No. 23-8065

In the United States Court of Appeals for the Tenth Circuit

JAYLYN WESTENBROEK, ET AL.,

Plaintiffs-Appellants,

v.

KAPPA KAPPA GAMMA FRATERNITY, AN OHIO NON-PROFIT CORPORATION AS NOMINAL DEFENDANT AND AS A DIRECT DEFENDANT, ET AL.,

Defendants-Appellees,

ARTEMIS LANGFORD,

Defendant.

On Appeal from the United States District Court for the District of Wyoming
No. 2:23-CV-00051-ABJ, Hon. Alan B. Johnson

BRIEF OF APPELLANTS

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***ORAL ARGUMENT IS REQUESTED**

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Pursuant to Circuit Rule 28.2(C)(3), Appellants state that there are no prior or related appeals.

INTRODUCTION

Well before women were granted the right to vote or permitted to attend most colleges, a small band of women in 1870 created a single-sex sorority, Kappa Kappa Gamma ("Kappa"), to provide women the benefits of Greek-letter societies then reserved for men. Those women were wildly successful, and today Kappa boasts 210,000 living alumnae. Kappa brings these many women together through its Bylaws and other governing documents, which set out Kappa's purpose, define membership, establish fees, and create organizational structure.

The question at the heart of this case is the definition of "woman," a term that Kappa has used since 1870 to prescribe membership, in Kappa's governing documents. Using any conceivable tool of contractual interpretation, the term refers to biological females. And yet, the district court avoided this inevitable conclusion by applying the wrong law and ignoring the factual assertions in the complaint.

First, the district court fabricated obstacles to avoid considering Plaintiffs' derivative claim, including Ohio courts' reluctance to interfere with an organization's internal affairs and the First Amendment's protection of expressive association. Neither of these doctrines applies here and neither prevents Plaintiffs' claims from proceeding as a matter of law. The non-interference rule applies when plaintiffs object to an organization's internal dispute-resolution process. It does not apply when, as here, plaintiffs claim a breach of fiduciary duty. Further, the First

Amendment prohibits the government from interfering with the expressive association rights of its citizens. It does not apply to a lawsuit devoid of state actors, and it does not prohibit private plaintiffs from suing to enforce the terms of a private organization's own bylaws. An Ohio corporation is bound to act in accordance with the rules of governance it voluntarily adopts. And Kappa's Bylaws plainly exclude biological men from membership.

Second, the district court erred in ruling that Plaintiffs had not sufficiently alleged direct claims stemming from the violation of the Bylaws and other governing documents. Rather than accept Plaintiffs' allegations as true in considering dismissal, as the court must, the district court treated these allegations as irrelevant. But they are not. Plaintiffs allege personal injuries stemming from the strange and sexualized behavior of the biological male (Langford) that Kappa admitted into the sorority house that were different from the injuries to the sorority as a whole. Specifically, Langford's unwanted staring, photographing, and videotaping of the Plaintiffs, as well as his asking questions about sex and displaying a visible erection while in the house, invaded Plaintiffs' privacy and caused emotional distress in a personalized and unique way. And thus Plaintiffs have pleaded a viable direct claim. This Court should therefore reverse the district court's dismissal of Plaintiffs' derivative and direct claims.

JURISDICTION

Plaintiffs-Appellants appeal from an order dismissing all their claims without prejudice entered August 25, 2023, by the U.S. District Court for the District of Wyoming. App. Vol. 2 at 108. The district court had subject-matter jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1332. In accordance with Federal Rule of Appellate Procedure 4(a), Plaintiffs filed a timely notice of appeal on September 25, 2023. App. Vol. 2 at 108–09. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

Because the district court dismissed Plaintiffs' complaint without prejudice, Kappa has argued this Court lacks an underlying final decision. But the dismissal of a complaint without prejudice does not mean the decision is "non-final under section 1291." *Moya v. Schollenbarger*, 465 F.3d 444, 448 (10th Cir. 2006). For example, where "the district court's grounds for dismissal are such that the defect cannot be cured through an amendment to the complaint, that dismissal (even if it is ambiguous or nominally of the complaint) is for practical purposes of the entire action and therefore final." *Id.* at 450–51.

Under these settled principles, and as explained in Plaintiffs' Opposition to Defendants' Motion to Dismiss Appeal for Lack of Appellate Jurisdiction, Doc. 01011093987, the district court's decision in this case is final. Plaintiffs cannot cure the defects the district court believed present in the First Amended Complaint

through an amendment because the district court's decision was based on "a matter going to the merits of appellant's complaint itself rather than a procedural problem which amendment of a complaint might rectify." *Petty v. Manpower, Inc.*, 591 F.2d 615, 617 (10th Cir. 1979) (per curiam); *accord Moya*, 465 F.3d at 448–49.[1]

ISSUES

1. Whether the district court erred in holding that Ohio's non-interference rule and the First Amendment bar Plaintiffs' derivative claim, which asserts a violation of fiduciary duties for admitting a biological male in contravention of Kappa's Bylaws and governing documents.

[1] Further, Defendants' entire challenge to this Court's jurisdiction rests on *Eastom v. City of Tulsa*, 783 F.3d 1181 (10th Cir. 2015) ("*Eastom II*"), and its progeny. But in those cases, the Court dismissed for lack of jurisdiction given the line of cases holding that parties may not manufacture appellate jurisdiction by seeking voluntary dismissal of certain claims. *Id*. at 1184; *see also Tri Cnty. Tel. Ass'n, Inc. v. Campbell*, No. 20-8053, 2021 WL 4447909, at *7 (10th Cir. June 16, 2021) (unpublished) (citing cases). Here, by contrast, the district court granted Kappa's motion to "dismiss Plaintiffs' claims in their entirety." App. Vol. 2 at 11; *see* App. Vol. 2 at 106. And, unlike the plaintiffs in *Eastom*, Plaintiffs here do not attempt to jettison claims or defendants to facilitate federal review. Instead, "[t]here was nothing pending before the district court after it issued [the motion-to-dismiss] order." *Frank v. Crawley Petroleum Corp.*, 992 F.3d 987, 995 (10th Cir. 2021). In addition, permitting this appeal would not "lead to piecemeal appeals," nor would litigation be "interrupted and delayed." *Id*. In fact, delaying Plaintiffs' right to appeal "may be irreparable." *Id.* Plaintiffs and Kappa members across the nation are unable to benefit from the female-only space for which they contracted without this Court's immediate review of the district court's dismissal of Plaintiffs' claims.

2. Whether the district court erred in holding that Plaintiffs' alleged injuries from the admission of a biological male—including loss of privacy and emotional distress caused by that student's inappropriate behavior—were not personal injuries that would support a direct action against the Defendants.

STATEMENT OF THE CASE

A sound understanding of the issues in this case requires some familiarity with the underlying facts (as alleged in the complaint) and the procedural history.

A. Facts

1. Kappa Was Founded as a Single-Sex Haven for Collegiate Women.

Plaintiffs are current and recent members of the University of Wyoming's Gamma Omicron Chapter of Kappa Kappa Gamma Fraternity, an organization founded in 1870 to bring the benefits of exclusively male Greek-letter fraternities to women. App. Vol. 1 at 20 (¶ 25).[2] Kappa is a non-profit corporation incorporated in Ohio. Kappa Certificate of Incorporation [App. Vol. 1 at 128–36]. Although Kappa is officially named a "fraternity" because its founding predated the common use of the term "sorority," it is now more commonly known as a sorority.

Kappa's governing documents include its Articles of Incorporation, Bylaws, and Standing Rules. App. Vol. 1 at 10 (¶ 3). The Articles of Incorporation form

[2] Appellants' Appendix is cited as "App. Vol. __ at __."

Kappa's charter. *Id.* at 28 (¶ 43). The Standing Rules describe the process Kappa must follow when selecting a new member, and the Articles of Incorporation state that these processes must be followed by every chapter. *Id.* at 36 (¶ 59). The Bylaws are the code of regulations for Kappa and govern membership criteria. *Id.*

Kappa also has certain official Policies, though these are unilaterally issued and are not governing documents. Rather, they are "statements of intent and rules formulated by Fraternity Council to consistently *carry out* its duties as defined by the … Articles of Incorporation and the Fraternity Bylaws and Standing Rules." App. Vol. 1 at 38 (¶ 64) (emphasis added) (citing App. Vol. 1 at 222). The Fraternity Council is Kappa's board of directors. *Id.* at 42 (¶ 72); App. Vol. 1 at 98.

The Articles of Incorporation and Bylaws can only be amended "by a Convention by a two-thirds vote provided notice of the amendment indicating its exact content has been sent to the voting members of the Convention three months prior to the Convention." App. Vol. 1 at 104. The Standing Rules can only be amended through a similar process. App. Vol. 1 at 36 (¶ 59).

Since its founding, Kappa has provided a self-described "single-sex haven" in the largely co-ed environment of college campuses. *Id.* at 20, 22 (¶¶ 25, 32). And all of Kappa's governing documents discussed above restrict membership to women. The Articles of Incorporation state that Kappa's purpose is "[t]o unite *women*,

through membership, in a close bond of friendship." App. Vol. 1 at 29 (¶ 47) (emphasis added) (quoting App. Vol. 1 at 132).

Kappa's Bylaws also provide that a "new member shall be a woman," *id.* at 31 (¶ 51), and explicitly enshrine the sorority's legal right to have sex-based membership practices under Title IX. App. Vol. 1 at 25 (¶ 37) (quoting App. Vol. 1 at 150–51 (Art. V, Sec. 2.D.)); *see also* 20 U.S.C. § 1681(a) (forbidding discrimination "on the basis of sex" in educational programs but exempting the "membership practices" of sororities). This position is well supported by social science research that has established the importance of preserving single-sex environments for women. App. Vol. 1 at 25 (¶ 38). Indeed, women "in single-sex environments are more likely to develop higher academic, and socially competent, self-images." *Id.* As recently as 2018, Kappa supported and defended the benefits of single-sex environments for women in a lawsuit against Harvard University, in which Kappa defended its single-sex status and right to discriminate on the basis of sex under Title IX. *Id.* at 25–27 (¶¶ 39–40) (citing Complaint ¶ 93, *Kappa Alpha Theta Fraternity, Inc., v. Harvard Univ.*, 397 F. Supp. 3d 97 (D. Mass. 2019) (No. 1:18-cv-12485), 2018 WL 6305759).

Further, the Standing Rules "do not include any language that supports [the] expansion of Kappa membership" beyond women. App. Vol 1 at 36 (¶ 60). And the Policies cannot deviate from or undermine the Articles of Incorporation, Bylaws,

or Standing Rules. *Id.* at 39 (¶ 67). Thus, it is unsurprising that the Policies prohibit "Kappa members from being affiliated with a men's fraternity or allowing men to have a recognized relationship with the Sorority or a chapter." *Id.* at 38–39 (¶ 65) (citing App. Vol. 1 at 224 (Policy III)). Policy III forbids this affiliation because "[t]he activities of such groups are not conducive to harmonious chapter operations and jeopardize our single-sex status." *Id.* (emphasis omitted) (quoting App. Vol. 1 at 224 (Policy III, Sec. 2)). And Policy VIII explicitly forbids men from participating in any Kappa recruitment events. *Id.* at 39 (¶ 65) ("Men shall not participate in any Kappa recruitment events[.]" (quoting App. Vol. I at 234 (Policy VIII, 3.I.))). Kappa Policies also require chapter members to live in their respective chapter houses upon admission and restrict the access of men to the house to provide "a private, safe space where young women can interact without concern that they will be on display for men." *Id.* at 44–45 (¶¶ 80, 83).

2. Defendants Have Subverted Kappa's Mission and Governing Documents by Changing the Definition of "Woman" Without Following the Required Processes.

In contrast to the governing documents described above, Kappa staff can publish "position statements," which are never presented to the Sorority's membership for approval or review. App. Vol. 1 at 50–51 (¶ 100). In 2015, and at the direction of the Fraternity Council, Kappa posted a position statement that claims

Kappa "is a single-gender organization comprised of women *and individuals who identify as women*."[3] *Id.* (quoting App. 263).

Then, in the Fall of 2022, Defendants Kappa and Mary Pat Rooney, the President of the Council of Kappa, and the Wyoming chapter leadership orchestrated and implemented a plan that resulted in the University of Wyoming chapter initiating as a member a biological male, Artemis Langford. *Id.* at 40–43 (¶¶ 68–76). It could not be otherwise: Kappa's Standing Rules explicitly provide that "no person can be initiated as a Kappa member without approval from Sorority headquarters." *Id.* at 40 (¶ 68).

Kappa's counsel has referred to its position statement to justify Langford's admission into the sorority. *Id.* But Kappa can only change its membership criteria by amending its Bylaws. And, as noted above, amendments can only be made if presented months before the Convention and approved by a majority (two-thirds) vote. *See* App. Vol. 1 at 104 (Bylaws, Art. XXIV, Sec. 1). Defendants did not amend Kappa's Bylaws to permit biological males and thus Langford's admission violated those Bylaws. App. Vol. 1 at 50–51, 52–53 (¶¶ 100, 102).

[3] The district court took note of two documents, the 2018 Guide for Supporting our LGBTQIA+ Members, and the Bylaws and Standing Rules Revisions 2022: FAQs. App. Vol. 2 at 70–71 (citing App. Vol. 1 at 111–23; App. Vol. 1 at 167–87). Neither of these documents appears in the Bylaws and each references the same 2015 statement, which this brief addresses.

3. Defendants Have Further Subverted Kappa's Governing Documents by Admitting Langford through Coercion and Voting Irregularities.

Aside from facilitating and approving Langford's admission in contravention of Kappa's governing documents, Defendants went even further and violated several Standing Rules throughout the admission process.

The Standing Rules, as described above, prescribe rules and procedures for the election of new members by a local chapter. App. Vol. 1 at 37–38 (¶ 62). But these rules were not followed for Langford's admission. While the Standing Rules require that elections employ a secret ballot and use Kappa's approved electronic voting system, Wyoming chapter leadership forced the Wyoming sisters to vote through a non-anonymous Google poll. *Id.* at 62–64 (¶¶ 129–130, 134). And even though the Rules require that all members vote on admission of a new member unless excused by the chapter's alumnae adviser in writing, "the chapter officers adopted the opposite policy" for Langford's vote, "forbidding Plaintiffs Choate and Ramar, and all other members who were not present at the chapter meeting on September 20, 2022 from voting," even though none of them had been excused. *Id.* at 37 (¶ 61).

Further in violation of Kappa's rules, Wyoming chapter officials, after consultation with Kappa's leadership, told members that voting against Langford's admission was evidence of "bigotry" that "is a basis for suspension or expulsion from the Sorority." *Id.* at 63 (¶ 131). After an initial anonymous vote conducted via

Google Poll failed to result in admission, Chapter officers forced a second, non-anonymous vote in which multiple sisters changed their votes because of "fear of reprisal." *Id.* at 65 (¶ 135). Without these unlawful procedures preventing some members from voting and pressuring other members to change their votes, Langford would not have been admitted. *Id.* at 65 (¶ 136).

When Plaintiffs—current members and recent graduates of the Wyoming chapter—contacted Kappa leadership and alerted them to these irregularities and their objection to Kappa admitting a biological-male member, the leadership dismissed their concerns. *Id.* at 48–49 (¶¶ 94, 95). In a response letter, counsel for Kappa rejected requests to enforce the Bylaws and rescind Langford's admission. *Id.* Other attempts to have the Wyoming chapter enforce the single-sex provisions of Kappa's Bylaws were similarly met with hostility and retaliation. *Id.* at 48, 49–51, 65–67 (¶¶ 93–94, 97–100, 137–42).

4. Langford's Admission Harmed the Sorority Holistically and Plaintiffs Individually.

Admission to the Wyoming chapter gave Langford access to all Kappa meetings and, crucially, the areas of the chapter house that were reserved for women only. *Id.* at 45 (¶ 81). This was contrary to the housing contract that Plaintiffs had to sign as members of the chapter, which required Plaintiffs to pay approximately $8,000 to live in the chapter house, *id.* at 45–46 (¶ 84), and specified that housing would be provided "subject to … the [Kappa] Bylaws, Standing Rules and Policies."

Id. at 31, 44–46, 77 (¶¶ 51, 78, 80, 83–84, 175); App. Vol. 1 at 246. Those rules exclude men from the house and limit membership to women. App. Vol. 1 at 31, 44–46, 77 (¶¶ 51, 78, 80, 83–84, 175); App. Vol. 1 at 246; *see* App. Vol. 1 at 44 (¶ 80) (quoting App. Vol. 1 at 275 (House Standing Rule 2.4.A.2)) ("The Kappa rules for the sorority house forbid all men from being on the second floor.").

Admission of a biological male also eliminated the "single-sex haven" that Kappa had promised to provide to Plaintiffs, one of whom is a sexual assault survivor who sought "a safe place to interact with other college students without the presence of men." *Id.* at 43–44 (¶ 77). That the chapter's house was not designed for co-educational living made matters worse. "[M]any of the [bedroom] doors do not lock consistently," two of the bathrooms are communal and without a lock, and the non-communal bathroom lacks "a private area to disrobe before showering." *Id.* at 44 (¶ 79).

Although Langford did not live in the house, Langford frequently entered the restricted area of the house and engaged in inappropriate and odd behavior there.[4] To give just a few examples, Langford has "several times chosen to sit for hours on the couch in the second-floor common area," not talking or studying but simply "star[ing] at women walking past." *Id.* at 45 (¶ 82). And "Langford has, while

[4] Further, the sorority has failed to assure Plaintiffs and other members that Langford would not live in the house at some point. App. Vol. 1 at 65 (¶ 137).

watching members enter the sorority house, had an erection visible through his leggings." *Id.* at 58–59 (¶ 119). At other times, Langford sat with a pillow covering his lap. *Id.* At a slumber party, Langford "repeatedly questioned the women about what vaginas look like, [and] breast cup size," and stared as one Plaintiff changed her clothes. *Id.* at 68 (¶ 144). Langford also talked about his virginity and discussed at what age it would be appropriate for someone to have sex. *Id.* And he stated that he would not leave one of the sorority's sleepovers until after everyone fell asleep. *Id.* at 68 (¶ 145). Langford also took pictures of female members "without their knowledge or consent." *Id.* at 69 (¶¶ 148–49). And members "observed Langford writing detailed notes about [the students] and their statements and behavior." *Id.*

In response to Plaintiffs' concerns about privacy and safety, "Kappa officials recommended that … they should quit Kappa Kappa Gamma entirely." *Id.* at 46 (¶ 85). As Kappa officials well know, however, once Plaintiffs were accepted into Kappa, they were permanently barred from ever joining another sorority, *id.* at 14–15 (¶ 12), and thus could never again obtain the single-sex sorority experience for which they had contracted.

B. Procedural History

Following the events described above, Plaintiffs sued on their own behalf and derivatively on behalf of Kappa itself under Ohio law, App. Vol. 1 at 74 (¶ 161), which "provides members of nonprofit corporations with a derivative cause of action

on behalf of the corporation," *Carlson v. Rabkin*, 789 N.E.2d 1122, 1127 (Ohio Ct. App. 2003) (citing Ohio Rev. Code Ann. § 1702.12(I)(1)(c)). In their First Amended Complaint, Plaintiffs alleged that Kappa's dissolution of the woman-only environment, orchestrated by Defendant Rooney, violated the sorority's Bylaws and other governing documents. App. Vol. 1 at 73–75 (¶¶ 159–67). Plaintiffs next asserted a breach of contract claim against Kappa Kappa Gamma Building Corp. ("Building Corp.") due to the presence of Langford in the restricted living areas of the house. *Id.* at 76 (¶¶ 168–72). Plaintiffs also brought claims against Rooney and Kappa for tortious interference with their housing contracts with the Building Corp. and asserted a direct claim against Rooney and Kappa seeking to recover for the personal, individual injuries Plaintiffs suffered because of Langford's unlawful admission and presence in the house. *Id.* at 76–77 (¶¶ 173–79).

Defendants moved to dismiss Plaintiffs' "claims in their entirety," identifying the "central issue in this case" as whether "Plaintiffs have a legal right to be in a sorority that excludes" biological males. App. Vol. 2 at 10, 11 (emphasis omitted). Defendants argued that Plaintiffs have no such right because Kappa's Bylaws do not create a "restrictive definition of the term 'woman.'" *Id.* at 21.

The district court granted Defendants' motion on August 25, 2023. App. Vol. 2 at 67–107. The court first addressed jurisdiction. It concluded that it lacked diversity jurisdiction to hear the breach of contract claim against KKG Building Co.

"because Plaintiffs do not seek damages against KKG Building Co. and fail to plead an amount in controversy as to that Defendant." App. Vol. 2 at 78.

The court held, however, that it was appropriate to exercise personal jurisdiction over Defendant Rooney because, "when Rooney approved Langford's admission, injury, if any, would occur on campus in Laramie, Wyoming," and therefore Rooney "purposefully directed her activities at Wyoming." App. Vol. 2 at 88 (internal quotation marks omitted).

Turning to the merits, the district court first concluded that Plaintiffs met the procedural requirements for a derivative claim under Ohio Civil Rule 23.1 because Plaintiffs and their families, before filing this lawsuit, petitioned Defendants to overrule Langford's admission and "communicated the crux of their future claims." App. Vol. 2 at 91. The court noted that Defendants rejected Plaintiffs' petition, and because they are the ones who approved Langford's admission, Defendants would oppose this lawsuit. *Id.* at 92. Thus, any attempt to make a pre-suit demand would have been futile. *Id.*

The court then held that Plaintiffs had failed to state a derivative claim against Kappa because Defendants had the right to interpret "woman" however they pleased. Specifically, the court understood the "gravamen" of Plaintiffs' lawsuit to be whether Kappa's Bylaws and other governing documents, in limiting membership to women, excluded biological males. App. Vol. 2 at 92. But the court refused to

hold that Plaintiffs had sufficiently alleged that Kappa's Bylaws "define[] 'woman'" to exclude biological men, instead concluding that (1) under Ohio law, it should not interfere with the actions taken by a voluntary association, and (2) Kappa has a First Amendment right to disregard its bylaw requirements. *See* App. Vol. 2 at 93 (citing Ohio precedent); *Id.* at 99 ("The Court will not … invade the organization's freedom of expressive association.").

The court also held that Plaintiffs could not bring a direct action against Defendants because they "have not shown a special duty, nor a separate and distinct injury, to sustain their direct claim." App. Vol. 2 at 103. The court reasoned that any injury from Langford's admission "inured to all KKG members alike, whether in Laramie or beyond," and stated that the egregious misbehavior of the biological male was "irrelevant" to the case. App. Vol. 2 at 105–06. The district court thus dismissed without prejudice all of Plaintiffs' claims, leaving no ongoing claims, counterclaims, motions, or other business before the court. App. Vol. 2 at 106.

Plaintiffs filed a timely notice of appeal on September 25, 2023 (App. Vol. 2 at 108–10). Defendants filed a motion to dismiss this appeal for lack of appellate jurisdiction, which Plaintiffs opposed on October 23, 2023. By Order of October 24, 2023, this Court deferred consideration of that motion to the merits panel.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

Reversal is required under this Court's settled standards. Specifically, this Court reviews de novo a district court's decision to grant a motion to dismiss under Rule 12(b)(6). *See Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). The court must "accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Id.* And a complaint "does not need detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is because "'[t]he court's function on a Rule 12(b)(6) motion is'" only to determine whether the complaint "'is legally sufficient to state a claim for which relief may be granted.'" *Smith*, 561 F.3d at 1098 (quoting *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)).

Under these standards, the district court was wrong to dismiss Plaintiffs' derivative and direct claims. First, the district court mistakenly applied a policy against judicial interference, which applies only to internal dispute-resolution processes, and the First Amendment, which applies only to state actors, to Plaintiffs' derivative claim. Without these irrelevant legal barriers, Plaintiffs' allegations of how Defendants violated their duties of care, loyalty, and compliance by acting outside of the Bylaws are sufficient to state a derivative claim.

Second, the district court disregarded key allegations in Plaintiffs' complaint to conclude that they had not adequately alleged a direct injury. The district court

had no basis for rejecting Plaintiffs' allegations of personal harm, including loss of privacy and emotional distress.

ARGUMENT

I. The District Court Erred in Dismissing Plaintiffs' Derivative Claim Against Defendants Kappa and Rooney.

Plaintiffs pled sufficient allegations for a derivative, breach-of-fiduciary duty claim because the First Amended Complaint explains in detail how Kappa disregarded its Bylaws and other governing documents to admit Langford, a biological male, into the sorority. The district court did so by ignoring longstanding principles of corporate law that require courts to enforce the articles and bylaws of a voluntary corporation. The district court compounded that error by misapplying the Supreme Court's First Amendment precedent to hold that Kappa is free to interpret the word "woman" however it pleases.

A. Plaintiffs Met the Procedural Requirements of Their Derivative Claim, and the Rule of Non-Interference Does Not Apply to That Claim.

Although the district court correctly applied the law governing derivative claims to hold that Plaintiffs met the futility requirement under Ohio Civil Rule 23.1, it applied the incorrect law to hold that it should not interfere with the actions of a voluntary association in defining the term "woman." A derivative claim like the one Plaintiffs brought is not subject to the rule of non-interference.

First, the district court correctly concluded that Plaintiffs met the futility requirement of Ohio Civil Rule 23.1. That rule requires a shareholder to make a demand upon the board of directors prior to bringing a derivative suit unless such a demand would be futile.

Plaintiffs' complaint provides more than enough evidence that a formal demand would have been futile in this case. As the district court observed, Plaintiffs and their parents made multiple attempts to contact and convince Kappa's Council not to admit Langford. App. Vol. 2 at 90–92. Plaintiffs also sent a letter through counsel seeking the enforcement of Kappa's Bylaws to prevent the initiation of Langford in November 2022. App. Vol. 1 at 4 (¶ 94). Kappa rejected this request through a letter from its own counsel and delineated its commitment to a policy of admitting individuals who identify as women regardless of their sex. *Id.* at 49–51 (¶¶ 95, 100).

Additionally, as the district court found, "Rooney, Executive Director Poole, and other Fraternity Council members are the same officers who purportedly approved Langford; under Plaintiffs' theory, Rooney and other directors violated KKG's Bylaws – of course the Fraternity Council would oppose Plaintiffs' federal lawsuit." App. Vol. 2 at 92. Thus, Kappa's directors were '"antagonistic, adversely interested, or involved in the transactions attacked,'" such that demand would be futile. *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 618 (6th Cir. 2008)

(quoting *Bonacci v. Ohio Highway Express, Inc.*, No. 60825, 1992 WL 181682, at *4 (Ohio Ct. App. July 30, 1992) (unreported)).

However, when it came to the substance of Plaintiffs' derivative claim, the district court applied the wrong law. Ohio law is clear that organizations that choose to avail themselves of the corporate form must accept the responsibilities that accompany that form, including the duty to abide by the terms of their articles of incorporation, bylaws, and other governing documents. *Ulliman v. Ohio High Sch. Athletic Ass'n*, 919 N.E.2d 763, 771 (Ohio Ct. App. 2009) (citing *Int'l Bhd. of Elec. Workers Local Union No. 8 v. Gromnicki*, 745 N.E.2d 449, 452–53 (Ohio Ct. App. 2000) ("Constitutions and bylaws entered into by an association and consenting parties constitute a contract between the association and its members."). As a non-profit corporation incorporated in Ohio, Kappa has an obligation under Ohio law to comply with its Articles of Incorporation, Bylaws, and Standing Rules, all of which are contracts that limit membership to women. *See id.*; App. Vol. 1 at 137–66 (Bylaws, Arts. II, III.1.A).

In addition, Ohio law grants shareholders in a non-profit organization the right to bring a derivative action to challenge actions taken by a board of directors that violate an organization's bylaws and governing directives. Ohio Rev. Code Ann. § 1702.12(I)(1)(c); *see also Carlson*, 789 N.E.2d at 1127. That is because corporate board members who disregard or otherwise seek to circumvent a corporation's

governing documents violate their duty of loyalty, duty of care, and duty of obedience (also called duty of compliance). *See* Ohio Rev. Code Ann. § 1702.12(I)(1)(c).

Rather than apply these well-settled rules to assess whether Plaintiffs had sufficiently stated a derivative claim, the district court applied the doctrine that "'Ohio courts are unwilling to interfere with the management and internal affairs of a voluntary association'" unless "'there has been some palpable violation of the constitution or laws of the corporation whereby he has been deprived of valuable rights.'" App. Vol. 2 at 93 (quoting *Redden v. Alpha Kappa Alpha Sorority, Inc.*, No. 1:09CV705, 2010 WL 107015, at *5 (N.D. Ohio Jan. 6, 2010) (unreported); *Powell v. Ashtabula Yacht Club*, No. 953, 1978 WL 216074, at *4 (Ohio Ct. App. 1978) (unreported) (emphasis omitted)).

But this rule does not apply to Plaintiffs' derivative claim. Indeed, none of the cases the district court cites apply this non-interference rule to a derivative claim or a claim concerning a breach of fiduciary duties. Rather, the court's cited cases all concerned a plaintiff's complaint about direct injuries resulting from a violation of due process or some other complaint personal to the plaintiff about an internal dispute-resolution process. *See Redden*, 2010 WL 107015, at *3–4 (plaintiff alleged sorority "did not comply with the requirements of due process which apply to proceedings for disciplining a member of a private association" and court applied

the non-interference rule only to this claim and not plaintiff's separate claim for breach of fiduciary duties); *Powell*, 1978 WL 216074, at *1 (plaintiff alleged association's termination of his membership for misbehavior violated due process); *Stibora v. Greater Cleveland Bowling Ass'n*, 577 N.E.2d 1175, 1178–79 (Ohio Ct. App. 1989) (suit arguing plaintiffs' suspension from membership because of their unauthorized withdrawal violated due process); *Putka v. First Cath. Slovak Union*, 600 N.E.2d 797, 801–02 (Ohio Ct. App. 1991) (plaintiff alleged organization violated his due process rights in expelling him from membership because he brought a complaint to a state agency before taking it to the organization).

Plaintiffs' derivative claim is not about due-process rights or a personal grievance concerning Kappa's internal-dispute resolution process. Rather, Plaintiffs allege, with particularity, the requirements for a derivative suit and why Plaintiffs meet those requirements. App. Vol. 1 at 74–75 (¶¶ 162–67). Specifically, Plaintiffs state that the Bylaws and rules of Kappa have always "limited membership to women only," and Defendants refused to enforce this requirement, which has resulted in the sorority losing "its identity as an organization for women" and experiencing "a significant decline in alumnae giving, membership, and participation." *Id.* at 75 (¶¶ 164–66). And thus, Defendants "have violated their duties of loyalty, care, and obedience/compliance." *Id.* at 74 (¶ 163).

Rather than analyze these allegations, the district court decided that it could not interfere with the private organization's interpretation and that the First Amendment permitted Kappa to define "woman" however it wanted. But, as explained above, the non-interference rule does not apply to this derivative claim.[5] And, as explained next, the First Amendment does not shield Defendants from this claim.

B. Corporations Have No First Amendment Right to Disregard the Terms of Their Governing Documents.

Faced with Kappa's plain violation of its Bylaws and abandonment of required democratic procedures in admitting a biological male, the district court

[5] Further, even if the non-interference rule applied to a derivative claim—a proposition no case supports—Plaintiffs' claim would clearly fall under the rule's exception for a '"palpable violation of the … laws of the corporation whereby [the plaintiff] has been deprived of valuable rights.'" *Redden v. Alpha Kappa Alpha Sorority, Inc.*, No. 1:09CV705, 2010 WL 107015, at *5 (N.D. Ohio Jan. 6, 2010) (unreported) (quoting *Powell v. Ashtabula Yacht Club*, No. 953, 1978 WL 216074, at *4 (Ohio Ct. App. 1978) (unreported)); *see* App. Vol. 1 at 30, 32–38 (¶¶ 49, 53–63); *Stibora v. Greater Cleveland Bowling Ass'n*, 577 N.E.2d 1175, 1178–79 (Ohio Ct. App. 1989) (explaining that Ohio law requires courts to reject decisions of voluntary associations that "are arbitrary and undertaken as a willful exercise of power."). Courts must not "hesitate to interfere where," as here, "proceedings have not been conducted in accordance with the organization's own rules of procedure," *Milkie v. Acad. of Med. of Toledo & Lucas Cnty.*, 246 N.E.2d 598, 602 (Ohio Ct. App. 1969), or when "'the managing officers are acting in excess of their corporate power.'" *Strah v. Lake Cnty. Humane Soc'y*, 631 N.E.2d 165, 171 (Ohio Ct. App. 1993) (quoting *Cincinnati Camp Meeting Ass'n of Methodist Episcopal Church v. Danby*, 56 N.E.2d 694, 696 (Ohio Ct. App. 1943)). And "the courts may and should protect the democratic processes of those organizations and vindicate the rights of their members." *Tucker v. Nat'l Ass'n of Postal Supervisors*, 790 N.E.2d 370, 374 (Cleveland Mun. Ct. 2003).

refused to consider Plaintiffs' claims on the grounds that Kappa's decision to admit biological-male members was "speech which th[e] Court may not impinge," and "Kappa's freedom of expressive association … insulate[s] the organization" from the requirement that it abide by its Bylaws as written. App. Vol. 2 at 96–97. But the First Amendment's freedom of expressive association applies when a state actor is meddling with such association. There is no state actor here, and no authority supports the court's novel conclusion that the First Amendment protects a *private* organization from a *private* lawsuit when it contravenes its own *voluntarily chosen and private* obligations as provided in its corporate bylaws.

The district court based its flawed First Amendment analysis on the Supreme Court's decisions in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). App. Vol. 2 at 94–97. However, those cases are inapposite: Both involved situations in which *the State* attempted to force an organization to accept a member (or participant) the organization did not want to include. *Dale*, 530 U.S. at 656 (holding that the state's public accommodations law, which would have forced the Boy Scouts to accept a gay scoutmaster, infringed upon the group's freedom of association); *Hurley*, 515 U.S. at 575–76 (holding that the state's public

accommodations law that would have forced a private parade to allow pro-LGBT participants was unconstitutional).[6]

Here, in contrast, *Defendants*, the nationwide leaders of the sorority, are attempting to force Kappa to accept individuals that Kappa's own Bylaws exclude. The State has required nothing of the organization in this regard. Instead, Kappa has imposed limitations on itself.

Because there is no state action at issue, the First Amendment is not implicated. If it were otherwise, as the district court held, then courts would be barred from resolving any private contractual dispute that could be alleged to implicate a party's associational freedoms. That is not the law.

On the contrary, courts routinely resolve disputes over an organization's membership decisions and whether an organization's expulsion of a member was consistent with that organization's bylaws and rules. *See*, *e.g.*, *Gromnicki*, 745 N.E.2d at 452–53 (explaining that "[t]o determine when the union-member relationship terminated, we turn to the union's constitution"); *Browning v. Fraternal Ord. of Eagles*, No. 1769, 1986 WL 9644, at *1 (Ohio Ct. App. Aug. 22, 1986)

[6] *Hurley* is also inapposite because it was a case primarily about compelled speech, not freedom of association. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 559 (1995) ("The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey.").

(unreported) (Ohio courts review an expulsion of a member of a fraternal society for "compliance with the constitution and bylaws of the association"); *Milkie v. Acad. of Med. of Toledo & Lucas Cnty.*, 246 N.E.2d 598, 602 (Ohio Ct. App. 1969) (invalidating a member's expulsion from professional association).

In such circumstances, the court's role is simply to enforce the organization's contracts. *Gromnicki*, 745 N.E.2d at 452–53 ("according to the United States Supreme Court, '[t]he court's role is but to enforce the contract'") (quoting *Nat'l Lab. Relations Bd. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 182 (1967)); *Reyes v. Laborers' Int'l Union of N. Am.,* 464 F.2d 595, 597 (10th Cir. 1972) (affirming a member's suspension because the court was not "apprised of any provision of the Union constitution which was violated by [the plaintiff's] suspension.").[7] Simply put, judicial enforcement of corporate requirements does not infringe an organization's First Amendment rights of association.

[7] Even if Ohio's requirement that Kappa abide by its governing documents could somehow be deemed state interference, that law poses no concerns under the First Amendment. The Supreme Court has recognized that "[t]he right to associate for expressive purposes is not … absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). State laws allowing shareholders and members to bring derivative suits against corporations when they deviate from their bylaws—a longstanding and unremarkable feature of corporate law—clearly meet that test.

C. Plaintiffs Have Sufficiently Alleged Defendants' Fiduciary Breach Due to Their Failure to Follow Kappa's Governing Documents That Define "Woman" as a Biological Female.

With the non-interference rule and First Amendment properly set aside, Plaintiffs' allegations state a viable derivative claim. As discussed above, the district court erred in concluding otherwise based on the theory that Kappa has "organizational autonomy … to interpret [its] own bylaws." App. Vol. 2 at 98. If the district court had properly assessed the contractual documents, it should have found that the Bylaws and other governing documents use "woman" as it is commonly understood—a biological female. And Kappa's off-the-cuff position statement in 2015 did not change that definition or give any of the Defendants the right to interpret the term as they wished.[8]

A plaintiff bringing a claim for breach of fiduciary duty "must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused therefrom." *Ray v. Hidden Harbour Ass'n, Inc.*, 104 N.E.3d 261, 269 (Ohio Ct. App. 2018) (citation omitted). Ohio law "imposes fiduciary duties on directors of nonprofit corporations." *Id.* (citing Ohio Rev. Code Ann. § 1702.30). In fact, Section 1702.30(B) explicitly states: "A director shall perform the duties of a director … in good faith, in a manner the director reasonably believes to be in or not

[8] If it were true that corporations could interpret their governing documents however they pleased, governing documents would become meaningless.

opposed to the best interests of the corporation, and with the care that an ordinary prudent person in a like position would use under similar circumstances." *Id.* (quoting Ohio Rev. Code Ann. § 1702.30(B)).

As noted above, part of a director's fiduciary duties involves following the terms of a nonprofit's governing documents, which are contracts. *Ulliman*, 919 N.E.2d at 771; *DiPasquale v. Costas*, 926 N.E.2d 682, 708 (Ohio Ct. App. 2010); *Carr v. Acacia Country Club Co.*, 970 N.E.2d 1198, 1206 (Ohio Com. Pl. 2011), *aff'd*, 970 N.E.2d 1075 (Ohio Ct. App. 2012). The governing documents may "reserve control" over the non-profit's governing body, *Carr,* 970 N.E.2d at 1206, including with respect to the "qualification[]" and "admission[]" of members, Ohio Rev. Code Ann. § 1702.11. And, when a board of directors violates an organization's bylaws and other governing documents, state law provides shareholders in a non-profit organization the right to bring a derivative action to challenge those actions. Ohio Rev. Code Ann. § 1702.12(I)(1)(c); *see also Carlson*, 789 N.E.2d at 1127.

The First Amended Complaint explicitly alleges numerous breaches of Defendants' fiduciary duties based on violations of the Bylaws, Standing Rules, and Articles of Incorporation. First, Kappa's governing documents all require that membership be limited to women. *See supra* pp. 5–8. Yet Kappa leadership admitted Langford by claiming that Kappa altered the membership criterion to

include individuals who identify as women without amending the Bylaws and other governing documents. App. Vol. 1 at 27–30 (¶¶ 42, 46, 48–49); *see generally Strah v. Lake Cnty. Humane Soc'y*, 631 N.E.2d 165, 172 (Ohio Ct. App. 1993) (affirming trial court's finding of arbitrariness when organization interpreted its bylaws inconsistently).

Second, Langford's admission violated additional provisions of Kappa's Standing Rules. App. Vol. 1 at 30–32, 38–39 (¶¶ 49, 52, 65). Specifically, the First Amended Complaint states that the Standing Rules were breached when (1) certain Plaintiffs and other members who were not present at the chapter meeting were prohibited from voting, and (2) voting took place in a non-anonymous and irregular way. *Id.* at 36–38 (¶¶ 59–63). Defendants approved Langford's membership despite these rule violations and coordinated with the Wyoming chapter leadership to pressure members to recruit then vote for Langford. *Id.* at 61–66 (¶¶ 125, 129, 131–36, 139). For the reasons stated below, these allegations cross the plausibility line.

1. The Court applies the plain and ordinary meaning of common words.

Under Ohio law, "the cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties." *Foster Wheeler Enviresponse, Inc. v. Franklin Cnty. Convention Facilities Auth.*, 678 N.E.2d 519, 526 (Ohio 1997) (citing *Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 544 N.E.2d 920, 923 (Ohio 1989)). The parties' intent is "presumed to reside in the language

they chose to employ in the agreement." *Id*. (quoting *Kelly v. Med. Life Ins. Co.*, 509 N.E.2d 411, 413 (Ohio 1987)). The court applies the plain and "ordinary meaning" of common words, "unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Id*. (quoting *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 150 (Ohio 1978)); *see also Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 875 N.E.2d 31, 34 (Ohio 2007). The relevant plain meaning is the meaning "at the time" the contract was made. *Alexander*, 374 N.E.2d at 151; *cf. Ohio v. Ramirez*, 151 N.E.3d 598, 604 (Ohio 2020) ("In interpreting a statute, we look to its ordinary meaning at the time of its enactment.").

2. Kappa's governing documents (its contracts) have always defined "woman" as a biological female.

Kappa was founded in 1870 because six biological females questioned why "women should be satisfied with literary societies while men on campus enjoyed full-fledged fraternity chapters." Denise Tessier & Gay Chuba Barry, *History 2000: Kappa Kappa Gamma Through the Years* 14 (2000).[9] The founders' "aim was to

[9] In deciding a motion to dismiss, courts may take judicial notice of "documents referred to in the complaint" and "documents that the complaint incorporates by reference." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (quotation marks and citation omitted from first quotation; citation omitted from second quotation). The complaint incorporates and references the above document and thus the court may take notice of it. *See* App. Vol. 1 at 21–22 (¶ 27).

draw into the society the choicest spirits among the girls, not only for literary work, but also for social development." *Id*. Initiation gave new members self-assurance that "Kappa girls [held] an equality with any women in the world, even royalty." *Id*. at 23; *see* App. Vol. 1 at 20–21 (¶¶ 25–27).

Kappa's Bylaws are a contract that "constitute the code of regulations of the Fraternity." App. Vol. 1 at 103 (Bylaws, Art. XIX); *accord Ulliman*, 919 N.E.2d at 771. The earliest Bylaws stated that "[a]ny lady" may be a candidate for membership. App. Vol. 1 at 21–22 (¶ 27); *see also* Kappa Kappa Gamma Fraternity, By-Laws of Kappa Kappa Gamma, Art. III, Sec. 1 (1870), available at https://bit.ly/49L8LpN. By 1882, Kappa described membership as limited to "women." Kappa Kappa Gamma Fraternity, Constitution of Kappa Kappa Gamma, Art. VI, Sec. 2 (1882), available at https://bit.ly/3SSBMtK.

"Women" in the 1882 Constitution referred to biological females.[10] Indeed, Kappa does not argue otherwise. And since its founding, the organization has consistently used the term in its governing documents to prescribe qualifications for

[10] *See Woman, Webster's International Dictionary of the English Language Comprising the issues of 1864, 1879, and 1884,* at 1661 (Springfield, Mass., G. & C. Merriam Co. 1898) [https://archive.org/details/webstersinternat00port/page/1660/mode/2up] (defining "woman" as a "female"); *Female, id.* at 551 [https://archive.org/details/webstersinternat00port/page/550/mode/2up] (defining "female" as a biological female—"[a]n individual of the sex…which has an ovary and produces ova.").

membership. *See, e.g.*, Kappa Kappa Gamma Fraternity, Constitution of Kappa Kappa Gamma, Art. IV, Sec. 1 (1910), available at https://bit.ly/49PGxdC ("women ... shall be eligible to membership"); Kappa Kappa Gamma Fraternity, Constitution of Kappa Kappa Gamma, Art. IV, Sec. 1 (1926), available at https://bit.ly/47KiJG1 (same); Kappa Kappa Gamma Fraternity, By-Laws of the Kappa Kappa Gamma Fraternity, Art. IV, Sec. 1 (1966), available at https://bit.ly/3sO1rcs ("[a] woman … may be elected to membership").

The current Bylaws state: "A new member shall be a woman who has accepted an invitation to join the Fraternity but has not been initiated." App. Vol. 1 at 86 (Bylaws, Art. III, Sec. 1.A). "To qualify as … a collegiate new member … a woman shall" meet certain criteria including college enrollment, a B+ high school grade point average, and not belonging to "any similar college or university women's social sorority." *Id*. at 87 (Bylaws, Art. III, Sec. 2.A–B).

While the Bylaws provide for waiver of certain obligations like the B+ grade point average (*Id.* at 87 (Bylaws, Art. III, Sec. 2.B.2)) or financial commitments (*Id.* (Bylaws, Art. III, Sec. 3.A.1)) in "extraordinary conditions" following a "petition" to Kappa's membership director from the "chapter," Kappa does not provide for an exception in any of its governing documents to the requirement that a new member must be a "woman" invited to membership or a "woman" who has not previously pledged to another sorority. App. Vol. 1 at 87 (Bylaws, Art. III, Sec. 2).

The use of "women" and "woman" in the Bylaws incorporates references to other laws and policies that define and apply those words in biological terms. App. Vol. 1 at 21–22 (¶¶ 28–32). For example, under Article V, Section 2, "Legal Compliance," Kappa explains that its woman-only nature stems from sororities' "exemption under the Title IX of the Educational Amendments of 1972." App. Vol. 1 at 151. Title IX addresses *sex*-discrimination in biological, binary terms. *See, e.g.*, 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in … any education program or activity"); *id.* § 1681(a)(8) (permitting "father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of *one* sex, opportunities for reasonably comparable activities shall be provided for students of the *other* sex" (emphasis added)); *cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (applying "sex" in Title VII of the Civil Rights Act, passed close in time to Title IX, as male or female as determined by reproductive biology). *See also* App. Vol. 1 at 24 (¶ 36).

And Kappa's Policies, which are intended to "carry out" the Bylaws, explain that Kappa women may not participate in "men's Fraternity events when or where the primary purpose is recruitment," and that "[m]en shall not participate in any Kappa recruitment events." App. Vol. 1 at 225, 234; App. Vol. 1 at 38–39 (¶ 65). These rules can only be understood through a biological lens.

3. Kappa has never changed the definition of "woman."

Significantly, Kappa does not argue that the founders of Kappa or the drafters of Kappa's 1882 Constitution intended the word "woman" to refer to anything other than a biological female. At no time has the organization amended its governing documents to define "woman" or "women" atypically or to open membership to people other than women.

In fact, the 2004 Convention voted to replace the Bylaws and Articles of Incorporation "in their entirety," to "*underscore* that we are a single gender organization." Kappa Kappa Gamma Convention 2004 and Bylaws/Standing Rules Revisions Video, Kappa Kappa Gamma, at 7:13, 9:36 (2004) ("Kappa Convention Video") (emphasis added), https://bit.ly/3SSQiSj.[11] Kappa's Fraternity Council President's use of "underscore" illustrates that the 2004 voting delegates were asked to continue, not eliminate, Kappa's longstanding membership criteria. The 2004 revision clarified that Kappa would "unite *women*, through membership, in a close bond of friendship." Restated Articles of Incorporation (2004) (emphasis added) (App. Vol. 1 at 132); App. Vol. 1 at 30 (¶ 49). Kappa filed restated articles of

[11] In deciding a motion to dismiss, courts may consider "matters of public record." 5B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (3d ed. 2023 update).

incorporation with the State of Ohio to reflect this clarified purpose, which have not since been refiled. App. Vol. 1 at 129–32; App. Vol. 1 at 27 (¶ 47).[12]

Yet Kappa seems to believe that a "position statement adopted in 2015" means its membership criteria includes individuals who "identify as women." App. Vol. 2 at 21. The 2015 online statement, prepared at the direction of Defendants and others on Kappa's board, says Kappa "is a single-gender organization comprised of women and individuals who identify as women whose governing documents do not discriminate in membership selection except by requiring good scholarship and ethical character." App. Vol. 1 at 263; App. Vol. 1 at 50–51 (¶ 100). But this statement did not change Kappa's membership requirements. Only the Bylaws—not online statements free from any process, collaboration, explanation, or review

[12] In the summer of 2022, Kappa adopted a technical revision of the Bylaws, though "most of the content [was] unchanged." App. Vol. 1 at 138 (Report of the Bylaws Committee (Mar. 16, 2022)); App. Vol. 1 at 32–33 (¶ 53). The revision was "structur[al]," to reflect that the Bylaws Committee "found that the subjects that should be in the Fraternity Bylaws were in the Fraternity Standing Rules, some things in the Fraternity Bylaws should be in the Fraternity Standing Rules, and some things should be moved to the Fraternity Policies." App. Vol. 1 at 138. The "major amendments" included: term limits for regional leadership, a fee increase, and the reconsideration of "gendered pronouns" including whether "chairman" was appropriate. (The Committee recommended keeping "chairman," given that it signified leadership and not maleness.). App. Vol. 1 at 139. The membership criteria remained the same: "A new member shall be a woman." *See* App. Vol. 1 at 31–33 (¶¶ 52–54). Thus, at no point in Kappa's history, including the 2004 or 2022 Conventions, were voting delegates made aware of a new or non-biological understanding of "woman" that differed from the term's constant presence as a biological limit to membership.

mechanism—govern membership. *See* Kappa Convention Video, at 3:24 ("we always protect the rights of our members and allow the general convention assembly to make decisions on … membership qualifications"); *id.* at 2:23 ("The Bylaws include the rules considered *so important* that they *cannot* be changed without previous notice to the members and a vote of the members.") (emphasis in original by inflection).

4. "Woman" is not an ambiguous term open to an evolving interpretation.

Despite the clear history of the definition of "woman" as a biological female in Kappa's documents, Kappa argued below that the word is "unquestionably open to multiple interpretations." App. Vol. 2 at 21. But courts will not find common words ambiguous unless '"manifest absurdity"' results or another meaning is '"clearly evidenced from the face or overall contents"' of the Bylaws. *Shifrin v. Forest City Enters., Inc.*, 597 N.E.2d 499, 501 (Ohio 1992) (quoting *Alexander,* 374 N.E.2d 146 at 148). Kappa cannot argue that applying its long-held biological meaning to "women" would be absurd. Nor can Kappa argue that a non-biological interpretation is clearly evidenced from the Bylaws.

Even if this Court were to hold that the word "woman" is ambiguous today, which it is not, Plaintiffs still prevail. The court may use extrinsic evidence to ascertain the parties' intended use of a word. *Lutz v. Chesapeake Appalachia, L.L.C.*, 71 N.E.3d 1010, 1012 (Ohio 2016). "Extrinsic evidence can include '(1) the

circumstances surrounding the parties at the time the contract was made, (2) the objectives the parties intended to accomplish by entering into the contract, and (3) any acts by the parties that demonstrate the construction they gave to their agreement.'" *Id*. (quoting *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 716 N.E.2d 1201, 1208 (Ohio Ct. App. 1998)).

As discussed above, Kappa crafted its Bylaws and other governing documents to provide an organization for women who were, at the time, excluded from fraternal organizations on the basis of sex, App. Vol. 1 at (¶ 12). Today's Bylaws reflect this history and 152 subsequent years of sisterhood, during which voting delegates have never been asked to re-define woman or to expand membership to biological men.

Nothing about Kappa's more recent position statement demonstrates that the parties intended to revise the Bylaws and other documents governing membership criteria. Kappa might think the 2015 statement (repeated in 2018 and 2020) either explains what earlier or later Bylaws mean, but that argument fails for several reasons.

First, an unattributed intention made without both parties' input (or awareness) cannot reliably determine a contract term's meaning, any more than a legislator or witness's statement in the legislative record determines the meaning of a statute. For this reason, Ohio courts have held that "intentions not expressed in the

writing are deemed to have no existence and may not be shown by parol evidence." *Aultman Hosp. Ass'n*, 544 N.E.2d at 923.

Second, Kappa holds the pen in revising the Bylaws and thus Kappa is not owed deference in asserting an interpretation outside the four corners of the document. Ohio courts have held that "a contract is to be construed against the party who drew it." *Graham v. Drydock Coal Co.*, 667 N.E.2d 949, 952 (Ohio 1996).

Third, reading the 2015 statement itself, Kappa agrees with Plaintiffs that "women" is biologically distinct from "individuals who identify as women." That is, Kappa understands that describing itself as an organization comprised of "women" is insufficient to cover "individuals who identify as women" because we see the word "*and*." App. Vol. 1 at 51 (¶ 100) (quoting App. Vol. 1 at 263). For example, your neighbor might say he owns cats and dogs, using "and" to delineate two different things. He would not say he owns pets and dogs, because when the second category is synonymous with or a subcategory of the first, we see other connectors like "including," "such as," or "who are."

Ultimately, Kappa knows that its organizational history contradicts any claim that Kappa founders understood the word woman to refer to anything other than biological females. So, the organization argues instead that the meaning of the word "woman" has "evolve[d] over time." App. Vol. 2 at 22. (What, exactly, the word has evolved to mean, Kappa has not said. Nor have Defendants articulated when or

how the word evolved or whether any voting delegate knew or agreed to this evolution.). But Kappa fundamentally misunderstands how contracts work. Courts enforce the meaning of terms "at the time" a contract is made. *Alexander*, 374 N.E.2d 146 at 151.

Incredibly, Kappa believes the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), blessed the idea that words evolve and courts should apply that evolved meaning. But *Bostock* and reams of Supreme Court precedent say the opposite. The Court interprets words in a statute "consistent with their ordinary meaning *at the time* Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (internal quotation marks, citation and alterations omitted) (emphasis added). The Court in *Bostock* did not reimagine "sex" under the Civil Rights Act of Title VII of 1964 as synonymous with "transgender status" in 2020, enabling Kappa to reimagine "woman" from the 1870s as synonymous with "transgender woman" today. App. Vol. 2 at 22. Instead, the *Bostock* Court applied "sex" as a binary, biological term not interchangeable with a non-binary, identity-based term like "transgender status." *Bostock*, 140 S. Ct. at 1739, 1741. Consistent with this understanding, the Court used "woman" throughout its opinion to mean biological female. It explained that employers discriminate against women—*i.e.,* discriminate on the basis of sex—when they employ men married to women but not women married to women. *Bostock*'s

interpretive guidelines, accompanied by its use of the term "woman" to mean biological female, support Plaintiffs' interpretation, not Kappa's interpretation, of the Bylaws.

* * *

In sum, there are no legal impediments to Plaintiffs' derivative, breach of fiduciary duty claim. The non-interference rule and First Amendment do not bar Plaintiffs' claims, and basic contract principles support it. Plaintiffs' allegations that Defendants flouted the definition of "woman" in the Bylaws and governing documents form a viable derivative claim.

II. The District Court Erred in Dismissing Plaintiffs' Direct Action Because Plaintiffs Were Separately and Distinctly Injured by Defendants' Admission of Langford into the Wyoming Chapter.

The district court also erred in dismissing Plaintiffs' direct claim against Kappa and Rooney on the ground that "Plaintiffs have not shown a special duty, nor a separate and distinct injury," to support that claim. App. Vol. 2 at 103. Under Ohio law, a shareholder may file a direct action "if the complaining shareholder is injured in a way that is separate and distinct from an injury to the corporation." *Crosby v. Beam*, 548 N.E.2d 217, 219 (Ohio 1989); *accord Heaton v. Rohl*, 954 N.E.2d 165, 175 (Ohio Ct. App. 2011).

The First Amended Complaint satisfies this requirement, as it details several claims of injury that are personal to Plaintiffs and that have not, as the district court

suggested, "inured to all [Kappa] members alike, whether in Laramie or beyond." App. Vol. 2 at 105. Kappa members beyond Laramie have not encountered Langford's unwanted and uncomfortable behavior, including Langford's having a visible erection while staring at the girls as they move about the sorority house. App. Vol. 1 at 67–71 (¶¶ 143–52). Nor have Kappa members nationwide been subject to Langford's "repeated[] question[ing]" about private anatomical details like "what vaginas look like." *Id.* at 68 (¶ 144). They have not been placed in the physically vulnerable position of unknowingly changing clothes in front of a biological male in what was supposed to be a single-sex living space. *Id.* at 68–69 (¶ 146). Plaintiffs were uniquely subjected to a loss of privacy, frustration of contractual expectations, and emotional distress, such that they were "injured in a way that is separate and distinct from an injury to the corporation." *Crosby*, 548 N.E.2d at 219.

The district court suggested these injuries should be disregarded because "only [Plaintiffs'] frustrated contractual expectations merit consideration," and those expectations were the same for "all KKG members." App. Vol. 2 at 105. That, too, was error.[13] Ohio law is clear that "a wrong involving one of the shareholder's

[13] Indeed, the district court's dismissal of Plaintiffs' direct claim is in tension with its holding that it had personal jurisdiction over Defendant Rooney, in part, because "when Rooney approved Langford's admission, injury, if any, would occur on campus in Laramie, Wyoming." App. Vol. 2 at 88. There was injury in Laramie, and that injury is separate and distinct from the injury that occurred to the sorority nationwide.

contractual rights as a shareholder" can result in "[a]n injury that is distinct from that suffered by other shareholders." *Carlson*, 789 N.E.2d at 1127. "The difference in the nature of the injury"—whether personal and direct or shared and derivative—"is reflected in the manner of recovery." *Maas v. Maas*, 161 N.E.3d 863, 880 (Ohio Ct. App. 2020). "In a shareholder's derivative suit, any recovery accrues to the corporation." *Id.* at 880–81. "In a direct action," on the other hand, "the complaining shareholder is directly compensated," which "prevent[s] the wrongdoers from being the principal beneficiaries of the damages." *Id.* at 881.

The contractual violations in this case resulted in personal injuries unique to Plaintiffs, who, unlike Kappa members of other chapters, found themselves required to share intimate spaces with a biologically male student. The district court was wrong to deem those harms "irrelevant" and dismiss Plaintiffs' direct claim. *See* App. Vol. 2 at 106 (n.67).

CONCLUSION

The district court dismissed Plaintiffs' derivative claim by applying the wrong law, and it dismissed Plaintiffs' direct claim by ignoring the complaint's alleged facts. This Court should reverse the lower court's legal and factual errors and hold that Plaintiffs have pleaded sufficient direct and derivative claims.

Dated: December 4, 2023

Respectfully submitted,

/s/ Sylvia May Mailman

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ORAL ARGUMENT STATEMENT

Plaintiffs-Appellants respectfully request oral argument because this case raises important issues about the applicable law to Plaintiffs' derivative claims as well as the correct standards for assessing factual allegations regarding Plaintiffs' direct claims.

December 4, 2023

/s/ Sylvia May Mailman
Sylvia May Mailman

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this document:

(i) complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(A) because, excluding those portions exempted by Fed. R. App. P. 32(f), it contains 10,312 words, as determined by the word counting feature of Microsoft Word; and

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Dated: December 4, 2023

/s/ Sylvia May Mailman
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