 3.

medical knowledge), and which strayed from the professional guidelines. *See supra* Facts IV.C. Eventually, Defendants deprived him of his teaching duties completely. They subjected Dr. Josephson, a renowned clinician, to unique oversight, preventing him from interacting with any medical fellows alone. *See supra* Facts IV.B. They banned him from treating LGBT patients, something they did to no one else.²⁹¹ *See supra* Facts IV.B, F. They also demanded he either apologize for or make public disclaimers about his remarks, something they did to no one else. *See supra* Facts III.B.

c. Defendants sought complaints against Dr. Josephson but never investigated them.

Maintaining a targeted, open-ended investigation against an employee creates a hostile environment. After all, a “retaliatory investigation . . . could also be considered an adverse employment action.” *Kallenberg v. Knox Cnty. Bd. of Educ.*, 2008 WL 3823732, at *5 (E.D. Tenn. Aug. 12, 2008). And “any form of official retaliation for exercising one’s freedom of speech, including . . . bad faith investigation and legal harassment, constitutes an infringement of that freedom.” *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (cleaned up). If this can constitute an adverse action by itself, it can certainly contribute to a hostile work environment.

And this is exactly what Defendants did to Dr. Josephson. Almost immediately after the demotion, Woods circulated the complaints against him that Steinbock manufactured, Lohr circulated one he had received a month earlier, and Le collected more from students and trainees. *See supra* Facts IV.D. As Carter put it, they “were gathering complaints and concerns” against Dr. Josephson.²⁹² Even before the demotion, Le started a spreadsheet (*i.e.*, her “Allan tracking document”), and they used it to memorialize every piece of negative information they could find (no matter how trivial), a step no one had ever seen taken for any other professor. *See supra* Facts IV.D. Carter even recognized that this made them look like they were targeting Dr. Joseph-

²⁹¹ Boland Dep. 106:19–22; Le Dep. 136:10–12; Lohr Dep. 79:18–20.

²⁹² *See supra* note 123 and accompanying text.

son, but that did not matter. Le still urged him on, comparing their actions to reporting to Child Protective Services. *See supra* Facts IV.D. And even after their last pre-termination meeting with Dr. Josephson, they were still collecting complaints, with Carter dictating to former students what those complaints should include.²⁹³

If Defendants were acting in good faith, they would have investigated the complaints and given Dr. Josephson a chance to respond to the charges made against him. But in the entire time between the demotion and the termination, they never took this obvious step. Why? They had already decided he would be terminated.

d. Defendants refused to investigate Dr. Josephson's well-founded allegations of misconduct towards him.

An employer's refusal to investigate an employee's complaints about mistreatment at the hands of his coworkers gives rise 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). Dr. Josephson discovered that a University official had created a fake email account to impersonate him and convey confidential employment information to opposing counsel in a matter in which he was offering expert testimony, with the purpose of damaging his testimony in that matter and his professional reputation in general. *See supra* Facts IV.A. He had documentary proof of this. Yet, when he approached Woods for help, Woods gave none—directing Josephson to Dr. Paul and University counsel, who sent Dr. Josephson back to Woods, who did nothing to investigate further. *See supra* Facts IV.F. Woods's choice simply to ignore hard evidence of serious misconduct directed toward one of his employees further ostracized Dr. Josephson, chilled his expression, and sent the message that he had a target on his back and would receive no cover from his superiors.

²⁹³ *See supra* notes 228–247 and accompanying text.

e. Defendants' hostile environment would deter any reasonable person from exercising his First Amendment rights.

The hostile work environment Defendants maintained from their demotion of Dr. Josephson through their decision to terminate his employment was severe enough that it “would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity.” *Bloch*, 156 F.3d at 678. In fact, it devastated Dr. Josephson emotionally and professionally. Being summarily demoted and cut off from his Division, and insulted by personal friends left Dr. Josephson shell-shocked, so much so that he almost had a car accident as events weighed on his mind.²⁹⁴ Further, Defendants' actions kept him from speaking further about gender dysphoria, an issue of immense importance to him as a psychiatrist and of profound public concern.²⁹⁵ He also stopped testifying as an expert entirely after his demotion, after learning that his coworkers were secretly working to undermine his testimony, and after realizing that his chair, Defendant Woods, would do nothing to help.²⁹⁶ Plus, he was forced to stop academic projects, lost teaching opportunities, and watched his national leadership in his profession dwindle. *See supra* Facts V. This reaction is reasonable under these circumstances and, consequently, Defendants' “campaign of harassment” against Dr. Josephson constitutes an adverse action under § 1983. *Thaddeus-X*, 175 F.3d at 398 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)).

2. Defendants refused to renew Dr. Josephson's contract.

It is undisputed that Defendants refused to renew Dr. Josephson's contract, a rare move for someone of his credentials and seniority. *See supra* Facts III.C. As a matter of law, this is an adverse employment action. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010) (quoting *Thaddeus-X*, 175 F.3d at 396) (“[A]dverse action’ . . . has traditionally referred to actions such as’ . . . nonrenewal of contracts.”). Defendants concede they do not refuse to renew contracts for no reason.²⁹⁷

²⁹⁴ Josephson Decl. ¶¶ 101–07.

²⁹⁵ Josephson Decl. ¶ 108.

²⁹⁶ Josephson Decl. ¶ 108.

²⁹⁷ *See supra* note 264 and accompanying text (admitting non-renewals are not “lacking any basis”).

C. Defendants took retaliatory action against Dr. Josephson because he exercised his constitutional rights.

To show “a causal connection” between Dr. Josephson’s constitutionally protected speech and Defendants’ adverse actions, Dr. Josephson need only establish that “the adverse action was motivated at least in part by his protected conduct.” *Scarborough*, 470 F.3d at 255; *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002). As undisputed evidence shows, Defendants “were at least partly motivated by [his] decision to speak” when they created the hostile environment and then terminated Dr. Josephson. *Scarborough*, 470 F.3d at 255. As such, they “must 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*, 270 F.3d at 1048, 1056 (quotation omitted). But they cannot “present[] any evidence to rebut [Dr. Josephson’s] *prima facie* showing . . . of causation” such that any reasonable jury would conclude they would have taken the same adverse actions against him in the absence of his speech. *Berkshire v. Dahl*, 2017 WL 3276466, at *8 (E.D. Mich. Aug. 2, 2017) (granting summary judgment on First Amendment retaliation claim), *aff’d*, 928 F.3d 520 (6th Cir. 2019). Summary judgment is therefore warranted. *Id.*

To show causation, Dr. Josephson may use direct evidence, temporal proximity, or a range of other circumstantial evidence. *Eckerman v. Tenn. Dep’t of Safety*, 636 F.3d 202, 208–09 (6th Cir. 2010). Here, undisputed evidence comes in all three forms.

1. Dr. Josephson’s speech was a motivating factor in Defendants’ adverse actions against him.

a. Defendants’ own words show their retaliatory motive.

Defendants directly tied their adverse actions against Dr. Josephson to his speech. Woods cited the “area of disagreement” (*i.e.*, the subject matter of Dr. Josephson’s speech) and Dr. Josephson’s “public promotion” of his views as the basis for his demotion.²⁹⁸ And Dr. Josephson may raise “other incidents of misconduct” by the Defendants (*e.g.*, the demotion) “for the purpose of determining whether [his] protected

²⁹⁸ Pl.’s Dep. Ex. 56 at 1–2.

activity was a ‘motivating factor’ in [their] decision to terminate him.” *Eckerman*, 636 F.3d at 209. The motive for the demotion is evidence of the motive for subsequent adverse actions. Defendants demoted Dr. Josephson and then continued to solicit and develop (but not investigate) other complaints about him to eventually terminate him, even before he had received a new work assignment (and thus, even before any legitimate allegations of lackluster performance could arise). *See supra* Part IV.D, F, I–J. Within four months of the demotion, Le put in writing: “We will likely be losing . . . Allan,” referring to not renewing Dr. Josephson’s contract.²⁹⁹ *See supra* Facts IV.H. Within six months of it, they were still irritated at him for his views regarding gender dysphoria. *See supra* Facts IV.I. Carter encouraged his fellow co-chiefs to keep compiling complaints against Dr. Josephson. Before Dr. Josephson’s new work assignment had been finalized and before any formal warning had been conveyed to Dr. Josephson (and thus before any opportunity for Dr. Josephson to correct any alleged productivity shortfall) Carter explained Defendants’ real objective: “to *avoid* Allan’s reappointment next summer.”³⁰⁰ In reply, Boland said, “the Dean is supportive of what we and you are doing.”³⁰¹ *See supra* Facts IV.J.

b. Defendants’ express opposition to the content of Dr. Josephson’s speech shows their retaliatory motive.

Dr. Josephson can also establish causation by showing that Defendants directly opposed his speech or maintained a “political atmosphere” that was hostile to his viewpoint. *Dye v. Office of the Racing Comm’n*, 702 F.3d 286, 308 (6th Cir. 2012) (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).

²⁹⁹ Pl.’s Dep. Ex. 164 at 1; Carter Dep. 238:1–9.

³⁰⁰ Pl.’s Dep. Ex. 106 at 1 (emphasis added).

³⁰¹ *See* Pl.’s Dep. Ex. 106 at 1 (“the Dean is supportive of what you are doing”).

Defendants uncontestably did both: Ganzel said Dr. Josephson’s speech “doesn’t reflect the culture we are trying so hard to promote” and conveyed her support for building a case for his removal through Boland.³⁰² *See supra* Facts III.A, IV.J. Woods told Dr. Josephson that his views put him “at odds enough with your Divisional colleagues that you will not be able to continue to lead them”³⁰³ even if he complied with Woods’ new requirements.³⁰⁴ *See supra* Facts III.B. Boland said his speech was “pretty concerning,”³⁰⁵ and assured Le, Carter, and Lohr that their “sleuthing” was “a huge help.”³⁰⁶ *See supra* Facts IV.I. Le and Carter said he would have to either apologize for his speech or issue a statement distancing his views from the Division.³⁰⁷ *See supra* Facts III.B. Lohr called his views “unscientific” and warned to colleagues that “[g]loves could be coming of.”³⁰⁸ *See supra* Facts IV.B. Carter and others demanded Dr. Josephson “cease and desist” sharing his views “as our division chief and UofL faculty member.”³⁰⁹ *See supra* Facts III.B And the University expressly maintained a “political atmosphere” that claimed that Dr. Josephson’s expressed opinions “run counter to our mission.”³¹⁰

c. Defendants’ timing shows their retaliatory motive.

The temporal proximity between Defendants’ campaign to remove Dr. Josephson and his protected speech is enough to raise an inference of causation and shift the burden of persuasion to Defendants. Indeed, “temporal proximity *alone* can, in certain circumstances, suffice to show a causal connection in a retaliation case. . . .” *Dye*, 702 F.3d at 305 (emphasis added). “A lapse of two months . . . is sufficient to show a causal connection,” *id.* at 306, and the evidence shows that both the demotion and

³⁰² Pl.’s Dep. Ex. 3 at 1; Pl.’s Dep. Ex. 106 at 1.

³⁰³ Pl.’s Dep. Ex. 45 at 3.

³⁰⁴ Pl.’s Dep. Ex. 51.

³⁰⁵ Pl.’s Dep. Ex. 85 at 1

³⁰⁶ Pl.’s Dep. Ex. 94 at 1; Pl.’s Dep. Ex. 133 at 1.

³⁰⁷ *See supra* notes 78–82 and accompanying text.

³⁰⁸ Pl.’s Dep. Ex. 130 at 2.

³⁰⁹ Pl.’s Dep. Ex. 8 at 2.

³¹⁰ Pl.’s Dep. Ex. 12 at 1–2.

the campaign to discredit and ultimately remove Dr. Josephson entirely began within two months of when Defendants learned of Dr. Josephson’s speech. *See supra* Facts III.A–C, IV.A–G.

d. Defendants’ discriminatory investigative tactics show their retaliatory motive.

Defendants also took other measures that bear the hallmarks of adverse action. The decision to “initiate[] an open-ended investigation into” Dr. Josephson after his protected speech is circumstantial evidence of retaliatory motive. *Cockrel*, 270 F.3d at 1056. This is especially true when officials revisit alleged misconduct that predates the protected speech and was previously unpunished. *Id.* at 1058 (allegations of “serious misconduct” that occurred before the protected speech but were not complained of until after the speech suggest the misconduct was not the real basis for the discipline). Defendants did both: resurrecting old complaints against Dr. Josephson that had already been addressed³¹¹ and instigating an open-ended “investigation” (really, just a complaint collection process) that ran from December 2017 until the decision not to terminate Dr. Josephson was communicated to him in February 2019 (though made long before). *See supra* Facts IV.D, I–J. In fact, University officials coordinated the complaints, urging people to submit them and even dictating their contents.³¹²

Compounding all this is the fact that Defendants did not direct any similar scrutiny to any other member of the Division. *See Arnett*, 281 F.3d at 561. They did not keep a list of (uninvestigated) complaints against any other member of the Division. *See supra* Facts IV.D. No other member of the Division was barred from teaching courses, working with psychology interns, or meeting with fellows alone. *See supra* Facts IV.B. No professors had their supervisors coach former students on what to put in complaints. *See supra* Facts IV.J. No one else had three co-chiefs pore over their

³¹¹ Pl.’s Dep. Ex. 110 (relaying the 2016 complaint against Dr. Josephson); Pl.’s Dep. Ex. 38 at 1–2 (Woods relaying 2016 complaint and noting nothing further needed to be done); Pl.’s Dep. Ex. 64 at 1 (relaying the complaint Lohr received but did not share until after learning of Dr. Josephson’s speech about gender dysphoria).

³¹² *See supra* notes 123–127, 233–237, and accompanying text.

electronic medical records multiple times in search of “documentation” to “avoid [their] reappointment.”³¹³ *See supra* Facts IV.I–J.

In contrast to Defendants’ open-ended catalogue of every unsubstantiated complaint against Dr. Josephson, Defendants ignored Dr. Josephson’s well-founded allegations of misconduct against *him*. *See supra* Argument I.B.1.c. Defendants overlooked serious misconduct by employees against Dr. Josephson and solicited flimsy complaints against Dr. Josephson (without actually investigating any of them), illustrating their ultimate goal: “documentation” to “avoid Allan’s reappointment.”³¹⁴

e. Defendants’ inconsistent standards show their retaliatory motive.

Finally, Defendants’ inclusion of an array of trivial complaints in their collection of “documentation” to “avoid Allan’s reappointment” suggests their adverse action was actually related to his speech. *See Cockrel*, 270 F.3d at 1059 (noting that “there is less evidence that the defendants were sufficiently motivated by [Dr. Josephson’s] conduct apart from [his] decision to speak when they made their decision to terminate” him since, of the charges leveled, “several of the proffered reasons provide a less than compelling basis for termination”). Defendants counted acts by Dr. Josephson as misconduct that they engaged in themselves, including reviewing depositions and printing documents.³¹⁵ They faulted his decreased productivity while ignoring the decreased productivity of six others, including themselves.³¹⁶ This conduct confirms they were not out to govern conduct or maximize productivity in the Division generally. Rather, their goal was to punish Dr. Josephson for his speech by building a case to terminate a distinguished professor who had perfect performance reviews in the

³¹³ Le Dep. 171:14–16.

³¹⁴ Pl.’s Dep. Ex. 106 at 1.

³¹⁵ Pl.’s Dep. Ex. 160 (Carter’s annotated copy of Dr. Josephson’s deposition); Carter Dep. 210:15–18 (admitting University printers were the only ones available for printing); 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).

³¹⁶ *See supra* notes 203–209 and accompanying text.

immediately preceding three years and had never received any formal warnings about his conduct or productivity before he spoke at the Heritage Foundation in October 2017. *See supra* Facts II.

2. Defendants cannot prove that they would have made the same decisions in the absence of Dr. Josephson’s speech.

As Defendants “were at least partially motivated by [his] decision to speak” when they terminated Dr. Josephson, they “must 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*, 270 F.3d at 1048, 1056 (quotation omitted). This they cannot do.

Defendants cannot make this showing because (1) their own asserted justification for not renewing Dr. Josephson’s contract is false, (2) they overlooked productivity shortfalls by other Division faculty, including some Defendants, without disciplining any of them (let alone terminating them), and (3) the evidence shows that they would have implemented other corrective measures before taking adverse action against a struggling faculty member that did not express the same views as Dr. Josephson.

Defendants claim they decided not to renew Dr. Josephson’s contract because he failed to improve his productivity.³¹⁷ The facts show this is not true. During the time period when Dr. Josephson’s work assignment was in flux and not clarified by Defendants, his productivity declined (as one would expect after such an abrupt demotion), but so did the productivity of six others. And Defendants did nothing about them,³¹⁸ showing that Defendants would not have made the same decision in the absence of Dr. Josephson’s speech. Then, after his only formal productivity warning in July 2018, Dr. Josephson’s productivity consistently increased.³¹⁹ That fall, they sent him a new work assignment, without mentioning any concerns about his productivity.³²⁰ Terminating a professor of Dr. Josephson’s seniority and experience for produc-

³¹⁷ Boland Dep. 44:11–19; Le Dep. 67:17–68:4; Ganzel 60:25–61:13.

³¹⁸ *See supra* notes 203–209 and accompanying text.

³¹⁹ Josephson Decl. ¶¶ 23, 61–62, 73–74.

³²⁰ Pl.’s Dep. Ex. 129 at 1–2.

tivity reasons when his productivity was improving makes no sense and shows that they acted not for this reason but because of his speech. *Arnett*, 281 F.3d at 561–62.

Finally, the evidence shows that Defendants were willing to collaborate with other employees that had some performance issues—so long as they don’t contradict the University’s preferred viewpoint on gender dysphoria. The undisputed evidence shows that the University’s normal practice for other employees—from administrative assistants up to professors—is to utilize a months-long probationary period or performance improvement plan to remediate any performance issues.³²¹ But with Dr. Josephson, there was one formal warning after years of stellar performance. Even after the single formal warning, Dr. Josephson consistently improved his productivity. But Defendants terminated him anyway, because that was their plan all along. The purpose of the July 2018 notification was to *justify* their predetermined nonrenewal of Dr. Josephson’s contract, not to actually remediate his performance. Defendants cannot show they would have made the “same decision” about Dr. Josephson in the absence of his speech, because the evidence shows they would have made the opposite decision for anyone else. *See supra* Part V.

As the undisputed evidence refutes every possible claim by Defendants that they would have made the “same decision” absent Dr. Josephson’s protected conduct, no reasonable jury could find for the Defendants after the burden of persuasion shifts based on Dr. Josephson’s showing of a prima facie case of retaliation. *Berkshire*, 2017 WL 3276466, at *8 (granting summary judgment on First Amendment retaliation claim). Thus, summary judgment is warranted.

II. No Defendant is entitled to qualified immunity.

Defendants are not entitled to qualified immunity. Back in 1994, the Sixth Circuit “thoroughly addressed whether an employee’s First Amendment right to be free of retaliation is clearly established,” finding it was. *Scarborough*, 470 F.3d at 263. And

³²¹ *See supra* notes 219–221 and accompanying text.

20 years ago, it denied qualified immunity to college officials who retaliated against a professor due to his speech. *Hardy*, 260 F.3d at 682–83. Nor did *Hardy* stand alone. *See, e.g., Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 594 (6th Cir. 2005) (finding professors do not “leave their First Amendment rights at the campus gates”). *Hardy* remains good law as to even professors’ in-class speech, *Meriwether*, 992 F.3d at 505, let alone Dr. Josephson’s off-campus, personal speech. *See supra* Argument I.A. In fact, when the Fourth Circuit reviewed a similar case, involving university officials who retaliated against a professor who spoke on his own time to an off-campus audience, it found they were not entitled to qualified immunity because “the underlying right . . . —that of a public employee to speak as a citizen on matters of public concern—is clearly established and something that a reasonable person in the Defendants position should have known was protected.” *Adams*, 640 F.3d at 565–66. Defendants ignored this clearly established law; they should be held accountable.

CONCLUSION

Defendants’ own documents and Defendants’ own words establish that they violated clearly established law when they retaliated against Dr. Josephson because he exercised his constitutional right to speak by creating a hostile environment and then terminating his employment. This Court should grant him summary judgment as to liability on both claims.

Respectfully submitted this 29th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 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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