No. ____

IN THE
Supreme Court of the United States

ERIC CLOPPER,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE;
THE HARVARD CRIMSON, INC.
Respondents,

JOHN DOES 1-10,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX

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June 20, 2023

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-2140

ERIC CLOPPER

Plaintiff – Appellant,

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON

Defendants – Appellees,

JOHN DOES 1-10,

Defendants.

United States Court of Appeals First Circuit

FILED

August 1, 2022

Maria R. Hamilton Clerk

Appeal from the U.S. District Court for the District of Massachusetts

Before Kayatta, Howard, and Gelpí, Circuit Judges.

JUDGMENT

Entered: August 1, 2022

After a thorough review of the record and of the parties' submissions, we affirm the dismissal of the claims against all defendants-appellees.

A dismissal for failure to state a claim is reviewed de novo. See Guadalupe-Báez v. Pesquera, 819 F.3d 509, 514 (1st Cir. 2016) (citations omitted). "In conducting this review, we accept the truth of all well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." Grajales v. Puerto Rico Ports Auth., 682 F.3d 40, 44 (1st Cir. 2012).

The First Amendment claim is waived for failure to raise it in the opening brief. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Flanders-Borden, 11 F.4th 12, 18 (1st Cir. 2021). The claim under the Massachusetts Civil Rights Act ("MCRA") was properly dismissed because the Complaint failed to allege actionable economic coercion. See Nolan v. CN8, 656 F.3d 71, 77 (1st Cir. 2011) (noting that the Massachusetts Supreme Judicial Court "has held that the termination, or threatened termination, of at-will employees is not coercive in the relevant sense under the MCRA"); Willitts v. Roman Catholic Archbishop of Boston, 411 Mass. 202, 210, 581 N.E.2d 475 (1991).

The contract claims were properly dismissed because the facts alleged in the Complaint uncontrovertibly supported a conclusion that the appellant was an employee-at-will. See Jackson v. Action for Boston Comm. Dev., 403 Mass. 8, 9, 525 N.E.2d 411, 412 (1988). Under Massachusetts law, then, he could "be terminated for any reason or for no reason." See Meehan v. Medical Inf. Tech., Inc., 488 Mass. 730, 732, 177 N.E.3d 917, 920 (2021). We reject the contention that Harvard's written Free Speech Policy or related statements about that policy created an implied-in-fact employment contract. "An implied contract requires proof that there was a benefit to the defendant, that the plaintiff expected the defendant to

pay for that benefit, and that the defendant expected, or a reasonable person should have expected, that he or she would have to pay for that benefit." Vita v. Berman, Devalerio & Pease, LLP, 81 Mass. App. Ct. 748, 754, 967 N.E.2d 1142, 1148 (2012). No such facts were alleged here.

We also conclude that the district court properly dismissed the claim that Harvard had breached its implied covenant of good faith and fair dealing. A duty of good faith and fair dealing is implied in an employment-at-will contract only where an employer has terminated an employee in bad faith in order to avoid paying that employee "identifiable, reasonably anticipate future compensation, based on his past services, that he lost because of his discharge without good cause." York v. Zurich Scudder Inv., Inc., 66 Mass. App. Ct. 610, 616, 849 N.E.2d 892, 898 (2006) (citing Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 672, 429 N.E.2d 21, 29 (1981)). The Complaint does not allege that the appellant was terminated in order to avoid paying compensation for past services. To the extent that the Complaint alleged that appellant was terminated for "asserting legally guaranteed rights, for doing what the law requires, and for refusing to do what the law forbids," this appears to be a reference to the public policy exception to the employment-at-will doctrine. See Acher v. Fujitsu Network Comm., Inc., 354 F. Supp. 2d 26, 29 (D. Mass. 2005). This exception is a narrow one, see King v. Driscoll, 418 Mass. 576, 582, 638 N.E.2d 488, 492 (1994), and the Complaint fails to allege any facts that would fall within this exception.

The promissory estoppel count also failed to state a claim. According to the Complaint, the Sanders

Theatre Policy Book, which was explicitly incorporated into the written rental contract for Sanders Theatre, prohibited nudity in the Theatre; and shortly before the performance, the appellant was expressly admonished by the Program Manager of Sanders Theatre that he could not perform nude. Under these circumstances, no reasonable employee in the appellant's position could have thought that Harvard had given him permission to perform nude in Sanders Theatre or that he would suffer no employment consequences for such a performance. See Masingill v. EMC Corp., 449 Mass. 532, 541, 870 N.E.2d 81, 89 (2007). Because the Complaint failed to allege reasonable reliance, it failed to state a claim for promissory estoppel. See Suominen v. Goodman Indus. Equities Mgmt. Grp., LLC, 78 Mass. App. Ct. 723, 731, 941 N.E.2d 694, 701 (2011).

Finally, the district court correctly dismissed the remaining claims pursuant to Fed. R. Civ. P. 12(b)(6). The defamation claim failed because the statements underlying that claim either were substantially true or were subjective statements that were not "provable as false." See Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990); McCafferty v. Newsweek Media Grp., Ltd., 955 F.3d 352, 357 (3d Cir. 2020); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir. 1992); see also Yong Li v. Yanling Zeng, 98 Mass. App. Ct. 743, 746, 159 N.E.3d 199, 203 (2020); Reilly v. Associated Press, 59 Mass. App. Ct. 764, 770, 797 N.E.2d 1204, 1211 (2003). For similar reasons, appellant's claim that the Harvard Crimson tortiously interfered with his employment contract fails; the Complaint did not set out any false accusations that allegedly interfered with his contract. The appellant admits that he failed to state

a claim for conversion; and any argument that the district court should have allowed him to amend his Complaint to replace the claim of conversion with one of theft of copyright is waived because he did not attempt to amend his Complaint, see Henderson v. Massachusetts Bay Transp. Auth., 977 F.3d 20, 33 (1st Cir. 2020), and because the copyright claim is not at all developed here. Finally, because the Complaint failed to allege any facts that would support substantive claims for defamation or conversion, the district court properly dismissed the related conspiracy claims.

The motion of Harvard University and the President and Fellows of Harvard College for summary disposition is allowed; the appellant's motion for summary reversal is denied; and the district court's dismissal of the Complaint as to all named defendants is affirmed. See 1st Cir. R. 27.0(c) (court may affirm summarily if it clearly appears no substantial question is presented).

By the Court:

Maria R. Hamilton, Clerk

cc:
Andrew DeLaney
William W. Fick
Daniel N. Marx
Amy Barsky
Robert A. Bertsche
Michael J. Lambert

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	No. 20-cv-11363-RGS

Before Richard G. Stearns,
District Court Judge.

ELECTRONIC ORDER

Entered: October 14, 2020

Full docket text for document 37:
Judge Richard G. Stearns: ELECTRONIC ORDER entered granting [23] Motion to Dismiss for Failure to State a Claim.

For the reasons stated in their memorandum, and as discussed in more detail below, the court ALLOWS the unopposed motion to dismiss filed by defendants President and Fellows of Harvard College and

Harvard University (collectively, Harvard). The court dismisses with prejudice all claims against these parties.

First, the court dismisses plaintiff's civil rights claims (Counts I and II). Even assuming *arguendo* that plaintiff's nude performance is entitled to some measure of protection under the First Amendment (which the court doubts), plaintiff nonetheless has failed to state a claim for relief under federal or state law. The Complaint does not, for example, allege that Harvard acted under color of state law, as required by the Federal Civil Rights Act, 42 U.S.C. s. 1983; nor does it plausibly suggest that Harvard used threats, intimidation, or coercion to achieve any alleged interference with his rights, as required by the Massachusetts Civil Rights Act, M.G.L. ch. 12, ss. 11H, 11I.

The court also dismisses plaintiff's contract-based claims (Counts III, IV, and V). Plaintiff does not identify any provision in the Sanders Theatre contract entitling him to perform nude. Indeed, he appears to concede that the Sanders Theatre contract contains a provision expressly prohibiting nudity in performances. He also does not explain how his termination, even if premised on the content of his performance, breached any employment agreement with the university. Plaintiff, after all, was an at-will employee and, subject to certain exceptions which plaintiff does not assert here, could be terminated at any time "for almost any reason or for no reason at all." *See Jackson v. Action for Bos. Cmty. Dev., Inc.*, 403 Mass. 8, 9 (1988).

Count VI seeks to enforce a right to perform nude under a promissory estoppel theory (Count VI), rather than a contract theory. Plaintiff, however, does not sufficiently plead the elements of promissory estoppel. He does not allege, for example, that Harvard (or any authorized or apparent agent of Harvard) made a clear or definite promise that he could perform nude. And even if plaintiff had made such an allegation, the Complaint does not establish that reliance on such a promise would have been reasonable under these circumstances, where the Sanders Theatre contract contained an express prohibition to the contrary. The court thus dismisses this claim.

The court also dismisses plaintiff's defamation claim against Harvard (Count VII). To the extent the allegedly false and defamatory statements cited in plaintiff's Complaint - "(i) that Clopper, a Jewish man, is anti-Semitic; (ii) that Clopper improperly brought nudity to Sanders Theatre; and (iii) that Clopper had engaged in a 'nude, anti-Semitic rant' in Sanders Theatre," *see* Compl. p. 101 - were made by Harvard employees (e.g., Rachel Dane) or can otherwise reasonably be attributed to the university, these statements either accurately relay facts (plaintiff *did* perform nude without permission) or express unactionable opinions. In any event, even if these statements were somehow actionable, plaintiff's defamation claim against Harvard would still fail because plaintiff acted as a limited-purpose public figure with respect to his performance and has not adequately alleged actual malice on the part of Harvard.

Finally, the court determines that dismissal of plaintiff's remaining claims against Harvard is appropriate. As to his conversion claim (Count VIII), plaintiff fails to allege the existence of any personal, tangible property over which Harvard exerted dominion. And as to his conspiracy claim (Count X), he fails to establish the existence of an underlying tort or plead any facts supporting his conclusory allegation of any common plan or scheme.

(RGS, law3)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	No. 20-cv-11363-RGS

Before Richard G. Stearns,
District Court Judge.

ELECTRONIC ORDER

Entered: October 19, 2020

Full docket text for document 45:
Judge Richard G. Stearns: ELECTRONIC ORDER entered denying [44] Motion to Set Aside and finding as moot [42] Motion to Seal Document and [43] Motion to Set Aside.

Plaintiff moves to set aside the Order of Dismissal issued by this court on October 14, 2020. Having reviewed plaintiff's explanation for his failure to

comply with the court's deadline and the contents of his proposed opposition to Harvard's motion to dismiss, the court DENIES his motion. Specifically, the court determines that, because plaintiff has failed to raise any meritorious argument against dismissal, it would not be in the interests of justice to set aside its prior Order.

Plaintiff's opposition fails to address the key pleading deficiencies cited by the court in its Order. The opposition does not, for example, explain how Count I can survive in the absence of any allegation of state action or how Count II can survive in the absence of any allegation of *direct* interference with plaintiff's exercise of a constitutional right by means of threats/coercion (actions occurring after the performance in retaliation for its contents cannot establish direct interference by means of threats/coercion with respect to the performance itself). Nor does it point to any factual allegations within the Complaint which might render plaintiff's conclusory assertions of actual malice, a common scheme or plan to commit a tort, etc., plausible.

Plaintiff attempts to avoid the dismissal of certain claims by invoking the applicability of exceptions to the general rule. For example, he argues that his contract claims should survive because Harvard waived enforcement of any prohibition on nudity and/or because the restriction in the license issued by the City of Cambridge to Sanders Theatre is unconstitutional. But neither argument has merit. Plaintiff does not allege that any official with sufficient authority to bind the university made an oral promise not to enforce the prohibition on nudity (to the extent he cites statements made by Hammond

and Bronski, the Complaint does not allege that Hammond or Bronski had actual or apparent authority to bind the university, and the court cannot reasonably infer that they did from other allegations in the Complaint). And the court cannot address the constitutionality of the ordinance where the City itself is not party to this litigation. The court accordingly denies the motion to set aside its Order.

(RGS, law3)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	No. 20-cv-11363-RGS

Before Richard G. Stearns,
District Court Judge.

ELECTRONIC ORDER

Entered: November 5, 2020

Full docket text for document 52:
Judge Richard G. Stearns: ELECTRONIC ORDER entered granting [34] Motion to Dismiss for Failure to State a Claim.

For the reasons stated in defendant The Harvard Crimson's memorandum, as well as those discussed in more detail below, the court will ALLOW its motion

and will dismiss all claims against the Crimson with prejudice.

Plaintiff's defamation claim (Count VII) relies on three alleged defamatory statements made by the Crimson: (1) that Clopper "improperly worked on the play during work hours," (2) that he "is anti-Semitic"; and (3) that he "engaged in a 'nude, anti-Semitic rant' in Harvard's Sanders Theatre." Pl.'s Opp'n at 4, citing Compl. paras. 101(c), 105. The court determines that none of these statements is actionable. The first statement, for example, is not reasonably capable of a defamatory meaning because it is demonstrably true. The Complaint directly acknowledges that plaintiff worked on his play during work hours, *see* Compl. para. 12, and while plaintiff appears to suggest that the Crimson falsely characterized this work as "improper," review of the article itself reveals no mention of the *propriety* of any work he did on his play during work hours.

Portions of the third statement are also demonstrably true. Plaintiff *did* include nudity in his performance. *See id.* para. 20. And even assuming, as plaintiff suggests, that he did not specifically perform a "nude... rant" because he did not speak during the nude aspect of his performance, the court disagrees that the "nude, anti-Semitic rant" headline is *reasonably* capable of the defamatory meaning proposed by plaintiff. Statements must be read in their context, *see Foley v. Lowell Sun Pub. Co.*, 404 Mass. 9, 11 (1989), and here, the context of the referenced headline indisputably dispels any defamatory interpretation. The first line of the article, after all, explicitly clarifies that "Harvard is 'reviewing' reports that University employee Eric

Clopper made anti-Semitic comments and *stripped to the nude during a public performance* he gave in Sanders Theatre." Ex. 1 to Aff. of Robert A. Bertsche (emphasis added). The article also includes several quotations from plaintiff describing his nude performance as the conclusion or "about the last 20 seconds" of his play. *Id.*

As to the remaining statements -- the second statement and the portions of the third statement characterizing plaintiff's performance as a rant or anti-Semitic -- the court determines that they are not actionable because they constitute opinions based on disclosed, non-defamatory facts (i.e., direct quotations from the performance). *See Dulgarian v. Stone*, 420 Mass. 843, 849-850 (1995). The court accordingly dismisses Count VII in its entirety.

The court also dismisses the remaining claims against the Crimson. The civil rights claim (Count II) fails because the Complaint does not plausibly allege that the Crimson interfered with any of plaintiff's constitutional rights *by means of threats, intimidation, or coercion*, as required by the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, secs. 11H, 11I. *See Bally v. Northeastern Univ.*, 403 Mass. 713, 718 (1989). And finally, the tortious interference (Count IX) and conspiracy (Count X) claims fail because they depend on the viability of the nonactionable defamation claim.

(RGS, law3)

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-2140

ERIC CLOPPER
Plaintiff – Appellant,

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON
Defendants – Appellees,

JOHN DOES 1-10,
Defendants.

United States Court of Appeals First Circuit

FILED

March 22, 2023

Maria R. Hamilton
Clerk

Appeal from the U.S. District Court
for the District of Massachusetts

Before Barron, Chief Judge*, Howard, Kayetta, Gelpí and Montecalvo, Circuit Judges.

ORDER OF COURT

Entered: March 22, 2023

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the

* Chief Judge Barron is recused and did not participate in the consideration of this matter.

original panel. The motion of Doctors Opposing Circumcision to file an amicus brief is granted.

The petition for rehearing is denied by the panel of judges who decided the case, as the petition fails to satisfy the standards for rehearing. See Fed. R. App. P. 35(b)(1). We add that the appellant had ample and repeated opportunities in his opening brief, his addendum, his motion for summary reversal, his Rule 28j letters, and now his petition to demonstrate that, had he been allowed to amend his complaint notwithstanding his failure to timely object to the motion to dismiss, he would have been able to set out one or more valid causes of action.

As it appears that there may be no quorum of circuit judges in regular active service who are not recused who may vote on petitioner's request for rehearing en banc, the request for rehearing en banc is also denied. See 28 U.S.C. § 46(d); 1st Cir. Loc. R. 35.0(a)(1). In any event, a majority of judges in regular active service do not favor en banc review.

By the Court:

Maria R. Hamilton, Clerk

cc:
Andrew DeLaney
William W. Fick
Daniel N. Marx
Amy Barsky
Robert A. Bertsche
Michael J. Lambert
John R. Sylla

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Eric Clopper Plaintiff, v. Harvard University et al Defendants.	Civil Action No. 20-cv-11363-RGS

Before Richard G. Stearns,
District Court Judge.

ORDER OF DISMISSAL

Entered: November 5, 2020

STEARNS, D.J.

In accordance with the court's Electronic Order [Dkt # 52] issued on November 5, 2020, granting defendant's Motion to Dismiss, it is ORDERED that the above-entitled action be, and hereby is, dismissed with prejudice.

By the Court:

/s/ Arnold Pacho
Deputy Clerk

APPENDIX G

Fifth Amendment of the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

Federal Rules of Civil Procedure

***

Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS BEFORE TRIAL.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

APPENDIX I

Local Rules of the United States District Court for the District of Massachusetts

***

Rule 7.1 MOTION PRACTICE

***

(b) Submission of Motion and Opposition not Motion.

(1) ***Submission of Motion.*** A party filing a motion shall at the same time file a memorandum of reasons, including citation of supporting authorities, why the motion should be granted. Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be filed with the motion.

(2) ***Submission of Opposition to a Motion.*** A party opposing a motion shall file an opposition within 14 days after the motion is served, unless (1) the motion is for summary judgment, in which case the opposition shall be filed within 21 days after the motion is served, or (2) another period is fixed by rule or statute, or by order of the court. A party opposing a motion shall file in the same (rather than a separate) document a memorandum of reasons, including citation of supporting authorities, why the motion should not be granted. Affidavits and other documents setting forth or evidencing facts on which the opposition is based shall be filed with the opposition. The 14-day period is intended to include the period specified

by the civil rules for mailing time and provide for a uniform period regardless of the use of the mails.

***

(f) Decision of Motion Without Hearing. Motions that are not set down for hearing as provided in subsection (e) will be decided on the papers submitted after an opposition to the motion has been filed, or, if no opposition is filed, after the time for filing an opposition has elapsed.

Effective September 1, 1990; amended effective October 1, 1992; December 1, 2009

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-2140

ERIC CLOPPER,

Plaintiff – Appellant,

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON

Defendants – Appellees,

Appeal from the U.S. District Court
for the District of Massachusetts

BRIEF OF DOCTORS OPPOSING CIRCUMCISION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Filed: November 21, 2022

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Attorney for Amicus Curiae
Doctors Opposing Circumcision

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, DOCTORS OPPOSING CIRCUMCISION as *Amicus Curiae* hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

s/ John Sylla _____

John Sylla

Attorney for Amicus Curiae
Doctors Opposing Circumcision

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STATEMENT OF IDENTIFICATION

Doctors Opposing Circumcision, (D.O.C.), founded in 1995 by Emeritus Professor of Medicine George C. Denniston, MD, MPH, is an international non-profit educational organization composed of hundreds of medical professionals of many specialties.[1] D.O.C. has 19 Board Members: eleven physicians (including two professors of medicine), four nurses, and two bioethicists. D.O.C. members oppose non-therapeutic, medically unnecessary modifications of the genitalia of minors who did not consent to being permanently mutilated. Our efforts often center around the most common form of genital reduction surgery in the United States: infant male genital mutilation, commonly referred to as "circumcision."

D.O.C. Board members, scholars, and contributors have authored well over 100 books, articles and commentary on the medical science and bioethics of genital mutilation. We have submitted numerous affidavits and amicus briefs in other legal settings. D.O.C. also provides pro bono scientific and bioethical advice to medical and nursing students, as well as to conscientious objectors, puzzled young parents, and men aggrieved by their infant male genital mutilation.

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[1] D.O.C.'s counsel and Plaintiff's counsel co-authored this brief. However, no individual or organization other than D.O.C. and its counsel contributed financial support to fund the submission of this brief.

More information is available at D.O.C.'s website https://www.doctorsopposingcircumcision.org.

AMICUS CURIAE'S INTEREST IN APPEAL

As fellow anti-male-genital-mutilation activists, the hundreds of medical professionals at D.O.C. are deeply invested in Mr. Clopper's appeal. As in Mr. Clopper's case, it is not unusual for anti-male-genital-mutilation activists to be smeared with false allegations of anti-Semitism because we provide factual information that may be uncomfortable or challenging to certain segments of the population. We strongly believe there must be due process and legal recourse when free expression concerning genital mutilation is wrongfully punished and suppressed.

D.O.C. is not an anti-Semitic organization; we actively oppose anti-Semitism.[2] However, the allegation of anti-Semitism should never deprive disfavored groups—including anti-male-genital-mutilation activists—of their day in Court to seek redress for wrongful punishment of free expression.[3] If different rules are applied to Mr. Clopper's litigation, D.O.C. members are deeply concerned that our members too may be deprived their Constitutional

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[2] In fact, nothing could be more PRO-Semitic than protecting Jewish infants from a sacrifice to which they have not consented. That is why we promote *Bris Shalom*, a non-cutting alternative welcome ceremony for the boy.

[3] More specifically here, allegations of anti-Semitism must not deprive Mr. Clopper the procedural right to amend a Complaint once as a matter of course as codified in Federal Rule of Civil Procedure 15(a)(1)(B).

due process rights and opportunity for fair Court consideration on the merits when claims arise.

GROUNDS FOR SUBMITTING AMICUS BRIEF

D.O.C. files this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure. D.O.C. prays this Court accept the filing of this brief upon the accompanying MOTION FOR LEAVE TO FILE D.O.C.'S *AMICUS BRIEF*.

ARGUMENT

I. The Handling of Mr. Clopper's Case Offends Constitutional Due Process and May Appear to Suggest Improper Adjudication.

DOCTORS OPPOSING CIRCUMCISION fears the appearance of impropriety—and perhaps even of animus—infecting the judicial process in Mr. Clopper's case against Harvard University.

The District Court granted with prejudice Harvard's 12(b)(6) motion to dismiss Clopper's case prior to his even filing an opposition. Worse, this dismissal deprived Clopper of his Constitutional right under Federal Rule of Civil Procedure 15(a)(1)(B) to amend his complaint once within 21 days of Harvard's motion to dismiss. The appellate panel treated Mr. Clopper's appeal with an equally concerning lack of normally-expected consideration. The appellate panel summarily dismissed Clopper's appeal outside the normal appeal process, while noting how the

Complaint could have been amended to cure defects but omitting any discussion as to why Clopper was not afforded that right to amend as Federal Rule of Civil Procedure 15 requires. This Kafkaesque handling of Mr. Clopper's case deeply troubles our members as to how the courts may treat other anti-male-genital mutilation activists in future cases.

To remedy any appearance of impropriety, Doctors Opposing Circumcision respectfully asks the Court *en banc* to: (1) remand the case to the District Court with instructions to allow Clopper to file an amended Complaint; or (2) return the case to the normal appellate process so the parties can have a reasoned decision on the merits with full briefing on the Constitutional issues.

II. Mr. Clopper's Position on Male Genital Mutilation Aligns with the Overwhelming Scientific and Medical Consensus on the Issue.

Defendants have sought to portray Mr. Clopper as a deranged anti-Semite whose views and expressions must not be taken seriously. We disagree.

The reality is this: there is no *medical* consensus in support of neonatal circumcision *anywhere in the world*. The *last* country's medical establishment to retract recommending circumcision was the United States. In 2017, the American Academy of Pediatrics' (AAP) allowed its pro-circumcision recommendation

to expire and then chose not to renew it.[4] More affirmatively, Canadian, Dutch, Australian, British, German, Danish, and other national medical bodies have issued guidance advising *against* neonatal circumcision until the persons most deeply affected are old enough to make an informed decision.[5]

In other words, Mr. Clopper's opposition to male genital mutilation is not based on anti-Semitism; it is based on facts. Today, despite religious texts and Abrahamic history, no one would seriously claim it is anti-Semitic to oppose slavery, the stoning of adulterers, or the criminalization of same-sex sexual relationship.

So too with Mr. Clopper's message—it is an undisputed fact that amputating an infant's foreskin results in incredible traumatic pain to the infant with a myriad of frequent physical and psychic complications,[6] which range from blood loss and

---

[4] Taskforce on Circumcision, *Circumcision Policy Statement*, 130 PEDIATRICS 585 (2012). Mr. Clopper spends over 40 minutes of his Harvard performance debunking the AAP's pro-circumcision policy. In fact, only recently has the AAP started indicating on its website that "This policy automatically expired." Other "expired" medical advice includes clitorectomies for young women and lobotomies for mental health patients.

[5] DOCTORS OPPOSING CIRCUMCISION, *Medical Organization Statements [on Circumcision]*, https://www.doctorsopposingcircumcision.org/for-professionals/medical-organization-statements/ [https://perma.cc/JQ3U-FXJ5] (last updated July 2022).

[6] *See* Gregory J. Boyle et al., *Male circumcision: pain, trauma and psychosexual sequelae*, 7 J. HEALTH PSYCHOL. 329 (2002).

infection to occasional and wholly preventable death.[7] It is also a medical fact that the foreskin is a normal, healthy, erogenous, and highly functional part of the human body.[8] Finally, although Clopper's rhetoric and style may be provocative, his performance was effective in raising people's awareness of the magnitude of the harms of infant male genital mutilation.

III. Based on Bioethics, Clopper's Message is not Offensive or Anti-Semitic but Corrective and Essential, and Worthy of Constitutional Due Process Protection, not the Procedural Short Straw.

Beauchamp and Childress, "*Principles of Biomedical Ethics,*" a standard U.S. textbook for students studying medicine or nursing, lists five basic principles of bioethics and the co-relative obligations

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[7] Glen Lau et al., *Identification of circumcision complications using a regional claims database.* Presentation at 66th annual meeting of the Societies for Pediatric Urology (May 18, 2018), https://spuonline.org/abstracts/2018/P21.cgi [https://perma.cc/4M2H-6LX9] (the study concluded "The incidence of post-circumcision complications at 2 years is much higher than expected at 11.5%."), available at http://spuonline.org/abstracts/2018/P21.cgi; *see also* Brian D. Earp et al., *Factors Associated with Early Deaths Following Neonatal Male Circumcision in the United States, 2001-2010*, 57 CLINICAL PEDIATRICS 1532 (2018).

[8] *See* Valeria Purpura et al., *The development of a decellularized extracellular matrix–based biomaterial scaffold derived from human foreskin for the purpose of foreskin reconstruction in circumcised males*, 9 J. TISSUE ENGINEERING (2018); *see also* John R. Taylor et al., *The prepuce: specialized mucosa of the penis and its loss to circumcision*. 77 BRIT J. UROLOGY 291 (1996).

which must always challenge the medical practitioner. Though the subject of many volumes in print, these principles bear brief explication here. An honest surgeon asks, answers for him or herself, and then presents to those giving proxy consent, the following five ethical challenges:

> ***Beneficence*** —Is the procedure medically necessary? Does the proposed procedure provide a net therapeutic benefit to the patient, considering the risk, pain, and loss of normal function?
> ***Non-maleficence*** —Does the procedure avoid permanently diminishing the patient, or causing unnecessary pain, in any way that could be avoided?
> ***Proportionality*** —Will the final result provide a significant net benefit to the patient in proportion to the risk undertaken, the pain endured, and the losses sustained?
> ***Autonomy*** — Lacking life-threatening urgency, did the procedure honor the patient's right to his or her own likely choice? Could it wait for the patient's assent?
> ***Justice*** —Will the patient have been treated as fairly as we would all wish to be treated?

All five prongs of the test (the fundamental principles of all modern bioethics since the Nuremberg Code of 1947) must be satisfied for a procedure to be deemed ethical. These principles apply with even more urgency in pediatric cases where the child cannot give effective consent and a proxy consent is required. Thus, the ethical physician

must remain ever alert that the proper balance is struck between the wishes of the proxy-adult (who may ignore scientific realities) and the actual physical needs of the child-patient.[9]

Infant male genital mutilation does not satisfy a single prong of these ethical rules. Unnecessary elective surgery on an infant is not medicine; it is violence. Further, because only a miniscule percentage of intact ("uncircumcised") adult males decide to undergo the procedure, circumcising an infant would almost certainly be against the infant's wishes. Finally, given that federal law already prohibits mutilation of a female infant's genitals, it is highly questionable whether performing the analagous procedure on male infant genitals serves justice.[10]

Clopper used his speech to powerfully communicate the above information of compelling

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[9] The Bioethics Committee of the American Academy of Pediatrics has published bioethical guidance that physicians should provide competent care that their patients need, not what their surrogates, usually parents, request. Committee on Bioethics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 PEDIATRICS 314 (1995). Unlike the AAP's pro-circumcision policy which the AAP intentionally "expired"—discussed in footnote 4 above—the AAP "reaffirmed" this bioethical guidance in May of 2011.

[10] 18 U.S.C. § 116; *but see United States v. Nagarwala*, No. 17-CR-20274 (E.D. Mich. Nov. 20, 2018) (https://www.govinfo.gov/content/pkg/USCOURTS-mied-2_17-cr-20274/pdf/USCOURTS-mied-2_17-cr-20274-1.pdf) [https://perma.cc/U6FL-WL2K] (holding that Congress exceeded its legislative power under the Commerce Clause in prohibiting female genital mutilation at the federal level.)

public concern. We medical professionals at D.O.C.—Jews and non-Jews alike—stand in unison with Clopper for effectively communicating this important information on what can only be accurately described as "infant male genital mutilation."

We at D.O.C. are hopeful that we and other bearers of this message will be afforded all due process and fair and substantive consideration on the merits afforded to other litigants when claims arise. To that end, we file this brief.

CONCLUSION

DOCTORS OPPOSING CIRCUMCISION asks this Court *en banc* to be mindful of the way the trial court and appellate panel have circumvented Mr. Clopper's procedural due process rights. The current handling of this case creates an appearance of taking sides against people whose only objective is to protect male infants and children from genital mutilation without informed consent. To remedy any appearance of impropriety and address our members' fears of similar disfavored treatment before the courts, D.O.C. respectfully asks this Court to: (1) remand the case to the District Court with instructions to allow Clopper to file an amended Complaint; or (2) return the case to the normal appellate process so the parties can have a reasoned decision on the merits with full briefing on the Constitutional issues.

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Respectfully submitted,

George C. Denniston, MD, MPH, President, on behalf of the Board Members of Doctors Opposing Circumcision

Joined by: Mark D. Reiss, MD, Executive Vice-President; George Hill, Vice-President for Bioethics and Medical Science; John V. Geisheker, JD, LL.M, Executive Director, General Counsel; Morris R. Sorrells, MD, Pediatric consultant; Andrew R. Biles, Jr, MD, Pediatric consultant; John W. Travis, MD, MPH, Infant Wellness consultant; Mat Masem, MD, Professor of Medicine, consultant; Gabriel Symonds, MB, BS; GP consultant; Michelle Storms, MD, Family Medicine consultant; Sarah E. Strandjord, MD, Pediatric consultant; James Snyder, MD, Urology Consultant; Adrienne Carmack, MD, Urology consultant; Zenas Baer, JD, Legal consultant; Michaelle M. Wetteland, RN, MMA, Nursing consultant; Janet M Gibson, RN, Nursing consultant; Amanda Dylina Morse, MPHc, Indigenous birth tradition researcher.

Dated: November 21, 2022

Respectfully Submitted by D.O.C.'s attorney,

s/ John Sylla _____
John Sylla
Attorney for Amicus Curiae
Doctors Opposing Circumcision

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-2140

ERIC CLOPPER,
Plaintiff – Appellant

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, (Harvard Corporation); THE HARVARD CRIMSON, INC.,
Defendants – Appellees

JOHN DOES 1-10
Defendants

Plaintiff-Appellant's Petition For En Banc Rehearing To Uphold Constitutional Due Process

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Statement of the issue for *en banc* review:

1. Whether *every* plaintiff—regardless of how offensive the plaintiff may seem—is entitled the opportunity to seek leave to amend a Complaint at least *once* as the Supreme Court's Federal Rule of Civil Procedure 15(a)(1)(B) and the Due Process Clause of Article 5 of the Constitution require.

Under Fed. R. of App. P. 35, the Plaintiff-Appellant respectfully asks this Court to hear his *Petition for en banc Rehearing to Uphold Constitutional Due Process* ("*Petition*") and reconsider the panel's summary dismissal in his case against Harvard University[1] based on a denial of the fundamental Procedural Due Process right expressed in Federal Rule of Civil Procedure 15(a) ("Rule 15").

Grounds for *en banc* Review

An *en banc* hearing may be ordered if the panel's decision conflicts with a decision of the United States Supreme Court.[2] Here, the Supreme Court unanimously held in *Nelson v. Adams USA, Inc.* that *strict compliance* with Federal Rule of Civil Procedure 15(a) ("Rule 15") is necessary to "further the due process of law that the Constitution guarantees."[3]

Rule 15 requires that District Courts provide *every* plaintiff an opportunity to amend their pleading once within 21 days of the filing of a 12(b) motion.[4] Here,

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[1] While only Defendant-Appellee Harvard moved for summary dismissal of the Appeal, the panel *sua sponte* also summarily dismissed the Appeal in favor of the other, distinct Defendant-Appellee The Harvard Crimson.

[2] FED. R. APP. P. 35(b)(1)(A).

[3] *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465–467 (2000) ("Rule 15 conveys the circumstances under which leave to amend shall be granted . . . and the due process for which it provides demand[s] a [] reliable and ordinary course.)

[4] FED R. CIV. PROC. 15(a)(1)(B) ("A party may amend its pleading once as a matter of course within . . . 21 days after service of a motion under Rule 12(b)."); *see also U.S. ex rel. D'Agostino v. EV3, Inc.*, 802 F.3d 188, 193 (1st Cir. 2015) ("We hold, without serious question, [] a plaintiff may amend a complaint [at minimum] once as a matter of course.");

instead, the District Court dismissed Plaintiff's Complaint with prejudice on the 15th day after the filing of the 12(b)(6) motion without even reading the Opposition to the 12(b)(6) Motion. In other words, the District Court dismissed Plaintiff's Complaint with prejudice 6 days *before* expiration of the deadline to amend as a matter of right.

Although Plaintiff repeatedly raised Rule 15 before the panel, the panel summarily affirmed the dismissal without addressing Rule 15. Both decisions point out a total of 14 different routes that Plaintiff could have used to state a cause of action. Thus, this Court can be certain of one thing – granting leave to amend would not be futile. That fact underscores the deprivation of Constitutionally required due process and the violation of the sanctity of judicial proceedings that has occurred.

Introduction

Below, Harvard incorrectly characterized the Plaintiff as a despicable "rabid, anti-Semitic nudist." In reality, Harvard terminated his employment in retaliation for his exercise of free speech – his anti-male-genital-mutilation activism. Plaintiff alleged that he relied on Harvard's Free Speech Policy to advocate for the protection of male children from genital mutilation until they are old enough to knowingly consent to a medical procedure—amputation of the foreskin—which the medical literature indicates has no health benefits, causes immediate pain as well as serious long-term physical and mental harm, violates the UN's Declaration of the Rights of the Child and conflicts with the Hippocratic

Oath.[5] Plaintiff seeks to raise awareness and advocate for legislation to protect male children, who—unlike female children[6]—lack any federal protection from genital mutilation.

Harvard's caricature of the Plaintiff is untrue. But that is beside the point. What matters is that courts put passion and prejudice aside and neutrally apply every rule to every party, *especially disfavored ones*.[7] To that end, this *Petition* asks this Court reconsider the panel's failure to address Rule 15 embodying the Due Process Clause of Article 5 of the Constitution. This *Petition* asks this Court to afford Plaintiff his Rule 15 procedural due process right to amend his pleading once as a matter of right. A remand with instruction to allow the Plaintiff this minimum level of due process is necessary to protect the fundamental Constitutional principle that those who come before the law are entitled to be treated as being of equal value and to be given *equal consideration* regardless of how disfavored they may be.

Argument

The District Court prematurely extinguished the Plaintiff's right to amend his Complaint when it

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[5] *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1884 n.4 (2021) (Alito, J., concurring), (quoting Frisch et al., *Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision*, 131 PEDIATRICS 796, 799 (2013)).

[6] 18 U.S. Code § 116 (whoever removes any part of a minor female's genitalia for non-medical reasons shall be fined or imprisoned. Religion is not a defense.)

[7] *Nelson*, 529, U.S. at 470 (recognizing the "fundamental[] unfair[ness] to impose judgment without going through the process of litigation our rules of civil procedure prescribe.")

issued an order granting with prejudice Harvard's 12(b)(6) motion to dismiss just 15 days after the motion was served.[8, 9] Because a District Court must vacate a judgment of dismissal prior to granting leave to amend,[10] the Plaintiff immediately filed a Rule 60(b) motion so that he could promptly amend his Complaint.[11] The District Court denied Plaintiff's Rule 60(b) motion,[12] thus improperly depriving the Plaintiff of six (6) full days he had remaining to amend his Complaint. In other words, Plaintiff was still well inside the statutory window and Plaintiff still had the Constitutional right to amend his Complaint "once as a matter of course."

Fortunately for Plaintiff, this Circuit does not affirm the "denial of [or here, *preclusion* of] leave to amend" without adequate reason; "(*e.g.,* undue delay, bad faith, dilatory motive, futility of amendment, prejudice)."[13] The standard of review in deciding "whether to grant or deny [or permit] an amendment is within the discretion of the trial court, *see Foman v. Davis*, 371 U.S. 178, 182 (1962) . . . although a

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[8] The Joint Appendix, filed with this Court on March 24, 2021, contains the docket and all the filings in the District Court. It is cited "JA[page number]."

[9] JA5–6.

[10] *Acevedo-Villalobos v. Hernandez,* 22 F.3d 384, 389 (1st Cir. 1994).

[11] JA7.

[12] *Id.*

[13] *Glassman v. Computervision Corp.*, 90 F.3d 617, 622 (1st Cir. 1996) (citing *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 5 (1st Cir. 1995) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962))).

'material error of law is invariably an abuse of discretion.' "[14]

Here, Plaintiff received 6 days less than the *minimum* procedural due process mandated time window for amending his Complaint by right. Thus, as a matter of law, there cannot be any undue delay or prejudice to a defendant. Further, there was no bad faith; Plaintiff freely assented to all Harvard's multiple requests for extension and has adhered to every rule of this Court to the best of his ability. Most important: amending the Complaint would *not* be futile.

Specifically, the District Court identified at least *seven* places where the Plaintiff could have amended his Complaint to state a plausible claim. Namely, the District Court held "The Complaint does not, for example, allege:

1. Harvard acted under color of state law . . .
2. plausibly suggest that Harvard used threats, intimidation, or coercion . . .
3. explain how his termination . . . breached any employment agreement . . .
4. sufficiently plead the elements of promissory estoppel[; h]e does not, for example, allege . . . a clear or definite promise that he could perform nude . . .

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[14] *In re Fustolo*, 896 F.3d 76, 83 (1st. Cir. 2018) (citations omitted).

5. adequately allege[] actual malice . . .

6. allege the existence of any personal, tangible property over which Harvard exerted dominion . . .

7. establish the existence of an underlying tort or plead any facts supporting his conclusory allegation of any common plan or scheme."[15]

The panel built on the District Court's holding by finding *seven additional* places the Complaint could be amended to state a plausible claim. Namely, the panel held the "Complaint failed to allege:

1. actionable economic coercion . . .

2. No such facts [of an implied contract] were alleged . . .

3. The Complaint does not allege [Harvard] terminated [Plaintiff] in order to avoid paying compensation . . .

4. The Complaint fails to allege any facts that would fall within [the public-policy] exception [to the employment-at-will doctrine] . . .

5. the Complaint failed to allege reasonable reliance ['that Harvard had given him permission to perform nude'] . . .

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[15] JA5–6. District Court's Judgment, entered October 15, 2020. Quoted verbatim.

6. The Complaint did not set out any false accusations that allegedly interfered with his contract . . .

7. Complaint failed to allege any facts that would support substantive claims for defamation or conversion."[16]

As such, four respected federal judges have opined that there are multiple routes open for Plaintiff to allege a viable cause of action

Due process—as embodied by Rule 15—mandates that a plaintiff is entitled *at least one* opportunity to amend the complaint within 21 days of the service of the Defendant's 12(b) motion. As such, it was a "material error of law" when the District Court dismissed with prejudice on the 15th day after service of the Defendant's 12(b) motion, thereby precluding the Plaintiff from exercising that Constitutional right.

Equally important, Plaintiff repeatedly and respectfully requested he be afforded his due process right to amend his Complaint throughout this Appeal.

Specifically, Plaintiff raised the issue of his deprivation of his Constitutional right to amend his Complaint in his Appellate Brief:

- "the District Court should have granted him leave to amend." "the District Court held that Plaintiff (not given leave to amend) did not adequately allege [required elements]." The District Court's denial of his Rule 60(b) motion

[16] Panel's Judgment, entered August 1, 2022. Quoted verbatim.

"foreclose[ed] [his] opportunity to amend the Complaint." [17]

In his Motion for Summary Remand ("MSR"):

- "Denying [Plaintiff] the opportunity to amend his Complaint once within the 21-day time period . . . deprived [Plaintiff of] his due process rights."[18]

In his Reply to Harvard's Opposition to his MSR:

- "[Plaintiff] had an unqualified, automatic right under Fed. R. Civ. P. 15(a)(1)(B) to file his [First Amended Complaint] within 21 days of being served Harvard's 12(b)(6) motion."[19]

And in his second Motion for Supplemental Authority:

- "from Day 15 through 21 following a defendant's motion to dismiss, a trial court that dismisses with prejudice deprives the plaintiff the express FRCP 15 right to amend his complaint."[20]

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[17] Appellant's Brief at 19, 52, 54, filed March 24, 2021.

[18] Plaintiff's MSR at 19, filed April 30, 2021; *see also id.* at 2, 4, 17–18.

[19] Plaintiff's Reply to Harvard's Response to MSR at 2, filed May 13, 2021; *see also id.* at 3–4.

[20] Plaintiff's 28(j) motion at 2, filed April 29, 2022 (citing Eric Clopper, *When Federal & Local Rules Of Civil Procedure Collide: Why District Courts Should Extend Plaintiff's Time To Respond To A Motion To Dismiss To 21 Days*, NORTHWESTERN UNIVERSITY LAW REVIEW OF NOTE (Apr. 25, 2022), https://blog.northwesternlaw.review/?p=2651 [https://perma.cc/5JLC-MAJD]).

Nevertheless, the panel's decision omitted any discussion of the Plaintiff's deprivation of his Constitutional due process right to amend his Complaint "once as a matter of course" under Rule 15. Instead, the panel focused on waiver of legal arguments because Plaintiff had not included various allegations in his original (unamended) Complaint.

To date, *every* decision from *every* court has slammed the Courthouse doors shut in Plaintiff's face. Specifically, the District Court:

- Granted a motion to dismiss *with prejudice*, without an opposition, and before the expiration of the 21-day amendment by right window.
- Denied a timely filed Rule 60(b) motion to reconsider its judgment, which is a prerequisite to file an amended complaint.
- Conversely, the District Court granted all Defendants' assented-to extensions for time.
- Refused to read the medical reasons why the Plaintiff's counsel missed a 12(b) opposition filing deadline by a single day.
- Denied the Plaintiff his Constitutional due process right to amend his Complaint once as a matter of course.
- Improperly resolved the conflict between Rule 15's 21 day time window and Local Rule 7.1(b)(2), allowing dismissals with prejudice 6 days earlier in favor of the Local Rule.

The United States Supreme Court has repeatedly ruled and codified that the FRCP trumps any conflicting Local Rules.[21]

On appeal:

- After 19 months, 5 months longer than the median timeframe for a fully briefed disposition,[22] the panel affirmed the dismissal on a 1st Cir. R. 27(c) motion.[23]
- The panel reached out and dismissed the appeal against a different appellee (The Harvard Crimson) without an Opinion and *without that appellee even having moved the Court to do so*.
- The panel omitted any discussion of Plaintiff's repeated pleas for his right to amend his Complaint within 21 days of the filing of 12(b)(6) motion as guaranteed by Rule 15 and procedural due process.

This is what a disfavored party looks like.

And if this Court does not correct this malfunction in the machinery of justice, it creates the roadmap for

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[21] FED. R. CIV. P. 83(a)(1); *see also Frazier v. Heebe*, 482 U.S. 641, 646 (1987).

[22] USCOURTS.GOV, *Federal Court Management Statistics—Summary* at 2, June 2022, https://www.uscourts.gov/file/45168/download [https://perma.cc/TR29-62DR].

[23] *Moist v. Belk*, 380 F.2d 721, 724 (6th Cir. 1967) (citing *Cohen v. Curtis Publishing Co.*, 333 F.2d 974, 978–979 (8th Cir. 1964)) (Dismissing "an appeal on the ground that it presents no substantial question for review [under a 27(c) motion] . . . should be granted only in extreme cases.")

depriving other disfavored parties of their Constitutional rights. Proceeding down this path imperils all this Court holds dear. When Courts do not uphold minimum procedural due process, it imperils this nation's deeply held, founding principle that everyone, *without exception*, is equal before the law.

Appeal to Justice

This Court need not decide whether this Jewish Plaintiff is: (i) a rabid anti-Semitic nudist; or (ii) an activist seeking to protect children from male genital mutilation like he suffered as a child. This *Petition* merely asks that this Court restore the procedural due process rights embodied in Rule 15, and order that Plaintiff be permitted to amend his Complaint once, as is his unequivocal right under Rule 15(a)(1)(B).

The current procedural posture falls below what minimum due process requires in America. Plaintiff's case was dismissed with prejudice six (6) days before his right to amend his Complaint expired, and the dismissal was upheld because he did not amend his Complaint.[24]

At its most fundamental, the law does not render judgment without providing the due process that is

[24] The panel states "any argument that the district court should have allowed him to amend his Complaint . . . is waived because he did not attempt to amend his Complaint." As emphasized throughout this *Petition*, Appellant was precluded below from so amending, and this quoted statement further and summarily serves to foreclose Constitutional due process.

afforded to every litigant simply because it can.[25] This principle of due process is the very foundation of American exceptionalism, which elevates principles over passion and prejudice.

As Judge Newman of the United States Court of Appeals for the Federal Circuit eloquently dissented from her well-respected colleagues—until a unanimous Supreme Court adopted her reasoning—absolute compliance with the procedural due process Rule 15 embodies:

> is not a matter of judicial "discretion." The judicial obligation is to preserve the process of justice.[26]

The Plaintiff respectfully asks this Court to do the same and order Plaintiff be given his Constitutional procedural due process right to file an amended complaint.

Respectfully Submitted,

/s/ Eric Clopper

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[25] *Nelson*, 529 US. at 471 (recognizing that "judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual [litigation].").

[26] *Ohio Cellular Products Corp.*, 175 F.3d at 1355 (Fed. Cir. 1999) (Newman, J., dissenting), *rev'd sub nom. Nelson*, 529 U.S.

By his attorneys,

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Dated: August 15, 2022

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIC CLOPPER *Plaintiff-Appellant*, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, *Defendants-Appellees*, JOHN DOES 1-10. *Defendants*.	Case No. 20-2140

RULE 28(j) SUPPLEMENTAL AUTHORITY LETTER

Pursuant to Fed. R. App. P. 28(j), Plaintiff-Appellant Eric Clopper hereby advises the Clerk of his recently published article in *Northwestern University Law Review Online* titled *When Federal & Local Rules of Civil Procedure Collide: Why District Courts Should Extend Plaintiffs' Time to Respond to a Motion to Dismiss to 21 Days* (the "Article").[1]

[1] Available at https://perma.cc/5JLC-MAJD.

The Article explores potential conflict between Federal Rule of Civil Procedure 15(a)(1)(B) ("FRCP 15") and some Local Rules of Civil Procedure ("LRCP") regarding deadlines for response to a Rule 12(b) motion ("motion to dismiss"). Specifically, FRCP 15 grants the plaintiff an express right to "amend [his complaint] once as a matter of course within . . . 21 days after service of a [motion to dismiss]." However, some LRCP, including the applicable LRCP 7.1(b)(2) in the District of Massachusetts, grants the plaintiff only 14 days to respond to a motion to dismiss before the district court may grant that motion with prejudice. Thus, from Day 15 through 21 following a defendant's motion to dismiss, a trial court that dismisses with prejudice deprives the plaintiff the express FRCP 15 right to amend his complaint.

As the Article explains, because Federal Rule of Civil Procedure 83(a)(1) grants district courts authority to promulgate LRCP *only if* they are "consistent with [the FRCP]," that suggests that dismissal before 21 days, even if permitted by LRCP, runs afoul of FRCP 15 and is thus presumptively invalid.

Clopper makes numerous references to how the District Court's dismissal prevented Clopper from amending his Complaint. *See* Appellants Br. 19, 52, 54. Clopper's Motion for Summary Reversal ("MSR") cites the loss of his FRCP 15 right as one of seven grounds for summary reversal. *See* MSR 2, 4, 13 n.15, 17–19; *see also* Reply to Harvard's Response to Clopper's MSR 1, 2–4.

The Article implies a procedural remand is appropriate so as to ensure district courts afford the FRCP right to amend. As an additional benefit, a

summary reversal would facilitate a merit-based conclusion to this dispute.

Dated: April 28, 2022

Respectfully Submitted,

/s/ Andrew DeLaney, Esquire
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 28, 2022.

/s/ Andrew DeLaney, Esquire
Attorney for Plaintiff-Appellant

APPENDIX M

No. 20-2140

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIC CLOPPER,
Plaintiff – Appellant

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, (Harvard Corporation); THE HARVARD CRIMSON, INC.,
Defendants – Appellees

JOHN DOES 1-10
Defendants

PLAINTIFF-APPELLANT ERIC CLOPPER'S REPLY TO HARVARD'S RESPONSE TO HIS MOTION FOR SUMMARY REVERSAL

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Counsel for Appellant

Plaintiff-Appellant Eric Clopper respectfully submits this Reply to "Harvard's Response" to his Motion for Summary Reversal ("MSR").[1] Harvard's Response actually demonstrates why summary reversal is appropriate. Summary reversal would allow Clopper a fair and equitable opportunity to exercise his *statutory right* to amend his Complaint, which the District Court cut off *before the deadline for an amendment* because of Harvard's emotionally misleading narrative and incorrect legal arguments.

Equity and justice would be best served by a summary reversal and instruction to allow Clopper to file a First Amended Complaint ("FAC"). Allowing this case to proceed will lead to clarity about whether free expression and lively debate about controversial issues make higher education better and are in fact necessary for fulfilling its purpose, even if a few administrators disagree.

I. Harvard Avoids Addressing Controlling Free Speech Precedent that Harvard Promised to Allow, Accept, and Support.

Instead of taking the *proudly* Jewish, anti-male-genital-mutilation activist's Play in context and "as a whole," as *California v. Miller*, 413 U.S. 15, 24 (1973) requires, Harvard: (i) disregards controlling law; and then (ii) willfully mischaracterizes the facts. Harvard transmogrifies Clopper's Play to protect male children from genital mutilation into a "PowerPoint lecture

[1] Clopper's Motion for Summary Reversal is referenced "MSR[page number]."

[appended] to an obscene public display." The District Court dismissed Clopper's Complaint with prejudice *before* considering Clopper's response, but such tactics should not survive this Court's careful de novo consideration *under the correct legal standard.*

Harvard incorrectly argues "Clopper develops no argument and supplies no authority" that his Play is protected. To make that argument, Harvard ignores Clopper's oft-cited, well-established *Miller* test defining non-obscene speech that Harvard contractually and by policy promised to allow and protect. By refusing to address *Miller*, Harvard invites this Court to repeat the District Court's error by engaging in an improper piecemeal analysis. Harvard's refusal seems intended to derail any thoughtful analysis of Clopper's contract-based claims, i.e. "*Harvard's Promises*" to not terminate him for engaging in "protected speech." (Counts I, IV, V, VI). MSR12–13. This obvious error justifies a summary reversal.

II. Denying Clopper his Statutory Right to Amend his Complaint was not a "Procedural Handling" in the District Court's Discretion

Clopper had an unqualified, automatic right under Fed. R. Civ. P. 15(a)(1)(B) to file his FAC within 21 days of being served Harvard's 12(b)(6) motion. MSR17–19. When the District Court prevented Clopper from exercising this right, it was not – as Harvard suggests without authority – a mere "procedural handling" within the District Court's discretion.

Seventeen (17) days after Harvard's 12(b)(6) motion, Clopper *properly* filed a Rule 60(b) motion for the District Court to reconsider its dismissal *with prejudice*, which would have allowed him to file an amended Complaint.[2] MSR17–19. Still within Clopper's 21-day statutory window, the District Court denied Clopper's Rule 60 motion, thus precluding Clopper from being able to file a request for leave to amend his Complaint. *Id.*

As the U.S. Supreme Court explained:

> It is … entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of … mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'

Foman v. Davis, 371 U.S. 178, 181–182 (1962) (citations omitted). It is an *extraordinary* case justifying summary reversal where the District Court: (i) grants a motion to dismiss *with prejudice* and without an opposition; (ii) denies a Rule 60 motion to reconsider, denying the Plaintiff his right to amend his complaint within his statutorily allotted timeframe to do so; (iii) refuses to see the medical reasons supporting the Rule 60 motion for the one-day

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[2] *Ondis v. Barrows*, 538 F.2d 904, 909 (1st Cir. 1976) ("[O]nce a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or 60.").

delay in the midst of a national health crisis; while (iv) granting all Defendants' assented-to extensions, giving Defendants approximately two additional *months* to file their 12(b)(6) motions, and (v) denying Clopper a single additional day to respond to Harvard's Motion to Dismiss. MSR17–19. These proceedings are "entirely contrary to the spirit of the [Fed. R. Civ. P.]" A summary reversal with instructions to allow Clopper to file a FAC would serve equity and "facilitate a proper decision on the merits" for this *societally important* case: a case involving academic freedom and free expression in our great universities that say they promise to respect and support divergent ideas and viewpoints. Harvard should welcome the chance for review and improvement where—as here—it falls short on keeping those promises.

III. Harvard Avoids Clopper's Substantive Points.

Harvard's distortion of the record makes reasoned analysis unnecessarily difficult. Clopper unambiguously pled the "written contract did not prohibit nudity." MSR14–16. Nevertheless, Harvard misled the District Court by repeatedly citing a *2020* policy book, *published two years later*, and applied it to the *2018* contract. *Id.* If the District Court had an opposition before it granted *with prejudice* Harvard's motion to dismiss, it would have avoided incorrectly accepting Defendant's assertions as true over that of Plaintiff's on a motion to dismiss.

Similarly, Clopper pled that Harvard published defamatory remarks about him in conspiracy with the

Crimson student newspaper. JA49. The District Court ruled it was *implausible* that Harvard and the Crimson worked together to defame Clopper. ADD1. However, Clopper pled that the Crimson "reporter" admitted that he had not seen the Play and was just publishing "Harvard's … one-sided stance on this" and Clopper has a recording of that admission. JA18; *see also* Br.52–53. These factual assertions confirmed by a recording cannot be deemed *implausible*.

Worse, the District Court then incorrectly held that the *false* headline that Clopper went on a "nude anti-Semitic rant" was not *susceptible* to a defamatory meaning based off of its "word" "by" "word" analysis – another misapplication of the standard of review and the law of defamation. MSR16–17.

CONCLUSION

Harvard's failure to address controlling precedent and its perverse mischaracterization of the facts invited the District Court to erroneously dismiss the Complaint with prejudice and prematurely extinguish Clopper's right to file a FAC. That simple amendment would have allowed Clopper to remedy any purported pleading deficiencies, obviated this appeal, and conserved judicial resources.

Thus, equity and justice would be best served by a summary reversal and instruction to allow Clopper to file a First Amended Complaint.

Respectfully Submitted,

Eric Clopper

By his attorney,

/s/ Andrew DeLaney, Esquire

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Dated: May 13, 2021

CERTIFICATE OF SERVICE

I, Andrew DeLaney, Esq. counsel for Plaintiff-Appellant Eric Clopper, certify that, on May 13, 2021, I caused this Reply to Harvard's Response to Clopper's Motion for Summary Reversal to be served electronically through the ECF system on the registered participants, including all counsel of record, as identified on the Notice of Electronic Filing.

/s/ Andrew DeLaney, Esquire

APPENDIX N

No. 20-2140

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIC CLOPPER,
Plaintiff – Appellant

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, (Harvard Corporation); THE HARVARD CRIMSON, INC.,
Defendants – Appellees

JOHN DOES 1-10
Defendants

DEFENDANT-APPELLEE PRESIDENT AND FELLOWS OF HARVARD COLLEGE'S RESPONSE TO PLAINTIFF-APPELLANT ERIC CLOPPER'S MOTION FOR SUMMARY REVERSAL

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Defendant-Appellee President and Fellows of Harvard College ("Harvard")[1] respectfully submits this Response in opposition to Plaintiff-Appellant Eric Clopper's Motion for Summary Reversal ("Clopper's Motion"). Clopper's claims are meritless for the reasons set forth in District Court's Orders and Harvard's Motion for Summary Disposition. Specifically, as to each of the seven purported "obvious errors" identified in Clopper's Motion:

1. The District Court's decision did not depend on a finding that Clopper's Sanders Theatre "play" contained unprotected obscenity, ADD1, although that does provide an additional basis to affirm the decision. Clopper develops no argument and supplies no authority to support his apparent contention that appending a lengthy PowerPoint lecture to an obscene public display transforms the obscenity into "protected speech."

2. After abandoning the First Amendment claim in his appeal brief, Clopper's Motion supplies no authority to support his contention that Harvard's alleged actions to comply with the Cambridge ordinance made it a state actor. Moreover, Clopper neither developed any argument that the Cambridge ordinance is unconstitutional nor named the city as a defendant. Accordingly, those arguments are waived.

3. The District Court accurately stated that Clopper's Complaint conceded that the contract for

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[1] Clopper's naming of "Harvard University" as a separate defendant is redundant because "President and Fellows of Harvard College" is the legal entity comprising Harvard University.

use of the Sanders Theatre prohibited nudity. ADD1; JA36.

4. Clopper does not identify any "ambiguity" in the Sanders Theatre Policy Book, which was expressly incorporated into the contract by reference. ADD8. Moreover, the contract also expressly provided that "use of the space" is subject to "any correspondence from the Memorial Hall/Lowell Hall Complex Program Manager," ADD8, and the Complaint incorporated by reference an e-mail from the Program Manager, Ruth Polleys, in which she unambiguously advised Clopper that nudity is not allowed. ADD12.

5. The District Court correctly dismissed Clopper's defamation claims because the only statements that could be attributed to Harvard accurately relayed facts or expressed unactionable opinions. Moreover, Clopper failed to allege actual malice, which he must establish to prevail as a limited purpose public figure.

6. The District Court correctly denied Clopper's theft and conspiracy claims because he failed to allege Harvard misappropriated personal, tangible property or any facts sufficient to infer a conspiracy.

7. Clopper has shown no abuse of discretion in the District Court's procedural handling of his Motion to Dismiss. Contrary to Clopper's contention, the District Court considered Clopper's proposed Opposition in denying his Motion to Reconsider. ADD2. Clopper did not seek to amend his Complaint below, nor has he explained how an amendment could

revive any of his claims. Accordingly, that argument is also waived.

WHEREFORE, the Court should deny Clopper's Motion for Summary Reversal, grant Harvard's Motion for Summary Disposition, and affirm the District Court's Order

Respectfully Submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

By its attorneys,

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CERTIFICATE OF SERVICE

I, William W. Fick, counsel for Defendant-Appellant President and Fellows of Harvard College, certify that, on May 10, 2021, I caused this Motion to be served electronically through the ECF system on the registered participants, including all counsel of record, as identified on the Notice of Electronic Filing.

/s/ William W. Fick

APPENDIX O

No. 20-2140

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIC CLOPPER,
Plaintiff – Appellant

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, (Harvard Corporation); THE HARVARD CRIMSON, INC.,
Defendants – Appellees

JOHN DOES 1-10
Defendants

PLAINTIFF-APPELLANT ERIC CLOPPER'S OPPOSITION TO HARVARD'S MOTION FOR SUMMARY DISPOSITION AND LIST OF OBVIOUS ERRORS JUSTIFYING SUA SPONTE SUMMARY REVERSAL

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Pursuant to Fed. R. of App. P. 27(a)(3), the Plaintiff-Appellant Eric Clopper, who is *proudly* Jewish and an anti-male-genital-mutilation ("anti-MGM") activist,[1] files this Opposition to Harvard's Motion for Summary Disposition ("MSD").[2] If Clopper's Principal Brief ("Br.")[3] raises "substantial questions," this Court must deny Harvard's MSD. 1st Cir. R. 27(c). But, if this Court finds "obvious error," it should summarily remand the case to the District Court. *See id.*

INTRODUCTION

In this case, there is good reason for summary remand for obvious errors. A summary remand spares this Court from reminding a District Court that the law requires considering all relevant authorities, allegations, and inferences in a plaintiff's favor on a 12(b)(6) motion.

Harvard offers an emotionally appealing, but inaccurate, caricature referring to Clopper's play as a former employee's obscene, anti-Semitic rant. *See generally* MSD. As in every free speech case, *context matters*; and the disputed facts and legal issues are more nuanced. Nevertheless, Harvard's narrative drove the District Court to dismiss the Complaint

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[1] Clopper opposes genital mutilation of *all* children, but he focuses his activism on *male* genital mutilation because federal law already prohibits female genital mutilation. 18 U.S. Code § 116.

[2] Harvard's Motion for Summary Disposition is referenced "MSD[page number]."

[3] Clopper's Brief is referenced "Br.[page number]."

before even reading the Opposition. JA4–5.[4] This dismissal, *with prejudice*, 15 days after Harvard's 12(b)(6) motion deprived Clopper of his *statutory right* to amend his Complaint once "as a matter of course" after being served a motion to dismiss.[5] Fed. R. Civ. P. 15(a)(1)(B).

In its reasoning, the District Court failed to apply controlling law in at least two instances and clearly erred at least five other times:

1. The District Court accepted Harvard's incorrect assertion that an artistic work can be analyzed by discrete parts in isolation,[6] instead of taken "as a whole," when determining whether a work is "protected speech" or obscene per First Amendment jurisprudence. *California v. Miller*, 413 U.S. 15, 24 (1973) (artistic works must be "taken as a whole" and considered protected if they have "serious literary, artistic, or political significance").

2. The District Court accepted Harvard's incorrect assertion that collateral estoppel prevented Harvard from being considered a state actor without giving the plaintiff an opportunity to conduct discovery and argue otherwise. *See*

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[4] The Joint Appendix is referenced "JA[page number]."

[5] Had the District Court honored Rule 15, that would have mooted this appeal and served the rule's function in advancing equity and judicial economy.

[6] *Compare* JA66 (Harvard arguing "parts" of a performance were obscene because it contained brief nude and sex scenes), *with* Br.29–33 (explaining Harvard's misapplication of *Miller* obscenity test and the District Court's concurring).

MSD14 (citing *Krohn v. Harvard Law School*, 552 F.2d 21, 23 (1st Cir. 1977) for the issue that Harvard is not a state actor); *but see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.")

3. With no explanation, the District Court held that the written contract to rent Sanders Theatre that has no express prohibition on nudity instead contained an express prohibition on nudity. Br.35.

4. Contrary to its mandate to construe all ambiguities in the light most favorable to Clopper, it held that an ambiguous provision, incorporating a document into the contract that Harvard never gave Clopper nor definitively produced, effectively prohibited nudity; and Clopper was bound to that extracontractual provision. Br.37–38; *see also* Br.38 n.16.

5. Despite possessing a filed and submitted video of the play showing that Clopper did not go on a "Nude Anti-Semitic Rant," it held that a headline stating that he did so was not *susceptible* to a defamatory meaning. Br.46-49.

6. Clopper alleged Harvard conspired with a third party to steal recordings of the scenes showing Clopper's genitals in his anti-MGM Play. JA21, JA49. Harvard submitted these explicit images of Clopper to the Court, prior to discovery, meaning it must have come in possession of these images through other means. Br.54. Yet, the District Court dismissed Clopper's conspiracy claims regarding theft of these materials in one sentence without explanation or reasoning. ADD1 ⁋ 6; *see also* Br.53–55.

7. The District Court (1) dismissed Clopper's case without an Opposition; (2) without reading the reasons for why it should allow Clopper's motion to reconsider based on excusable neglect; and (3) without allowing Clopper the opportunity to exercise *his statutory right* "to amend [his] pleading once as a matter of course within … 21 days after service of a [12(b)(6)] motion" per Fed. R. Civ. P. 15(a)(1)(B), thereby casting potential doubt on appearance of impartiality and raising serious Due Process concerns.

If this Court does not agree that the errors above, shown in more detail below, meet the 1st Cir. R. 27(c) "obvious error" bar for this Court to issue a summary reversal sua sponte, then these errors still present "substantial questions" for this Court to decide. A single "substantial question" is enough to defeat Harvard's motion for summary affirmation prior to briefing. *See* 1st Cir. R. 27(c).

ACCURATE CONTEXT

Eric Clopper, a *proudly* Jewish anti-MGM activist, performed a play entitled "SEX & CIRCUMCISION: An American Love Story" (the "Play") before a sophisticated and highly educated audience at Harvard's iconic Sanders Theatre (the "Theatre"). *See* Sealed Ex. A. of Br.[7]; hereinafter "*Play*."[8] Clopper modeled this Play after an explicit and impassioned lecture he gave on the harms of genital mutilation at Cornell in October 2017. JA13–14. Harvard knew that the Play would include: (i) audio and visual depictions of a penis; and (ii) criticism of Judaism relating to the practice of male genital mutilation more widely referred to as circumcision. *Id.* Criticism of a practice associated with his own religion does not make Clopper anti-Semitic. Under Harvard's broad-brush characterization, a pro-choice Catholic, like President Biden, would be deemed anti-Christian.

Every action Clopper took in creating his Play to raise awareness about the harms of male genital mutilation were at the direction of his Harvard boss Thomas Hammond. JA13; *see also* JA141 n.6. Hammond was a Harvard-trained linguist, alumnus, and the longstanding Director of Harvard's Language Center. Br.28–29. Clopper reasonably and *correctly* relied on Hammond's assertions that (i) nude

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[7] Filed under seal with this Court on March 23, 2021.

[8] Citations to the recordings refer to the timestamp by hour and minute ("H:MM"). The show, less the "adult-only" parts, is also freely available here: https://www.youtube.com/watch?v=FCuy163srRc.

performance[9] is "protected speech;" and (ii) that his Play *must* be "taken as a whole" when determining its protected status under law and Harvard policy.[10] *Id.*

Every Harvard officer who Clopper consulted promised him that Harvard would not terminate him for engaging in "protected speech" during his Play. *See* Br.7–10; *see also* Br.11 (Clopper alleges he "relied upon promises from (i) senior faculty; (ii) his boss; (iii) his dean; (iv) Theatre staff; (v) the Theatre contract; (vi) two Harvard presidents; and (vii) Harvard's free speech policy, that Clopper could perform his Play without retaliation [termination]; hereinafter, collectively referred to as '*Harvard's Promises*.'"). Clopper relied on *Harvard's Promises* that state his Play would be assessed by "established First Amendment standards." Br.10.

Clopper signed a contract with Harvard to rent the Theatre in his legal capacity as an officer of an anti-MGM nonprofit on March 1, 2018 for his May 1, 2018 Play. Br.9. **Notwithstanding Harvard's subsequent false assertions that the contract contained an "express" and/or "written" prohibition against nudity, it did not.** *Compare* ADD6–10 (showing entire Theatre contract containing no "express prohibition" to nudity), *with e.g.,* JA73, JA75, and MSD19 (Harvard *falsely*

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[9] Nude performance has been "protected speech" under Article 16 of the Massachusetts's Constitution since the 1980s. *See* Br.34; *see also Cabaret Enters., Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 17 (1984))

[10] Artistic works must be "taken as a whole," in determining whether they are protected or obscene. *Miller*, 413 U.S. at 24.

asserting the "clear written contract" prohibited nudity).

Clopper clearly pled "the written contract for Sanders Theatre did not prohibit nudity." JA16. However, Clopper also pled that a "policy book"[11] referenced in the contract "does not encompass nudity." JA36. Harvard misled the District Court by copying the July 20, 2020 Complaint's ambiguous "encompassing" language and writing it into a September 1, 2020 post-dated "policy book," *see* MSD6–7, to argue that the March 1, 2018 contract had a "written prohibition" against nudity, when it did not. *See* Br.38 n.16. Fortunately, the contract is in the record and the actual contract language, not Harvard's sleight of hand, controls. *See In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003) ("[A] writing is the best evidence of its contents.").

For fifty-eight (58) days following the signing of the contract, Clopper spent $40,000 advertising the Play alongside Harvard. JA14–15. The forewarned and self-selected, paying audience had seen *Harvard's* ads showing Clopper naked, pointing to his penis, with "adult-only" and "explicit content" warnings. *Id.*; *see also* ADD5. Many in the audience had also seen *Clopper's promotion of the Play* including *a fleet of actors dressed in seven-foot inflatable penis costumes*. JA14. Context matters: any reasonable audience member expected to see an irreverent show about penises – and likely Clopper's penis – and every

[11] Harvard never produced or provided Clopper this "policy book." JA143.

audience member had *paid Harvard* to attend the Play against genital mutilation. JA15.

Three days before the show, a Theatre employee emailed Clopper to relay him the message from an anonymous purported authority that the "event may well not contain nudity," ADD12, or else Harvard would revoke the contract and leave Clopper with a $40,000 loss. Br.11–12. Unsure how to respond to this coercive $40,000 last-minute demand from this unknown authority that conflicted with all of *Harvard's Promises*, Clopper did not heed the threat. *Id.*

In the Play, after Clopper received a prolonged standing ovation following his call to end male genital mutilation,[12] he performed a naked dance where the audience clapped in unison then gave him another standing ovation. Br.12–15. Harvard shut down the Play after the dance. *Id.* However, as the audience departed, a slideshow projected images of the difficulties men who undergo male genital mutilation as infants must overcome to achieve orgasm. *Id.*; *see also* JA15.

Unbeknownst to Clopper, the third-party events vendor whom Clopper hired at Harvard's request ("Baystate") intercepted and copied this slideshow containing explicit images of Clopper and sent them to Harvard so as not to lose its chance of signing future contracts with Theatre performers. JA21; *see also*

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[12] People forget that at one time many religions, including Judaism, practiced ritual animal sacrifice – though it is very difficult to even contemplate requiring so now. The point is Clopper's political speech is not anti-Semitic.

Sealed Ex. B of Br.; hereinafter "*The Stolen Slideshow*." The remaining audience members jockeyed among each other to get pictures with Clopper as the slideshow aired. *Play* at 2:18–2:21 (permitting a reasonable inference that neither the Play "as a whole" nor the audience members were "anti-Semitic" since they competed for pictures with the proudly Jewish, anti-MGM performer: Clopper).

The next day, a member of Harvard's Hillel community convinced two student "reporters" for the Harvard Crimson to publish the headline that Clopper gave a "Nude Anti-Semitic Rant in Sanders Theatre," even though neither "reporter" had seen the Play nor spoken with Clopper about it. JA18, JA167. For the following sixty-nine (69) days, Harvard then "investigated" Clopper seeking a pretext to terminate him. JA19–20, JA22–24.

Clopper pled tortious and bad-faith conduct resulting in actionable harm to himself and others during this protracted "investigation." Br.15–17. For example, after conspiring with its student newspaper to defame Clopper, *id.*, Harvard then threatened Clopper's boss, Hammond, and dean if they refused to cooperate in terminating Clopper on a pretext, trying to avoid public scrutiny that what they were actually doing was breaking *Harvard's Promises*. Br.3–5. Hammond resisted Harvard's coercion to terminate Clopper on a pretext concerning his work performance. *Id.* Absent from Harvard's over-simplified caricature is any mention of Hammond's harassment complaints relating to Harvard's wrongful efforts to coerce Hammond to support a

pretextual termination of Clopper, and Harvard's related violations of federal law requiring acknowledgement of Hammond's complaints. Br.25 n.13. Worse, Harvard casually implies that Hammond committed suicide due to a recent cancer diagnosis, when Harvard's own coercion and threats to terminate Hammond played a significant role. JA25–26, Br.25–26.

Although hopeful that Harvard would possess the integrity[13] to resist the retaliation Clopper presaged in his Play,[14] it did not. Harvard ruthlessly retaliated against Clopper and his allies by breaching all *Harvard's Promises*, destroying Clopper's career, and driving Hammond to suicide. Br.3–5. Harvard spent nine months conducting an internal investigation on this matter exonerating itself of any malfeasance. JA26. Left with no other recourse, Clopper matriculated at Georgetown Law School and filed this

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[13] In the Play, Clopper expressly invoked *Harvard's Promises*: "I'm thankful our new president [Bacow] has the integrity to protect my right to express potentially controversial views." *Play* at 0:05–0:06. Clopper "underscore[d that his Play] in no way, shape, or form reflects the views of Harvard." *Id.* Although not intended as a joke, hundreds of Harvard's community members erupted in laughter at the assertion that Harvard had the integrity to honor *Harvard's Promises* to protect controversial free expression. *Id.*

[14] In the Play, *Clopper spent twenty-four (24) minutes explaining how many of America's largest media outlets disseminate medical misinformation about MGM and wield accusations of anti-Semitism as a weapon against opponents of MGM*. *Play* at 0:59–1:23. Clopper alleged similar retaliation from the Crimson, JA18–19, in conspiracy with Harvard and a portion of its alumni. JA41, JA48–49.

lawsuit to vindicate his legal rights and clear the reputation of his friend and mentor Hammond. Br.17.

STANDARD OF REVIEW

This Court may issue summary reversals "[i]n case of obvious error." 1st Cir. R. 27(c). "Obvious error" is approximately that of "plain error" or "clear error." *See U.S. v. Sweeny*, 226 F.3d 43, 46 (1st Cir. 2000) ("'plain error' must be just that—clear-cut, patent, and *obvious*.") (emphasis added) (suggesting "plain errors" encompass "obvious errors"). To prevail on a "plain error" review, Clopper must show: "(1) an error occurred (2) which was clear or obvious and which not only (3) affected the [appellant's] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Sparkle Hill, Inc., v. Interstate Mat Corp.*, 788 F.3d 25, 30 (1st Cir. 2015) (citations omitted). It is an "extremely demanding" standard. *Id.*

On the opposite side of the fulcrum, this Court reviews Harvard's motion for summary affirmance de novo. *See, e.g., Decoulos v. Town of Aquinnah*, No. 18-1820, 2019 WL 11234357, at *1 (1st Cir. Dec. 10, 2019). This Court may affirm a 12(b)(6) motion prior to briefing only if the appellant does not present a single "substantial question." *See id.*; *see also* 1st Cir. R. 27(c). Although imperfectly defined, a "substantial question of law or fact" has been widely accepted as "a 'close' question or one that very well could be decided the other way." *See U.S. v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) (interpreting "substantial question of law or fact" along with five other circuits in the

criminal sentencing context of 18 U.S.C. § 3143(b)). Dismissing "an appeal on the ground that it presents no substantial question for review … should be granted only in extreme cases." *Moist v. Belk*, 380 F.2d 721, 724 (6th Cir. 1967) (citing *Cohen v. Curtis Publishing Co.*, 333 F.2d 974, 978–979 (8th Cir. 1964)).

When deciding whether Clopper proposes a single "substantial question" that "could be decided the other way," this Court (1) accepts the Complaint's factual allegations as true; (2) construes allegations in the light most favorable to the plaintiff; and (3) draws all reasonable inferences in plaintiff's favor. *Ruivo v. Wells Fargo Bank, N.A.*, 766 F.3d 87, 90 (1st Cir. 2014). This generous standard "require[s this Court] to consider not only the complaint but also matters fairly incorporated within it and matters susceptible to judicial notice." *In re Colonial Mortgage Bankers Corp.*, 324 F.3d at 15.

OBVIOUS ERRORS THAT WARRANT SUMMARY REVERSAL

I. The District Court Misapplied the "Protected Speech" Doctrine.

Harvard argued that if you broke Clopper's Play into "parts," some "parts" would not be "protected speech." Br.31. The District Court agreed. Br.32–33; *see also* ADD1 ("doubting" Clopper's "nude performance" was protected, instead of taking the predominately clothed Play "as a whole"). The District Court committed obvious error in doing so, because according to the U.S. Supreme Court's *Miller* test, it

must consider a work "as a whole." 413 U.S. at 24. This "obvious error" is not consistent with law, and our 21st century freedom of expression. This is not only an obvious error, but a material one that substantively affected Clopper's rights because the protected nature of the Play supports his First Amendment (Count I), breach of Employment Contract (Count IV), breach of Covenant of Good Faith & Fair Dealing (Count V), and Promissory Estoppel (Count VI) claims. Br.26–45.

II. The District Court Denied Clopper his Right to Litigate his First Amendment Claim.

The District Court dismissed Clopper's First Amendment claim (Count I) because Clopper "[did] not allege that Harvard acted under color of state law." ADD1. But, Clopper *did so allege*.[15] JA28–29. Clopper alleged Harvard was acting on behalf of Cambridge to enforce an unconstitutional ban on nude performance when it, inter alia, "interrupted [his expressive] play," and "terminat[ed] his employment" for exercising his First Amendment Rights. *Id.* These allegations gave Harvard a "short and plain statement … 'of what the ... claim is and the grounds upon which it rests.'" *See Gargano v. Liberty Intern. Underwriters, Inc.*, 572 F.3d 45, 58 (1st Cir. 2009) (citations omitted).

[15] If the deficiency was that Clopper did not recite the talismanic phrase "Harvard acted under color of state law," the District Court should have granted Clopper leave to amend "as a matter of course." *See* Fed. R. Civ. P. 15(a)(1)(B). It did not. *See* **Obvious Error VII**, *infra.*

Harvard citing a prior case to "prove" that it is not a state actor does not collaterally estop Clopper from litigating this issue. *See Blonder-Tongue*, 402 U.S. at 329. On a 12(b)(6) motion, it is immaterial whether Clopper would "ultimately prevail;" the relevant inquiry is "whether the [plaintiff] is entitled to offer evidence to support the claims." *See Scheur v. Rhodes*, 416 U.S. 232, 236 (1974). Due process demands that Clopper be given the opportunity to collect evidence and present his arguments on this claim. *Blonder-Tongue*, 402 U.S. at 329.[16]

III. The District Court Held that the Theatre Contract "Contained an Express Prohibition to [Nudity]" when it did Not.

Clopper pled "the written contract for Sanders Theatre did not prohibit nudity." JA16. The District Court had the *entire* Sanders Theatre contract. ADD6–10 (containing no "express prohibition" to nudity). Notwithstanding Clopper's allegations *and* a copy of the contract showing no "express prohibition to nudity," the District Court held that the "Sanders Theatre contract contained an express prohibition to [nudity]." ADD1 ⁋ 4 (dismissing Clopper's Promissory Estoppel claim for relying on *Harvard's Promises* to

[16] After dismissing the Complaint with prejudice, Clopper conceded that under current case law "Harvard is not a state actor." JA135. At the time of this concession, there was no way Clopper could prove *on the pleadings* that Harvard was a state actor. But, if this Court vacates the dismissal, then with proper factfinding, as Clopper's due process rights demand, he could prove the claim.

perform nude because "the Sanders Theatre contract contained an express prohibition to the contrary."). *Holding that the Theatre contract contained an express prohibition to nudity when it did not is an obvious error*; it greatly prejudiced all Clopper's claims; and it justifies a summary reversal.

IV. The District Court Construed Allegations and Ambiguities in *Defendants'* Favor.

Clopper pled the Theatre contract "did not prohibit nudity." JA16. Clopper also ambiguously pled a policy book referenced in the Theatre contract "does not encompass nudity." JA36. Harvard published a policy book *after* the Complaint's filing date, *See* Br.38 n.16, where Harvard copies the Complaint's ambiguous "encompassing" phrasing *exactly*. *See* MSD6–7. Instead of construing ambiguous contractual provisions in Clopper's favor,[17] as the District Court *must* on a 12(b)(6) motion, instead, it held that Clopper "appears to concede that the Sanders Theatre contract contains a provision expressly prohibiting nudity in performances." ADD1. "Appear[ing] to concede" a material issue, *especially when pleadings and exhibits to the contrary exist*, does not follow the 12(b)(6) standard construing all allegations, ambiguities, and inferences *in Clopper's favor*. This is another obvious error.

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[17] *See, e.g., International Audiotext Network, Inc. v. AT&T Co.*, 62 F.3d 69, 72 (2nd Cir. 1995) ("At [the 12(b)(6)] stage in the proceedings—we will strive to resolve any contractual ambiguities in [Plaintiff-Appellant's] favor.").

V. The District Court Held that a Headline Stating Clopper Went on a "Nude Anti-Semitic Rant" was Not *Susceptible* to a Defamatory Meaning, even though It had a Video Showing that He did Not do so.

For Clopper's defamation claim (Count VII) to survive a 12(b)(6) motion, the alleged libel must be *susceptible* to a defamatory interpretation. *See Stanton v. Metro Corp.*, 438 F.3d 119, 124–125 (1st Cir. 2006). Notwithstanding the District Court possessing a video of the *Play* showing that Clopper did not go on a "Nude Anti-Semitic Rant," it held that a headline stating he did so is not "*reasonably* capable of the defamatory meaning proposed by [Clopper];" ADD3; i.e., that he went on a naked anti-Semitic rant. JA162, Br.49. To reach this extraordinary holding, the District Court parsed the truth of the headline *by the word*.[18] Br. 46. In doing so, it overlooked applicable tort principles that separate a headline from its contents, *Id.* at n.21; and it did not accept Clopper's easily verifiable pleadings that readers found the Crimson's headline to be defamatory as true. Br.47–48.

As Clopper's message to protect Jewish and Gentile boys from male genital mutilation continues to gain traction, the District Court's holding stands not only on the wrong side of the facts and the law, but

[18] This piecemeal reasoning to interpret the truth of the headline "word" "by" "word" to the Crimson's benefit on a 12(b)(6) motion mimics its also incorrect analysis of the Play as unprotected by assessing it in "parts" to Harvard's benefit.

also "the arc of the moral universe [that] bends towards justice." M.L.K. Jr. It would be wise to remand to apply the proper standard of review.

VI. The District Court Dismissed Clopper's Conspiracy to Steal His Play Claim When It Had Possession of His Stolen Play.

Harvard submitted *The Stolen Slideshow* into evidence. Br.54. Clopper alleged Harvard stole this slideshow in concert and conspiracy with Baystate. JA49 (Count X). Notwithstanding Harvard's possessing and submitting *The Stolen Slideshow*, the District Court dismissed Clopper's conspiracy claims as implausible in one sentence without further reasoning. ADD1 ⁋ 6; *see also* Br.53–55. This is an obviously wrong holding; it prejudiced Clopper's case; and it "seriously impair[s] the fairness [and] integrity" of this proceeding. *Sparkle Hill, Inc.*, 788 F.3d at 30.

VII. The District Court Denied Clopper his Right to Amend his Complaint Once as a Matter of Law, and it did not Impartially Adjudicate the Proceedings.

Fifteen (15) days after Harvard filed its 12(b)(6) motion, the District Court granted Harvard's unopposed motion *with prejudice* for the Complaint's pleading deficiencies.[19] JA5–6. However, as "*as a*

[19] For example, the District Court held "the Complaint does not allege [1] Harvard acted under color of state law … [2] suggest that Harvard used threats, intimidation or coercion … [3] explain how his termination … breached any employment agreement …

Matter of Course," Clopper still had 6 days to exercise his *statutory right* within "21 days after service of [Harvard's 12(b)(6)] motion," to "amend [his] pleading once." Fed. R. Civ. P. 15(a)(1)(B). It was an *obvious error* to dismiss the Complaint *with prejudice* within his 21-day time window, thereby foreclosing Clopper's opportunity to amend his Complaint to remedy any pleading deficiencies, which would have mooted this appeal.

To try and still exercise his Rule 15 right, Clopper *promptly* filed a Rule 60(b) motion[20] to reconsider the final judgment for "excusable neglect." JA120–125. This motion explained that Clopper's lead counsel missed the deadline to oppose Harvard's 12(b)(6) motion by one day because of his "medical condition that was completely outside the control of the Plaintiff." JA123; *see also* Br.18.

Clopper's counsel then submitted a motion to seal to disclose his diagnosed depression and Covid-like symptoms to the court. Br.18–19. The District Court promptly denied the motion to submit affidavit under seal; and it promptly denied Clopper's motion to reconsider, claiming it "had reviewed plaintiff's explanation for his failure to comply with the court's

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[4] allege … a clear or definite promise that he could perform nude … [5] allege[] actual malice … [6] allege existence of personal tangible property … [7] plead any facts supporting his conclusory allegation[s]." ADD1

[20] *Ondis v. Barrows*, 538 F.2d 904, 909 (1st Cir. 1976) ("[O]nce a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or 60.").

deadline." JA7–8. Insofar as the District Court did not allow the motion to seal, it did not in fact "review plaintiff's explanation," thereby preventing it from *fairly* determining whether the one-day, mid-Covid delay constituted "excusable neglect."[21]

Denying Clopper the opportunity to amend his Complaint once within the 21-day time period was an *obvious error*. This error, combined with the six other obvious errors above, do not "satisfy the appearance of justice," *In re Murchison*, 349 U.S. 133, 136 (1955), and may cause an observer to reasonably question the District Court's impartiality. *See* 28 U.S.C. § 455(a); *see also* Br.56 n.24. Accordingly, Clopper was deprived his due process rights, and this Court should summarily reverse the ruling of the District Court and remand the case with instructions to give the Plaintiff the impartial hearing to which he is entitled.

SUBSTANTIAL QUESTIONS EXIST

Where Clopper has shown that the District Court committed seven obvious errors in dismissing his case, it follows that substantial questions exist, and thus Harvard's motion must be denied. Other substantial questions are discussed below.

I. Whether Harvard is Bound to its Policy and Promises to Not Retaliate

[21] In sharp contrast, the District Court granted Defendants five (5) extensions to file their 12(b)(6) motions without hesitation. JA4–5.

Against a Speaker for Engaging in "Protected Speech"?

As described above, the District Court (1) dismissed Clopper's Play as unprotected; (2) held the Theatre contract contained an express prohibition to nudity when it did not; (3) held Clopper's reliance on *Harvard's Promises* to put on the Play as he did was unreasonable; and (4) asserted Clopper's boss did not have authority to approve the Play on behalf of Harvard. By not accepting Clopper's pleadings to the contrary as true[22] – as it was bound to do – the District Court skirted discussion of this **important question**:

> Can it be that private schools can promise to follow free expression under the First Amendment, but those promises are not binding and cannot be relied upon?[23]

The recent case of *Meriwether v. Hartop*, No. 20-3289 (6th Cir. Mar. 26, 2021) shows the answer. In *Meriwether*, the defendant Shawnee State University ("Shawnee") disciplined the plaintiff employee for engaging in "protected speech."[24] The plaintiff alleged

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[22] (1) JA15, JA22, Br.28–33 (Play was protected); (2) JA16 (contract did not prohibit nudity); (3) JA15, Br.7–11 (Clopper reasonably relied on *Harvard's Promises* to put on the Play as he did without being terminated); (4) JA13, Br.8 (Clopper's boss approved and directed every element the play).

[23] If Harvard wants to profess honoring the First Amendment, but not do so in practice when its members rely on the promise, it should have to admit its duplicity, instead of relying on this Court to do its handywork.

[24] In *Meriwether*, the plaintiff's protected speech challenged the propriety of *mandating* specific gender pronouns for students. Here, Clopper's protected speech challenged the propriety of MGM.

that Shawnee disciplined him for "expression that is protected by academic freedom (as contractually defined) and the First Amendment." Plaintiff's Verified Complaint at ⁋ 347, *Meriwether v. Hartop, et al,* Case No. 1:18-cv-753 (S.D. Ohio Nov. 5, 2018). Clopper brought analogous causes of action. JA28–29 (Count I: First Amendment); JA37–40, (Counts IV–VI: Employment Contract, Covenant of Good Faith and Fair Dealing, and Promissory Estoppel claims for "contractually defined" breach of *Harvard's Promises*).

The *Meriwether* Court reversed the 12(b)(6) dismissal because the "various irregularities in the university's investigation and adjudication process," and its "alleged [disciplinary] basis [for his protected speech] was a moving target … [with] repeated changes in position [that] permit a plausible inference that the university was not applying a preexisting policy in a neutral way." *Meriwether*, slip op. at 25–26. If these inferences survived discovery, "a jury could conclude that the university's refusal to stick to its [previous promises] is 'pretext for punishing [plaintiff's] … speech.'" *Id.* at 27. Clopper similarly alleges "irregularities" and a plausibly pretextual "investigation" that destroyed his career and drove Hammond to suicide. *See* Br.43–44.

Harvard attempts to distinguish *Meriwether* because Shawnee is *public*. MSD14 n.9. But the *Meriwether* Court vacated dismissal of plaintiff's state-law free-expression claims "as contractually defined [via school policy]," *Meriwether*, slip op. at 32, just as Clopper alleged he relied on *Harvard's* [contract-based] *Promises*. Clopper also alleged First

Amendment violations against Harvard, but he did not receive the opportunity to litigate that claim. **Obvious Error II**, *supra*.

II. Whether There are Other "Substantial Questions"?

Even if the seven "obvious errors" above do not meet the clear error bar, they still present "substantial questions" for this Court to decide.[25] Also, Clopper's Brief – supported by persuasive facts and good law – reviewed *de novo* with the proper standard of review, raises *many* substantial questions of law and fact throughout. As such, Harvard's motion must be denied.

CONCLUSION

For the foregoing reasons, this Court should summarily remand this case for obvious errors pursuant to 1st Cir. R. 27(c), thereby saving a lot of time and energy; and Harvard's motion to summarily affirm the dismissal should be denied.

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[25] As examples of the "substantial questions" the above "obvious errors" raise: "Did the Theatre contract prohibit nudity?" "Did the District Court apply the proper standard of review?" "Did Hammond have authority to approve the Play?" "Was the Crimson's headline susceptible to a defamatory meaning?" "Did Harvard plausibly conspire with Baystate to steal Clopper's intellectual property?" etc.

CERTIFICATE OF COMPLIANCE

I, Andrew DeLaney, Esq., counsel for Plaintiff-Appellant Eric Clopper, certify pursuant to Fed. R. App. P. 27(d)(2)(A) that this motion contains 5,175 words, as counted by the Microsoft Word system used to prepare the motion. The motion was prepared in proportionally spaced typeface in 14-point Times New Roman font.

/s/ Andrew DeLaney, Esquire
Andrew Delaney

Attorney for Plaintiff-Appellant

Dated: April 30, 2021

CERTIFICATE OF SERVICE

I, Andrew DeLaney, Esq. counsel for Plaintiff-Appellant Eric Clopper, certify that, on April 30, 2021, I caused this Opposition to Harvard's Motion for Summary Disposition to be served electronically through the ECF system on the registered participants, including all counsel of record, as identified on the Notice of Electronic Filing.

/s/ Andrew DeLaney, Esquire
Andrew Delaney

Attorney for Plaintiff-Appellant

Dated: April 30, 2021

APPENDIX P

No. 20-2140

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIC CLOPPER,
Plaintiff – Appellant

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, (Harvard Corporation); THE HARVARD CRIMSON, INC.,
Defendants – Appellees

JOHN DOES 1-10
Defendants

DEFENDANT-APPELLEE PRESIDENT AND FELLOWS OF HARVARD COLLEGE'S MOTION FOR SUMMARY DISPOSITION AFFIRMING THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE OF PLAINTIFF-APPELLANT ERIC CLOPPER'S COMPLAINT

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Pursuant to Local Rule 27.0(c), Defendant-Appellee President and Fellows of Harvard College ("Harvard")[1] respectfully moves for summary disposition affirming the District Court's order dismissing with prejudice Plaintiff-Appellant Eric Clopper's claims against Harvard, because no substantial question is presented on appeal.

Should the Court nevertheless conclude that this appeal is not appropriate for summary disposition, Harvard requests leave to file a brief addressing the issues presented.[2]

BACKGROUND

On May 1, 2018, before a public audience in Harvard's historic Sanders Theatre, Plaintiff-Appellant Eric Clopper delivered a 130- minute presentation condemning male circumcision. As an "encore," Clopper appeared nude on stage and engaged in simulated sex acts with an inflatable doll. Clopper also played a stop-motion video in which he repeatedly inserted his erect penis into the doll's

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[1] Clopper's naming of "Harvard University" as a separate defendant is redundant because "President and Fellows of Harvard College" is the legal entity comprising Harvard University.

[2] The "Joint" Appendix filed by Clopper is referenced as "JA__," although Clopper's counsel did not actually consult with defendants' counsel about its contents. See Fed. R. App. P. 30(b). Clopper's brief is referenced as "Br.__" The Addendum to Clopper's brief is referenced as "ADD__."

mouth and ejaculated on its face.[3] At the time, Clopper worked as an at-will employee in Harvard's Lamont Library, but after receiving numerous complaints and conducting an extensive review, Harvard terminated Clopper.

On July 20, 2020, Clopper sued Harvard (and *The Harvard Crimson*, an independent student newspaper, which published articles about the events), alleging civil rights claims (Counts I and II), contract- based claims (Counts III, IV, and V), promissory estoppel (Count VI), defamation (Count VII), conversion (Count VIII), and conspiracy (Count X).[4] JA11.

On September 29, 2020, Harvard filed a Motion to Dismiss on the basis that the Clopper's complaint failed to state any viable constitutional, statutory, contractual, or tort claims against Harvard. JA51. The deadline under the Local Rules to oppose Harvard's Motion came and went on October 13, 2020, without

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[3] Clopper posted a video recording of his Sanders Theatre presentation (minus the encore proceedings) on YouTube. *See Sex & Circumcision: An American Love Story by Eric Clopper*, *available at* https://www.youtube.com/watch?v=FCuy163srRc (posted July 19, 2018; last visited April 16, 2021) ("You Tube Video," cited as "YTV H:MM"). Harvard also provided the District Court, under seal, with exhibits containing the full video Clopper played during the "encore" as well as spectator videos Harvard received of Clopper's simulated sex with the doll (the "sealed exhibits"). Clopper complains in his brief that these materials were not "complete," Br.12, but he does not dispute their authenticity or descriptions of their content. Meanwhile, Clopper tendered his own sealed exhibits to this Court on March 23, 2021, but he has not served Harvard with copies.

[4] Count IX was a claim for tortious interference with employment contract against only the *Crimson* and John Doe defendants.

any response or request for extension by either of Clopper's two attorneys. JA5.

On October 14, 2020, the District Court (Stearns, J.) entered an electronic order granting Harvard's then-unopposed Motion to Dismiss, with prejudice. ADD1. On October 16, 2020, Clopper filed a Motion for Relief from Order of Dismissal and to Extend Deadline to File Opposition on the basis that one of his lawyers had been "temporarily incapacitated due to two concurrent serious unanticipated illnesses." JA120. On October 19, 2020, Clopper filed an Amended Motion to Set Aside Order of Dismissal, accompanied by a proposed opposition to Harvard's Motion to Dismiss. JA132.

The District Court denied Clopper's Amended Motion and rejected the request to revisit dismissal of all claims against Harvard: "[B]ecause plaintiff has failed to raise any meritorious argument against dismissal, it would not be in the interests of justice to set aside [the Court's] prior order." ADD2.

The *Crimson* filed a separate motion to dismiss, Clopper filed an opposition, and the District Court allowed that motion on November 5, 2020. JA6-8.

Clopper then appealed.

This Court affords "*de novo* review to a district court's order granting a motion to dismiss for failure to state a claim." *Alston v. Spiegel*, 2021 U.S. App. LEXIS 4883 at *7, 988 F.3d 564 (1st Cir. 2021). While this Court must "accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences therefrom" in plaintiff's favor, it "need not

credit a plaintiff's threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at *8. In addition, "the district court's rationale is not binding" on this Court, and it "may affirm an order of dismissal on any ground made manifest by the record." *Id.*

Clopper's prolix brief is replete with *ad hominem* argument, allegations of fact absent from his Complaint, and implausible inferences. Still, it does not identify any cognizable error by the District Court or any other substantial legal question for this Court to decide.

FACTS[5]

Plaintiff Eric Clopper is an outspoken opponent of neonatal male circumcision, JA12, which he describes as a "Satanic Ritual" promoted by Jews, whom he calls a "genital mutilation cult" governed by an "evil ideology." YTV 1:56; 2:02, 2:06.

On July 17, 2017, Clopper started a full-time position as an at-will employee in Harvard's Language Resource Center ("LCR"). JA11. A few months later, in October 2017, Clopper delivered a lecture at Cornell University in which he spoke against circumcision. JA13. The Complaint does not allege that the lecture included any public nudity, much less a live sex show.

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[5] The following facts are taken from the Complaint, as well as documents attached or incorporated by reference in the Complaint. *See O'Brien v. Deutsche Bank Nat'l Tr. Co.*, 948 F.3d 31, 35 (1st Cir. 2020).

After Clopper returned to the Harvard campus, he showed a video recording of his Cornell lecture to Michael Bronski, a professor in Harvard's Women, Gender, and Sexuality Department. JA13. Bronski encouraged Clopper to turn his lecture into a "play," titled "Sex & Circumcision: An American Love Story," with "more theatrical components." JA13.

Clopper discussed the idea with his boss, Thomas Hammond, the LRC's director, and Hammond decided to help Clopper. JA12. Hammond is now deceased, JA16, but the Complaint alleges that he "approved" the "play" and served as its "stage manager." JA13. It further alleges that Hammond "urged" Clopper to include a "nude dance" and "educational slideshow relating to masturbation." JA15.

On March 1, 2018, Clopper and Foregen, a "charitable organization" that researches "regenerative medical therapies for circumcised men," entered an agreement with Harvard to reserve the Sanders Theatre for May 1, 2018. JA14; *see* https://www.foregen.org. The contract, which the Complaint incorporates by reference, licensed Clopper and Foregen to use the Sanders Theatre on the specified date and time. ADD7.

In the "Rules and Policies" section, the contract stated that use of the theater is subject to the licensee's compliance with all federal, state, and local laws as well as Harvard's "policies, rules, and regulations . . . including, but not limited to, the Sanders Theatre Policy Book." ADD8. The Complaint acknowledges that the "policy book states that the entertainment license from the City of Cambridge

does not encompass nudity." JA36; *see also* Sanders Theatre Producer's Handbook at 3 ("Our Entertainment License from the City of Cambridge does not encompass nudity").[6]

On March 14, 2018, Tina Smith, the Sanders Theatre's Box Office Manager, began advertising Clopper's "play." JA13. An online notice appeared on the website for Harvard's Office of the Arts, and "print ads" were placed "in the Sanders Theatre complex." *Id.* The promotional materials indicated that Clopper's "play" was "adult only" and would include "explicit content." *Id.*

With respect to that explicit content, the Complaint vaguely alleges:

> Harvard made many express and implied promises to Clopper—verbally and in writing— that he would be free to express himself in his explicit Play without retaliation because of protection of free expression described by Professor Bronksi, Clopper's manager Hammond, Harvard's outgoing president Drew Faust, Harvard's incoming president Lawrence Bacow, and Harvard's Free Speech Policy.

JA15.

Clopper publicized his "play" by placing posters around Harvard's campus. JA14. The posters featured Clopper, naked, with his genitals obscured by a "thin censor bar." *Id.* He also

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[6] *Available at* https://sites.fas.harvard.edu/~memhall/PDF/SandersTheatreProducerH andbookNA.pdf. Clopper notes that the version currently available online post-dates his performance, Br.38 n.16, but he does not allege that the operative version permitted nudity and admits Harvard expressly warned him it did not.

hired actors to appear in Harvard Yard in inflatable penis costumes, hold signs, and take pictures with passers-by. *Id.* Clopper "believe[d]" that the explicit nature of his "play" was obvious from these promotional efforts and that, if Harvard "had an issue," it should have alerted him. JA15.

Yet, the Complaint acknowledges that on April 28, 2018, Harvard did just that. JA16. By email, Ruth Polleys, the Manager for the Office for the Arts, told Clopper:

> Due to the nature of the posters advertising the event, I've been asked to let you know that *zoning laws and our Entertainment License with the City of Cambridge do not permit nudity as part of any event*. The May 1 event may well not include nudity, but we want to be sure—and want to be sure the Entertainment License for Sanders remains in compliance.

ADD12 (emphasis added). Clopper responded:

> I understand your concerns about the posters. My publicist has been very aggressive with them. Apparently, this is what is known in the publicity business as "implied nude"—slightly embarrassing to walk around campus and have the tourists pointing at me and then at the posters! It's an edgy show, but *we'll stay within the bounds of propriety*, no worries.

ADD11 (emphasis added).

The Complaint asserts that Clopper nevertheless believed that he had a "right to include nudity in the Play." JA16. In short, Clopper admits that he disregarded Sanders Theatre's policy and Harvard's instruction, because Clopper felt that he had invested too much time and money in his pet project, decided it was "too late to change the Play," and believed he had a "right"

to stage a live simulated sex show and pornographic video before an unwitting public audience. *Id.*

Although the Complaint refers to a "play," its allegations describe a lengthy performance that proceeded in two distinct parts. During the first part, which ran for more than two hours, Clopper delivered a lecture, with a PowerPoint presentation, in which he equated circumcision with "torture" and attacked Judaism as "an evil ideology." JA17; YTV 1:35, 1:56. At the end, Clopper bowed and exited the stage. During the second part, Clopper returned to the stage, naked and holding an inflatable sex doll. JA17. For the next five to ten minutes, he simulated sex acts with the doll and projected a self-made pornographic video on the screen behind the stage in which he repeatedly inserted his erect penis in the doll's mouth, masturbated, and ejaculated on the doll's face.[7]

The Complaint alleges that Maureen Lane, Harvard's production assistant and venue representative, "rushed toward Clopper" and "scream[ed] at him for his nude dance." JA17. The theatre lights flashed on and off, indicating the show was over, and the audience began to leave. *Id.* The Complaint alleges that, as a result, Clopper was unable to get dressed, return to the stage, and deliver "his final message." *Id.*

Not surprisingly, and as intended by Clopper, his performance drew significant attention. On May 2, 2018, the *Crimson* published an article by two student reporters, titled "Harvard 'Reviewing' Employee's Nude, Anti-Semitic Rant in Sanders Theatre." JA18. The article quoted an email from Rachael Dane, Director of Media Relations for Harvard's Faculty of Arts and Sciences ("FAS"), who said only that Harvard was "'reviewing' reports" about Clopper's anti-Semitic

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[7] This description, which Clopper does not dispute, is documented in the sealed exhibits Harvard filed in the District Court.

comments and nude performance. ADD13. On May 4, 2018, the *Crimson* published another article, "Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours," which repeated Dane's statements about Harvard's ongoing "review." JA19; ADD17. A few days later, on May 9, 2018, the Editorial Board published an opinion piece that, again, quoted Dane, ADD17, and went on to "castigate" Clopper for "us[ing] his position to deliver a tirade prominently featuring nudity and anti-Semitism to an audience that was given no fair warning to expect either."[8] Later, the *Crimson* published two other pieces, one article and one editorial, that mentioned Clopper's show, JA17, but did not feature any statements from Harvard about Clopper.

From April 23, 2018, through May 4, 2018, including the night of his event, Clopper was on previously scheduled, paid time-off from his job at the LRC. JA19. When Clopper returned to work, he was placed on administrative leave and told by Dean Robert Doyle that Harvard was conducting "a careful review" about whether Clopper had misrepresented his plans, violated rules against public nudity, and delivered an anti- Semitic diatribe followed by an obscene performance. *Id.*

Over the next few months, Harvard conducted an extensive investigation. *Id*. Dean Doyle and Ann Marie Acker, an administrator in Harvard's HR Department, and Gary Cormier, Director of Harvard's HR Consulting, met with Clopper and also solicited input from LRC employees and the FAS community. JA20.

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[8] *Available at* https://www.thecrimson.com/article/2018/5/9/editorial-against-sex-and-circumcision/.

As the investigation proceeded, Clopper "fear[ed]" that "powerful interests"—the Jews—had "compromised" "the integrity of Harvard's administration." *Id*. As a result, on May 17, 2018, he filed a complaint with Harvard's Office of Labor and Employee Relations ("OLER"). OLER considered an employment investigation to be "premature," because at that time, Harvard had not yet taken any adverse employment action against Clopper. *Id.*

On July 12, 2018, at the conclusion of its lengthy investigation, Harvard terminated Clopper from his at-will employment in the LRC. JA22. The termination letter cited several reasons, including Clopper's sexually explicit display in the Sanders Theatre as well as his "misrepresentations and misleading statements to LRC colleagues and to Sanders Theatre staff members regarding the content of the Show." ADD20.

Clopper alleges that, after Harvard terminated his employment, it "focused its energies on Hammond." JA24. Clopper contends that Harvard retaliated against Hammond for assisting Clopper (before the show) and refusing to terminate Clopper (afterwards). On September 17, 2018, Harvard sent Hammond a "Final Written Warning" concerning his involvement in Clopper's performance. JA25. Around the same time, Clopper, who had no money and no job but "increasing debts," moved into Hammond's apartment, which Hammond rented from Harvard. *Id.* Hammond, who had recently been diagnosed with cancer, took his own life on September 24, 2018. JA26.

On January 7, 2019, Clopper emailed Brian Magner, the Associate Director of OLER, requesting action on the complaint Clopper had filed before his dismissal. JA26. On February 7, 2019, Magner sent Clopper the "final results" of the OLER investigation. *Id*. Clopper contends that the decision "failed to address" two of his allegations against Harvard, including, specifically, an allegation that Harvard "conspired with" a vendor (Baystate) "to steal an unauthorized recording of his copyrighted Play in order to conduct a pretextual investigation to censor his anti- circumcision beliefs." *Id.*

ARGUMENT

Clopper has not plausibly identified any error in the District Court's decision dismissing his Complaint against Harvard with prejudice.

I. First Amendment (Count I).

The District Court correctly held that "even assuming *arguendo* that plaintiff's nude performance was entitled to some measure of protection under the First Amendment (which the court doubts), plaintiff nonetheless has failed to state a claim" because the Complaint does not "allege that Harvard acted under color of state law." ADD1; *see Krohn v. Harvard Law School*, 552 F.2d 21, 23 (1st Cir. 1977) (explaining that Harvard is neither "a public institution" nor "sufficiently intertwined with the Commonwealth of Massachusetts so as to meet the 'state action'

requirement"). Clopper does not challenge this ruling on appeal.[9]

Moreover, Clopper's display, sprung without warning on his audience, added nothing to his anti-circumcision message and included "ultimate sexual acts, normal or perverted, actual or simulated," as well as "masturbation" and "lewd exhibition of the genitals," all of which the Supreme Court has identified as "plain examples" of obscenity, which the First Amendment does not protect. *Miller v. California*, 413 U.S. 15, 25- 26 (1973).

II. Massachusetts Civil Rights Act (Count II).

The District Court correctly held that "the Complaint does not . . . plausibly suggest that Harvard used threats, intimidation, or coercion to achieve any alleged interference with his rights, as required by the Massachusetts Civil Rights Act, M.G.L. ch. 12, §§ 11H, 11I" ("MCRA"). ADD1; *see Buster v. George W. Moore, Inc.*, 438 Mass. 635, 645 (2003).

As an initial matter, to the extent Clopper's performance included unprotected obscenity, no "right" was violated.

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[9] Clopper filed a Notice of Supplemental Authorities on April 19, 2020, discussing the recent Sixth Circuit decision in *Meriwether v. Hartop*, 2021 U.S. App. LEXIS 8876, _F.3d _(6th Cir. Mar. 26, 2021) (reversing dismissal of free speech and free exercise claims arising from discipline against professor for refusal to use students' preferred gender pronouns). However, that decision does not help Clopper because it arose at Shawnee State University, "a small *public* college in Portsmouth, Ohio." *Id.* at *3 (emphasis added); *see also id.* at *18 (noting that the First Amendment "applies at public universities").

On appeal, Clopper relies on a theory that Harvard's alleged retaliation against Hammond somehow violated Clopper's rights under the MCRA. Br.24-25. But as the District Court pointed out, the Complaint still suffers from "the absence of any allegation of direct interference with plaintiffs' exercise of a constitutional right by means of threats/coercion (actions occurring after the performance in retaliation for its contents cannot establish direct interference by means of threats/coercion with respect to the performance itself)." ADD2.

Moreover, although the Massachusetts statute "reaches private actors, it was not intended to create, nor may it be construed to establish, a vast constitutional tort." *Buster*, 438 Mass. at 645 (internal quotation marks omitted). While the SJC has found economic, rather than physical, coercion to be actionable in limited situations, it has found no violation where, as here, "a plaintiff's own conduct provided independent grounds for the defendant to terminate its bargained-for obligations to a plaintiff." *Id*. at 648.

Finally, the Complaint fails to identify any constitutional right with which Harvard interfered. Even assuming that Clopper had a civil right to dance nude on-stage and display a pornographic video of himself on Harvard property in violation of applicable local law, Harvard's express rules, and his own express representations to Sanders Theatre's management, Harvard's decision to terminate his employment after he finished did nothing to interfere

with his exercise of that theoretical right. Clopper did dance nude on the stage, and he played the video to completion. His later termination is not actionable under the MCRA because he had no constitutional right to his at-will position. *See, e.g., Webster v. Motorola, Inc.*, 418 Mass. 425, 430 (1994) (affirming dismissal of MCRA claim where "defendants allegedly attempted to interfere with the plaintiffs' rights by threatening the loss of their 'at-will' positions" because such "interference is "not actionable conduct"); *Korb v. Raytheon Corp.*, 410 Mass. 581, 585 (1991) ("Korb is free to express whatever opinions he wishes. Raytheon need not pay him to do so").

III. Contract-Related Claims (Counts III – VI)

Regarding Count III, the District Court explained that Clopper "does not identify any provision in the Sanders Theatre contract entitling him to perform nude" and "appears to concede" that the contract "contains a provision prohibiting nudity in performances." ADD1. Clopper apparently abandons this claim on appeal.[10]

Regarding Count IV, the District Court correctly held, Clopper "does not explain how his termination, even if premised on the content of his performance, breached any employment agreement with the university." ADD1. "Plaintiff, after all, was an at-will employee and, subject to certain exceptions which

[10] Clopper suggests that the bar on nudity was not the "principal purpose" of the contract, Br.34, but supplies no authority to suggest that somehow invalidates its express language.

plaintiff does not assert here, could be terminated at any time 'for almost any reason or no reason at all.'" *Id*. (quoting *Jackson v. Action for Bos. Cmty. Dev. Inc.*, 403 Mass 8, 9 (1988)).

Without citing any authority, Clopper suggests that "Harvard's Free Speech Policy," general public statements by past and present Harvard Presidents Faust and Bacow, and certain statements to Clopper by Hammond and Bronski, created an "implied in fact" contract that Harvard breached. Br.27-29. But even if the "Free Speech Policy" or general statements by Faust and Bacow could comprise an implied employment contract, Clopper fails to plausibly explain how it would permit Clopper to violate the *written* Sanders Theatre contract, put on an obscene performance, or lie to Harvard about his intentions. As to alleged oral promises, "the Complaint does not allege that Hammond or Bronski had actual or apparent authority to bind the university, and the court cannot reasonably infer that they did from other allegations in the Complaint." ADD2; see *Hudson v. Mass. Prop. Ins. Underwriting Assn.*, 386 Mass. 450, 457 (1982) ("Apparent or ostensible authority results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to enter into negotiations or to make representations as his agent."). And even assuming authority, oral statements cannot override the terms of a clear written contract. *See Coll v. PB Diagnostic Sys.*, 50 F.3d 1115, 1124 (1st Cir. 1995).

Regarding Count V, the covenant of good faith and fair dealing, the Complaint does not specify what

conduct, apart from the alleged breach of contract, violated the implied covenant. *See Ayash v. Dana-Farber Cancer Ctr.*, 443 Mass. 367, 385 (2005) (noting implied covenant does not "create rights and duties not otherwise provided for in the contract") (internal quotation marks omitted).

Regarding Count VI, the District Court correctly held:

> Plaintiff . . . does not sufficiently plead the elements of promissory estoppel. He does not allege . . . that Harvard (or any authorized agent of Harvard) made a clear or definite promise that he could perform nude. And even if the plaintiff had made such an allegation, the Complaint does not establish that reliance on such a promise would have been reasonable under these circumstances, where the Sanders Theatre contract contained an express prohibition to the contrary.

ADD1; see *Michelson v. Dig. Fin. Servs.*, 167 F.3d 715, 725-26 (1st Cir. 1999). Clopper identifies no error in this analysis.

IV. Defamation (Count VII)

The District Court correctly dismissed Clopper's defamation claims against Harvard, ADD1, and further elaborated on its reasoning in dismissing those claims against the *Crimson*, ADD3. "To the extent that the allegedly false and defamatory statements . . . were made by Harvard employees or can otherwise be attributed to the university, these statements either accurately relay facts . . . or express unactionable opinions." ADD1.

Harvard was, in fact, "'reviewing' reports about the incident, ADD3; Clopper "did perform nude without permission," ADD1; and the "Complaint directly acknowledges that Clopper worked on his play during work hours." ADD3.

The assertion that Clopper or his performance was "anti-Semitic" expresses an opinion based on disclosed facts, which is not actionable. *See McCafferty v. Newsweek Media Grp.*, 955 F.3d 352, 357 (3d Cir. 2020) ("Under the First Amendment, opinions based on disclosed facts are absolutely privileged, even when an opinion is extremely derogatory, like calling another person's statements 'anti-Semitic'").[11]

Finally, the District Court noted, "even if these statements were somehow actionable, plaintiff's defamation claim against Harvard would still fail because plaintiff acted as a limited purpose public figure with respect to his performance and has not adequately alleged actual malice against Harvard." ADD1; *see Lemelson v. Bloomberg, L.P.*, 903 F.3d 19, 23 (1st Cir. 2018).

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[11] Among other things, Clopper called Judaism "an evil ideology" that is "hideous and duplicitous enough to fool an entire nation" to perpetrate the "unspeakable evil" of circumcision, "a Satanic ritual." YTV 2:02-2:03. He insisted that Jews have "too strong a grip" and wield "a demonstrably evil influence on this country." YTV 2:03. He claimed, "the Jews … raped me" and exhorted his audience "not [to] allow them to rape the next generation of children." YTV 2:05. Invoking the most traditional of anti-Semitic tropes, Clopper threw cash from the stage and shouted the Jews "can keep their money." YTV 1:58.

V. Conversion (Count VIII)

The District Court correctly dismissed Clopper's conversion claim concerning a purported unauthorized video copy of his performance because he failed "to allege the existence of any personal, tangible, property over which Harvard exercised dominion." ADD1; *see Kelley v. Laforce*, 288 F.3d 1, 11-12 (1st Cir. 2002) (citing *Third Nat'l Bank v. Cont. Ins. Co.*, 388 Mass. 240, 383 (1983)); *Blake v. Prof'l Coin Grading Serv.*, 898 F. Supp. 2d 365, 386 (D. Mass. 2012) (collecting cases for proposition that conversion does not apply to intellectual property).

Clopper concedes on appeal that "he should have pled the tort of theft of copyright instead of theft of chattel." Br.54. He contends that the District Court should have granted him leave to amend," *id.*, but this argument is waived because he does not explain the merits of a putative copyright claim in his brief, nor did he develop the issue or request leave to amend below.

VI. Conversion (Count VIII)

The District Court correctly ruled that Clopper failed "to establish the existence of an underlying tort or plead any facts supporting his conclusory allegation of any common scheme or plan." ADD1*; see Kurker v. Hill*, 44 Mass. App. Ct. 184, 189 (1988).

Clopper contends his Complaint "plausibly implicates Harvard as wanting the *Crimson* to publish its angle, and not letting Clopper rebut the accusations. Harvard also knew who the true, secret

authors of the hit pieces were." Br.52.[12] However, such speculative inferences about what Harvard allegedly "wanted" cannot make Harvard jointly liable for the statements of an independent legal entity.

Clopper also argues that Harvard conspired with Baystate to "steal" a video recording of the "play," Br.54, but even assuming a viable underlying "theft" claim, any inference that Baystate shared tortious intent to harm Clopper is defeated by Clopper's own allegations that Harvard "threatened" Baystate to obtain the video by coercion. *Id*.

[12] Clopper is apparently referring to an email from Hammond, not referenced in the Complaint but filed with Clopper's papers below and included in the Joint Appendix, JA167, speculating that a Jewish student associated with the Harvard Hillel named "Benjamin" was the "real" author of the *Crimson* articles, published under the by-lines of Michael Xie and Lucy Wang.

CONCLUSION

For the foregoing reasons, this Court should summarily affirm the District Court's order dismissing all claims against Harvard with prejudice.

Respectfully Submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

By its attorneys,

/s/ William W. Fick
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CERTIFICATE OF COMPLIANCE

I, William W. Fick, Esq., counsel for Defendant-Appellee President and Fellows of Harvard College, certify pursuant to Fed. R. App. P. 27(d)(2)(A) that this motion contains 4,427 words, as counted by the Microsoft Word system used to prepare the motion. The motion was prepared in proportionally spaced typeface in 14-point Century Schoolbook font.

/s/ William W. Fick

CERTIFICATE OF SERVICE

I, William W. Fick, counsel for Defendant-Appellant President and Fellows of Harvard College, certify that, on April 20, 2021, I caused this Motion to be served electronically through the ECF system on the registered participants, including all counsel of record, as identified on the Notice of Electronic Filing.

/s/ William W. Fick

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIC CLOPPER *Plaintiff-Appellant*, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, *Defendants-Appellees*, JOHN DOES 1-10. *Defendants*.	Case No. 20-2140

RULE 28(j) SUPPLEMENTAL AUTHORITY LETTER

Pursuant to Fed. R. App. P. 28(j), Plaintiff-Appellant hereby advises the Clerk of the recent decision in *Meriwether v. Hartop et al.*, (6th Cir., No. 1:18-cv-00753.)[1]

In *Meriwether* Shawnee State University ("Shawnee") threatened a professor with discipline for objecting to a requirement to refer to a transgender

[1] Available at https://perma.cc/9PDS-LHCB.

student by her preferred pronouns. Of particular relevance here:

1. The *Meriwether* Court vacated the lower court's 12(b)(6) dismissal because it was based on the "legally erroneous [premise]" that "[Meriwether's] speech was not protected." Slip op. 22, n.5. Harvard argues that because Clopper's play was not protected speech, it is not bound by the promises of its Free Speech Guidelines. *See* Appellant's Br. 26–41. But by any reasonable analysis, and as Clopper alleges, his play was protected speech, *id.*; and Clopper has adequately alleged reasonable reliance on Harvard's express and implied promises not to retaliate.

2. The *Meriwether* Court further ruled that Shawnee's "alleged [disciplinary] basis was a moving target … [with] repeated changes in position [that] permit a plausible inference that the university was not applying a preexisting policy in a neutral way." Clopper similarly alleges. *See* Appellant's Br. 43–44.

3. Drawing on a rich set of authorities, the Court emphasized the importance to society of robust speech protection in institutions of higher learning, and described three "critical interests," summarized as: students' interests in receiving information, speakers' interests in sharing information, and "the public's interest in exposing our future leaders to different viewpoints." Slip Op. 15–16. Thus, the retaliation Clopper alleges at Appellant's Br. 15–17 and 43–44, beyond actionably breaking promises Harvard made to <u>all</u> members of the community including Clopper, also implicates "critical" societal interests.

<u>/s/ Andrew DeLaney, Esq.</u>

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 19, 2021.

/s/ Andrew DeLaney, Esquire
Attorney for Plaintiff-Appellant

APPENDIX R

No. 20-2140

In the United States Court of Appeals

FOR THE FIRST CIRCUIT

ERIC CLOPPER,
Plaintiff - Appellant,

v.

HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, (Harvard Corporation); THE HARVARD CRIMSON, INC.,
Defendants – Appellees

JOHN DOES 1-10
Defendants

On Appeal from the U.S. District Court for the District of Massachusetts
No. 1:20-cv-11363 (Hon. Richard G. Stearns)

BRIEF OF APPELLANT

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This is an important case that involves whether Harvard University, one of the world's greatest educational institutions, can encourage free speech and promise to protect employees who engage in it from retaliation, propose that the Plaintiff perform an edgy Play, approve every word and action in the Play, advertise it, recommend Harvard's theater as the venue for it, profit from it, and then terminate him and vilify him when he performed the well-received Play, expressing his sincerely held beliefs in his capacity as a private individual.

The Complaint is 40 pages long and contains 10 counts alleging interrelated tortious behavior by Harvard for failing to follow its own policies and promises in good faith, and by its student newspaper for assisting Harvard in doing so. It will assist the Court to hear oral argument about the facts, the counts at issue on appeal, and the applicable law.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1332(a) because Clopper is a resident of Washington, DC, all defendants are incorporated and do business in Massachusetts, and the amount in controversy exceeds $75,000. JA11–12.[1]

This Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from a final order from the United States District Court for the District of Massachusetts wherein all Plaintiff's claims were dismissed in three separate docket entries, on the merits, with prejudice. ADD1–4.[2]

This appeal is timely because notice of appeal was due December 7, 2020, and Plaintiff filed notice on December 1, 2020. JA9. This brief was due March 23, 2021, and Clopper filed it prior.

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[1] The Joint Appendix is cited "JA[page number]."
[2] The Addendum is cited "ADD[page number]."

STATEMENT OF THE ISSUES

1. The District Court dismissed Clopper's claims against Harvard in one day, *with prejudice*, without benefit of an opposing brief. The judge also stated that he had "reviewed plaintiff's explanation" for being one day late filing his brief in opposition (depression, COVID and brain fog), when he had not, because the explanation would have been submitted under a motion to seal that the Court did not allow. Whether the District Court erred in dismissing the case with prejudice and denying Clopper a fair hearing on the merits?

2. Clopper's boss, Clopper's dean, Harvard faculty, Sanders Theatre staff, Harvard's free speech policy, and two Harvard presidents promised Clopper that he could perform his "adult-only" play without censorship or retaliation. Whether the District Court erred in dismissing the breach of employment contract and promissory estoppel claims against Harvard for terminating Clopper, notwithstanding Clopper relied on Harvard's policy and promises?

3. Clopper's standing-ovation, anti-circumcision performance ended in a *wordless* naked dance. Hence his Play cannot truthfully be described as a "Nude, Anti-Semitic Rant." Whether the District Court erred in dismissing Clopper's defamation claim against The Crimson reasoning that the body of an article with an allegedly libelous headline "indisputably dispels any defamatory interpretation," where principles of tort law say otherwise?

4. Harvard "investigated" Clopper for 69 days following his Play. During this "investigation," Harvard interfered with Clopper's contractual relations and procured the stolen "adult-only" parts of his Play, and then shared it with his friends and colleagues (and eventually with the federal judiciary). Clopper alleged this was a breach of the covenant of good faith and fair dealing. Whether the District Court erred in dismissing Clopper's related claim against Harvard on the merits without discussing the claim at all?

5. Harvard threatened Clopper's boss and dean, whom he cared about deeply, with loss of their jobs unless they fired Clopper. Clopper's boss, facing termination and ruin, committed suicide before submitting to Harvard's threats. Whether the District Court erred in dismissing Plaintiff's claim that Harvard had engaged in threatening behavior to deprive Clopper of his rights, in one sentence, calling the claim "implausible"?

INTRODUCTION

The Plaintiff, Eric Clopper, a once idealistic 25-year-old Harvard employee, relied on Harvard's *many* written and oral promises that he would be free to put on his controversial, adult-only play about penis functions called "SEX & CIRCUMCISION: An American Love Story" (the "Play") without retaliation, specifically losing his job. *See Statement of the Case*, Part A, *infra*. Plaintiff's boss approved every word and action in the Play. JA13 ⁋ 12, JA141 n.6. Other Harvard officers, including the dean, also promised Clopper that Harvard would honor its free speech policy, JA15 ⁋⁋ 16–17, JA141 n.4–8, which states that the proper response to "disagreeable" ideas is "reason and speech." JA147.

On May 1, 2018 Clopper gave his well-received anti-circumcision performance that concluded with a wordless naked dance and, after Harvard shut down the Play, a masturbation slideshow. JA16–18 ⁋⁋ 19–23. The next day, Harvard's student newspaper—co-Defendant "The Crimson"—reported that Clopper went on a "Nude, Anti-Semitic Rant in Sanders Theatre." JA18 ⁋ 24–25. The Crimson's reporter had not seen the Play. *Id.* He published the article because a "Benjamin" from Harvard's Hillel community told him to. JA167. Clopper, who is Jewish and anti-circumcision, was forevermore labeled anti-Semitic.

Not surprisingly, chaos ensued. Alumni kept senior deans "up all night" complaining about Clopper, JA168. Smart enough to know that it could not outright fire Clopper without overtly breaking its many promises to him, Harvard began an "investigation" instead. JA19–20 ⁋⁋ 27–30. Harvard

desperately sought any pretext to terminate Clopper. *Id.* Almost immediately, Clopper caught Harvard stealing his play, the tort of copyright theft, and the tort of interfering with his contractual relations. JA21–22 ¶¶ 32–34. This prolonged the "investigation," *id.*, as it would be much harder now for Harvard to argue that it was terminating Clopper in "good faith," as it is legally obligated to do.

Clopper's colleagues and friends organized a protest to show their support for him during this "investigation," JA23 ¶ 40, but the dean of the college had decided to terminate Clopper "whatever the cost." JA24–25 ¶ 37. Harvard threatened to terminate Clopper's boss and friend Thomas Hammond ("Hammond") unless he supported terminating Clopper on a pretextual ground. JA24–25 ¶¶ 43–46. Hammond refused. *Id.* Moving up the chain, Harvard pressured Clopper's dean and friend Robert Doyle ("Doyle,") who had given Clopper a bonus just seven days before the Play, JA23 ¶ 39, to terminate him. With his *40-year career* at Harvard at stake, Doyle reluctantly complied, and mumbled under his breath to Clopper "in a barely audible voice" the termination letter Harvard's attorneys had prepared. JA22 ¶ 35.

Not content with terminating Clopper, Harvard turned its guns on his boss, Hammond, who had approved every word and action in the Play. A Harvard alumnus, brilliant linguist, and long-time employee, JA25 ¶ 48, Hammond had mentored Clopper for many years. In 2016, Clopper perceived that Hammond's obesity would soon take him. So, *Clopper mentored Hammond* at Harvard's gym every day for two years to help him lose 140 pounds so that he would not succumb to his obesity-related illnesses,

compounded by depression.[3] By 2018, Hammond had contracted terminal cancer, and both Clopper and Harvard knew it. JA25 ⁋ 47.

Unlike Doyle, Harvard had no leverage over Hammond, who *under no circumstances* would betray Clopper. So, Harvard hired Hammond's replacement, forced Hammond to train her, JA24–25 ⁋ 44, and issued Hammond a "Final Written Warning" for remaining unapologetically proud in his support of Clopper. JA25–26 ⁋ 48.

Hammond had been at Harvard for two decades; he knew what followed the letter. Before Harvard could terminate Hammond — a pillar of the Harvard community, a friend to all, and a *good man* — he committed suicide on September 24, 2018. JA26 ⁋ 49–50. Clopper, his life already shattered for relying on Harvard's promises and being publicly reviled as an anti-Semite, suffered his deepest wound: finding Hammond dead. *Id.*

Clopper enrolled at Georgetown Law in September 2019, JA28 ⁋ 55, and sued Harvard in July 2020. JA3. Notwithstanding Clopper's plausible allegations, the District Court dismissed all Clopper's claims against Harvard on the first day it could, with *prejudice*. JA5.

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[3] *See Two-Part Video Series Clopper and Thom started (but never finished) to document Thom's weight loss journey to inspire others to do the same,* June 26 and August 2, 2016, https://vimeo.com/421367639/af868a4abb; https://vimeo.com/421544434/5cb2379b74. These are the two characters of this tragedy.

STATEMENT OF THE CASE

A. Harvard Promised Clopper to Respect His Right to Free Expression Without Fear of Retaliation; i.e., Losing His Job.

Clopper had worked on-and-off at Harvard since he was 18 years old. JA11 ⁋ 2. In July 2017, he accepted the full-time position of "Systems Administrator" in Harvard's Language Resource Center ("LRC"). *Id.* Clopper accepted the position because it would pay for 90% of his tuition at Harvard's School of Engineering & Applied Sciences ("SEAS"). JA27 ⁋ 52. Clopper expected to be accepted there because he began working at SEAS at age 18, JA11 ⁋ 2; he had near-perfect physics and standardized test scores, JA27 ⁋⁋ 53–54; moreover, faculty invited him to apply. *Id.*

Clopper, who was born to a Jewish father, is an anti-circumcision activist who advocates for children's right to bodily integrity. JA12 ⁋⁋ 7–8. As a logical corollary, Clopper believes that parents should not irreversibly sever part of their child's penis. [4] *Id.* In October 2017, Cornell University invited Clopper to speak on "how circumcision damages the penis for

[4] Opposing circumcision is not a fringe position. Most Western civilized countries do *not* circumcise their children; the United States is an *extreme outlier* in circumcising the majority of its newborn boys. Any medical guidance to circumcise children in the United States expired four years ago, https://medium.com/@bdmarotta/journalists-the-aap-has-no-circumcision-policy-statement-36647821cd6a, and every other western country's medical organizations advise *against* circumcision. Even mothers in Israel are lamenting their decision. *See, e.g.*, https://www.tabletmag.com/sections/belief/articles/why-we-didnt-circumcise-our-second-son.

both masturbatory and sexual purposes." JA13 ⁋⁋ 9–11. Harvard then invited Clopper to redeliver his graphic Cornell circumcision presentation at Harvard on campus. *Id.*

i. Promises from Senior Faculty.

Clopper showed a videotape of his Cornell lecture to Professor Michael Bronski of Harvard's Women, Gender, and Sexuality Department. *Id.* Bronski then invited Clopper to re-deliver his message at Harvard in the form of an edgy play about "sex" and "circumcision." *Id.* Clopper expressed concern that Harvard might not honor its Free Speech policy, despite its emphatic promises it does, but Bronski *forcefully* promised Clopper:

> your speech -- as rousing as it may be – is a form of political activism. As such, no matter what you [sic] employment position is at Harvard, it is protected speech … *This seems to be a simple case of employment policy* and I am sure HR will stand by you.

JA141 n.7 (emphasis added).

Clopper relied on Harvard Faculty's promises.

ii. Promises from his Boss.

Clopper shared Bronski's invitation to put on an adult-only play about sex and circumcision with his boss at the LRC, Hammond. JA13 ⁋ 12. Hammond enthusiastically supported Clopper in putting on the Play; he approved every word and every action in the Play, *id.*; and Hammond even directed Clopper to

include a sexually explicit dance and masturbation slideshow at the end of his Play to take full advantage of what "protected speech" entails in front of a willing adult audience. JA15 ⁋ 17, JA141 n.6.

Clopper followed his boss's directives and relied on his many promises.

iii. Promises from his Dean.

Dean Doyle also promised Clopper that he would be free to engage in protected speech without retaliation, and assured Clopper that "provocative plays are welcome at Harvard" and that "*your play is conservative in comparison*." JA141 n.5 (emphasis added).

Clopper relied on his dean's promises and assurances that his Play would not even register at Harvard, and that his show was conservative.

iv. Promises, Behavior, and a Contract from Sanders Theatre Staff

Harvard offered its Sanders Theatre (the "Theatre") to Clopper for his show. JA14 ⁋ 13. After carefully reading every word in the contract Harvard provided Clopper, Clopper paid $4,020 on March 1, 2018 to reserve the Theatre for his May 1, 2018 Play. *Id.* Clopper signed the contract in his legal capacity as an officer of an unaffiliated nonprofit (Foregen), ADD9, and *he performed the Play as a private individual*. JA18 ⁋ 23. Thus, *the Play had nothing to do with his job. Id.* Clopper's superiors all promised him that he had the right to engage in protected speech during his Play, and Clopper signed the

contract in reliance upon those promises. Harvard never provided Clopper with any document supplementary to the contract. JA14 ¶ 13, JA143. The contract that Clopper signed did not mention a dress code or prohibit nudity. ADD6–10. Had it done so, Clopper would have chosen another venue. JA14 ⁋ 13.

Moreover, Harvard promoted the Play by hosting advertisements of it showing Clopper naked and pointing to his genitals, with "EXPLICIT CONTENT" warnings obscuring them. ADD5, JA14 ¶ 13. Harvard collected the ticket sales from these nude ads of Clopper for six weeks prior to the show without complaint. JA15 ¶ 16. And, six days prior to the show, the staff of the Theatre reassured Clopper and promised him "we don't intend to censor things." JA 141 n.4.

Clopper relied on the promises of Harvard Theatre staff that Harvard would not censor his show.

v. Harvard's Free Speech Policy

All of these promises—including promises reasonably inferred from Harvard presidents Faust and Bacow, JA15 ¶ 16—revolved around one document: Harvard's Free Speech Policy.[5] Harvard's written free speech policy, which has not changed since 1990, promised all members of the university community, including Clopper, that "[s]peech is privileged in the University community"; that "[w]e do not permit the censorship of noxious ideas"; that "reason and speech provide the correct response to a

[5] Harvard University, *Free Speech Guidelines*, Feb. 13, 1990, https://www.fas.harvard.edu/files/fas/files/freespeech_guidelines_1990.pdf.

disagreeable idea"; and that free speech disputes will be resolved "*consistent with established First Amendment standards*" (emphasis added). Harvard "assign[s] such a high priority to free speech" because it fulfills Harvard's "*primary function* of discovering and disseminating ideas." *Id.* (emphasis added).

B. In Reliance on "Harvard's Promises," Clopper Invested His Life's Savings ($40,000) in Advertising, Jointly with Harvard, an Explicit, Partly Nude, Adult-Only Play.

Clopper was a 25-year-old employee. He "massively relied" on the totality of Harvard's foregoing express and implied written, oral, and by-behavior contractual promises. Specifically, Clopper relied upon promises from (i) senior faculty; (ii) his boss; (iii) his dean; (iv) Theatre staff; (v) the Theatre contract; (vi) two Harvard presidents; and (vii) Harvard's free speech policy, that Clopper could perform his Play without retaliation; hereinafter, collectively referred to as "*Harvard's Promises*." Clopper then spent the fifty-eight (58) days after signing of the contract investing his life savings and all the money he could gather, $40,000, into co-advertising, *alongside Harvard*, his naked, explicit, adult-only Play about circumcision and penises. JA 15 ¶ 17.

C. On the Eve of the Performance, An Unrevealed Officer Demanded that Clopper Abstain from Performing Part of the Play Nude, as Advertised, Which Would Have Left Clopper with a $40,000 Loss.

Three (3) days before the Play, an anonymous source of unknown authority became uncomfortable with the Play's subject matter and then "relayed" to Clopper that his adult-only performance about penises could no longer include the sight of a penis, citing an entertainment ordinance Harvard purported to be bound by. ADD12 ("I've been asked to let you know [by an unknown source] … The May 1 event may well not include nudity.") The contract allowed Harvard to cancel at any time, and for any reason, and "in no event" be liable for Clopper's $40,000 investment. ADD8, provision 15. Clopper had already spent the $40,000. JA15 ⁋ 17. The "pre-event publicity previewed the nude performance." JA92. The audience members had seen *Harvard's ads* of a naked Clopper, ADD5, and they had *paid Harvard* to see a show that would *very likely* contain nudity and frank depictions of the penis and its functions. JA14–16. Clopper, who had relied on *Harvard's Promises* and could not change the Play on such short notice, replied that he would remain "within the bounds of propriety." JA16, ADD11.

D. Clopper Performs His Play as Agreed.

Clopper submitted the *entire* video of the 140-minute Play to the Court. Sealed Ex. A, hereinafter

"*Clopper's Play*."[6] Harvard, falsely claiming that it was providing the Court with a "complete, accurate record of what Clopper said and did," JA56 n.1, instead submitted *twenty-four* (*24) carefully edited seconds* of Clopper's 4-minute naked dance. Sealed Ex's C & D.

Hundreds of audience members received the Play well. *See Clopper's Play*. They laughed, clapped, and some even cried. *Id.* Clopper's 130-minute monologue concluded with a call to protect children's right to bodily integrity. *Id.* The audience gave Clopper a prolonged standing ovation, *id.*, which Harvard misleadingly depicts as, "Clopper bowed and exited the stage." JA60. A Harvard student showered the stage with $100 bills showing support for Clopper's message that children should have the human right to be protected from genital mutilation. Harvard, by contrast, falsely claims its students were applauding an "anti-Semitic diatribe followed by an obscene performance." *Compare Clopper's Play* at 2:09–2:10, *with* JA62.

As the standing ovation continued, Clopper left the stage. *Clopper's Play* at 2:10–2:15. After a brief interlude, Clopper returned on stage completely naked with an inflatable love doll. *Id.* Clopper then performed a *wordless* dance with a couple of erotic moves to the pop song *Toxic* by Britney Spears. *Id.* The vast majority of the audience sat through the entire dance, eventually decided to clap along, and then gave Clopper rousing applause at the end. *Id.* Some gave him another standing ovation. *Id.* Harvard

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[6] Citations to the recordings refer to the timestamp by hour and minute ("H:MM").

misleadingly describes the applauding crowd as the "unwitting public audience." JA60.

Harvard shut down the Play after the dance. JA17 ⁋ 21. Clopper alleged this was a breach of contract. JA37 ⁋ 79. Regardless, after Harvard ended the Play, the Play's queued-up video continued in the background as the audience began to depart. JA17 ⁋ 22.

Unbeknownst to Clopper, the third-party events vendor "Baystate," whom Clopper hired upon Harvard's request, was making an unauthorized screen capture of this final video to please Harvard. JA21 ⁋ 32. In other words, Baystate stole Clopper's intellectual property to remain a "preferred events vendor," so Harvard would continue to offer it lucrative contracts with Theatre performers. *See* Sealed Ex. B, hereinafter "*Harvard's Stolen Slideshow*."

Drawing from other plays at the Paris Opera,[7] Clopper—at the behest of his boss, JA159 n.1—ended his adult-only play about penis functions with a masturbation slideshow, artfully synchronized to Comptine D'un Autre Été: L'après-Midi. Clopper's commentary on this culture's baby-mutilating sexual norms concluded with what is this culture's most

[7] Vadlav Najinski, widely considered to be one of the greatest dancers of all time, ended his "Afternoon of the Faun" performance at the Paris Opera House by masturbating in front of the audience (live, not filmed). Emma Whipday, *Sex, Scandal, and Ballet*, Cherwell, Nov. 2, 2007, https://cherwell.org/2007/11/02/sex-and-scandal-in-ballet/. Najinski's detractors accused him of obscenity, but modern artists vindicated him. *Id.* His play provoked fierce support and derision, just like Clopper's Play.

common conclusory act in adult-only performances: an ejaculation on the face of the receptive partner – in Clopper's commentary, not a human, but an inflatable love doll. *See, e.g., Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update* at 1074,[8] (finding in a large analysis of best-selling, adult-only performances, 62.5% of scenes ended with an ejaculation on the receptive partner's face or mouth); *see also* JA137.[9] As evidence *indisputably* shows, not only were audience members not offended by the masturbation slideshow, they were jockeying among each other to get pictures with Clopper as it aired. *Clopper's Play* at 2:18–2:21.

In the final frame, Clopper posed with the love doll as his "final message" aired, which was a plea to the broader public for help for what he predicted would be forceful retaliation from Harvard's "powerful [alumni] interests" for his anti-circumcision performance, which is exactly what happened. *See Harvard's Stolen Slideshow* at 0:10 (showing Clopper's "final message"); JA17–18 ¶ 22.

E. Harvard's Retaliation Following the Play.

Harvard informed Hammond that a member of Harvard's Hillel Community named "Benjamin" wrote a hit piece against Clopper to discredit his standing-

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[8] Available at http://media.virbcdn.com/files/79/FileItem-273118-AgressionandSexualBehavior2010.pdf

[9] If the slideshow was *illegal*, i.e. "unprotected," e.g., bestiality or necrophilia, that's one thing. But this was a slideshow—matched to classical music—of this culture's *most commonly filmed sexual act*. If Clopper was doing something truly horrific, like mutilating a newborn, Clopper could understand Harvard's purported mortification.

ovation anti-circumcision performance. JA167. The next day, on May 2, 2018, this "Benjamin" recruited two student-Gentile reporters to affix their names to his hit piece and publish it in The Crimson, even though these "reporters" had neither seen the Play nor spoken with Clopper about it. *Id.* Notwithstanding "Benjamin" giving the Crimson "reporters" cell phone footage showing that Clopper gave a wordless, naked dance, they published the false headline that Clopper went on a "Nude, Anti-Semitic Rant," ADD13. JA167. As would be expected, this headline incensed Harvard's alumni, who complained to Harvard's most senior administrators, keeping them "up all night." JA168. These complaints resulted in Harvard beginning an "investigation" into Clopper and his Play. *Id.*

After opponents at Harvard destroyed his reputation, they targeted his career. On May 4, 2018, The Crimson published its next hit piece: "Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours." ADD17. This falsely communicated that Clopper had abused Harvard's time and resources to produce his Play. JA44–45 ¶ 105.

Harvard then interrogated Clopper, trying to persuade him to "admit" to a work policy violation, as the Crimson's latest article claimed. JA19–22 ¶¶ 27–34. Clopper did no such thing, and his boss Hammond confirmed it, so Harvard needed to find a different justification to terminate him, so it expanded the scope of its "investigation." *Id.* Harvard's expansion hit unlawful territory when Harvard, in concert and conspiracy with Baystate, stole a recording of his Play and began sharing—around Harvard (and eventually

with the federal judiciary)—the masturbation portion, which Clopper intended be shown only to the adult audience during the Play. *Id.* Clopper told Harvard that he knew it was doing this, but that he would forgive Harvard if it just honored its non-retaliation policy and promises and let him return to work. *Id.* Caught red-handed with *Harvard's Stolen Slideshow*, Harvard then had to reconsider how to justify terminating him, *id.*, so "[o]ver the next few months, Harvard conducted an extensive investigation." JA62.

Even though Harvard promised to protect free speech, approved every word and action in the Play, advertised that it would contain nudity and adult content, profited off those adult ads, and offered its Theatre as the venue for it, Harvard claimed — after the fact — that the Play was not conservative enough, and it terminated his employment, even though he had performed the Play in his individual capacity and not as a Harvard employee. ADD20. Harvard also ended Clopper's otherwise stellar career by falsely claiming that he had made misleading comments and abused Harvard's time and resources, *Id.*, ignoring the insistence of Clopper's boss Hammond, the *only person* in a position to judge the accusation, that it was groundless. JA24–26 ¶¶ 43–50.

Harvard, to please certain of its alumni, then began to retaliate against Hammond for his refusal to help Harvard terminate Clopper on pretextual grounds. *Id.* Hammond preempted Harvard's retaliatory termination by committing suicide. *Id.* One year later, Clopper matriculated at law school, JA28 ¶ 55, and sued Harvard.

F. Procedural Posture.

On July 20, 2020, Clopper filed a Complaint against Harvard, its student newspaper "The Crimson," and ten Doe defendants ("John Does 1–10"), alleging a web of tortious behavior, broken contracts, and broken promises (Counts 1–10) that culminated in Clopper's termination.[10] JA2.

Plaintiff assented to *five* extensions of time to either Harvard or The Crimson so they could compose their responses. JA4. Defendants filed their respective motions to dismiss on September 28, 2020 and October 5, 2020. JA4–5.

In the midst of a pandemic and unbeknownst to Plaintiff, his lead counsel was bedridden — suffering from diagnosed depression, compounded by COVID with "brain fog," a common symptom, JA118–120 — and he missed the deadline to ask for Clopper's *first* extension to file his Opposition to Harvard's Motion to Dismiss *by one day*. JA175. The next day, on October 14, 2020, without benefit of a brief from the Plaintiff arguing why the Complaint should not be dismissed, the District Court not only granted Harvard's Motion to Dismiss all claims, but did so *with prejudice*. JA5–6.

Plaintiff filed: (1) a Motion to Vacate a Final Judgment on October 16, 2020 for excusable neglect, JA120–125; and (2) an assented to motion to submit affidavit of counsel under seal so Plaintiff's lead counsel could "provide sensitive medical information that is not appropriate for filing on the public docket."

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[10] Clopper reserves the right to appeal all 10 counts.

JA118. On October 19, 2020, Plaintiff filed a revised Motion to Vacate a Final Judgment, together with an attached "Opposition to Harvard's Motion to Dismiss." JA126–153.

Only a few hours later, on the *same day*, the District Court ruled that Plaintiff's motion to seal was moot, JA7, stating that it had "reviewed plaintiff's explanation for his failure to comply with the court's deadline." ADD2. Insofar as the Court did not allow the motion to submit the reasons under seal, however, the court did not in fact review plaintiff's explanation, so it could not possibly have determined whether the circumstances constituted "excusable neglect" in the midst of a pandemic.

The Court reasoned that it would uphold its original dismissal with prejudice because "plaintiff has failed to raise any meritorious argument against dismissal" in his attached opposition,[11] ADD2, foreclosing Clopper's opportunity to amend the Complaint.

Plaintiff timely filed his Opposition to The Crimson's Motion to Dismiss on November 3, 2020.

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[11] Unless an issue is raised in the District Court, it can only be reviewed for clear error. *Blockel v. J.C. Penney Co., Inc.*, 337 F.3d 17, 25 (1st Cir. 2003). The District Court "reviewed . . . the contents of [plaintiff's] proposed opposition to Harvard's motion to dismiss" and denied his motion to vacate "because the court determines that . . . plaintiff has failed to raise any meritorious arguments against dismissal." ADD2. Thus, the District Court *must* have considered all Plaintiff's issues and arguments raised in his opposition to dismiss them on the merits. Therefore, all of Plaintiff's arguments in his attached Opposition to Harvard's Motion to Dismiss are appealable per the applicable standard of review for a judgment on the pleadings.

JA154–176. Two days later, the District Court granted The Crimson's motion to dismiss, again with *prejudice*. ADD3.

Plaintiff timely filed his Notice of Appeal on December 1, 2020, JA9, and now respectfully brings his case to the First Circuit Court of Appeals to challenge the District Court's dismissal and the correctness of its application of the standard of review at the motion-to-dismiss stage.

SUMMARY OF ARGUMENT

Plaintiff has meritorious and important claims against Harvard and The Crimson. At the motion-to-dismiss stage, the District Court was required to accept all pleadings as true and draw all inferences in *Plaintiff's* favor, but it erred in failing to do so. It drew all inferences in *Defendants'* favor, and dismissed all of Plaintiff's claims *with prejudice*, and as soon as it possibly could, without benefit of an opposing memorandum of law, suggesting a predisposition to rule against the Plaintiff. The District Court also erred in not addressing many of his arguments and, at other times, dismissing claims as "implausible" without further discussion.

Plaintiff contends that his allegations are all verifiably true and that he has provided the Court with enough information in his Complaint—which must be a *brief* statement of the facts and counts—that there was considerable unlawful behavior among the Defendants resulting in actionable harm to Plaintiff.

Clopper's boss and his dean—both dear friends of Clopper—did not independently decide to terminate him for his Play. And it was an insult to the integrity of our system to rule *on the pleadings*—in the face of overwhelming evidence—that it is "implausible" that Harvard did not acquiesce to alumni pressure to terminate him.

It is manifestly plausible that Harvard, via Dean of the College Michael Smith, threatened Clopper's boss and dean with their jobs to "play along" with Harvard's fictitious narrative. Unfortunately for Smith, and the alumni he sought to please, Clopper's boss went to his grave before he gave Harvard an inch.

Harvard itself adopted the written policy that the only proper response to a novel idea that some might find noxious, such as Clopper's, is rational discourse on the merits. The academy should not be allowed to: (1) promise to protect free speech; (2) reaffirm the promise (e.g., *Harvard's Promises* to Clopper); and thereby (3) induce reliance (as Clopper relied); but when it suits Harvard (4) vilify the speaker, thereby incensing alumni, and (5) terminate him, in violation of its promises and of Harvard's mission and standards.

The academy must be held to its policy and promises. Paraphrasing Professor Bronski, it is "simple employment policy" to honor its members' right to free expression without retaliation. It is immaterial whether that member is a Professor Emeritus or a Systems Administrator at the Language Resource Center. To try to wriggle out of its many promises to Plaintiff, Harvard, in bad faith, intentionally misstates the rules it promised to honor

for protected speech by classifying Clopper's highly regarded, 2+ hour, tour de force Play as an "unquestionably obscene" "live sex show," citing 24 carefully edited seconds and a slideshow recording it unlawfully stole via conspiracy with a third party.

It cannot be countenanced that so long as Harvard's legion of attorneys can articulate *any* reason, no matter (1) how many promises it breaks; (2) how many employees it threatens; (3) how many *verified torts* it commits; and (4) even how many alumni and/or employees kill themselves, it can always rely on the courts to uncritically accept what it says and rule in its favor, as the District Court did.

Or, this great First Circuit Court of Appeals could treat Harvard like any other litigant. Employers are bound by implied terms, even in the at-will context, and Harvard promised Clopper many times, in many ways, expressly and impliedly, that it would follow its free expression policy without retaliation. Contrary to its principles, policies, and promises, pressured by alumni, Harvard then engaged in an epic retaliation campaign against Clopper in concert with its allies: The Crimson and Baystate. If Harvard needed to cow or dispose of Clopper's allies along the way, it did not hesitate.

Clopper respectfully requests from this Court a remand, to discover whether any and all of his well-pled counts are, in fact, justiciable.

ARGUMENT

I. Standard of Review

This Court reviews the grant of a motion to dismiss under Rule 12(b)(6) de novo. *Ruivo v. Wells Fargo Bank, N.A.*, 766 F.3d 87, 90 (1st Cir. 2014). In assessing a plaintiff's complaint, this Court (1) accepts the Complaint's factual allegations as true; (2) construes allegations in the light most favorable to the plaintiff; and (3) draws all reasonable inferences in plaintiff's favor." *Id.* If, after doing so, Plaintiff's claims are "plausible on its face," then the Complaint must survive the 12(b)(6) motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. Harvard Threatened the Vulnerable Hammonld to Dissuade Clopper from Filing this Lawsuit, and These Threats' Coercive Effect on Clopper Constitute a Plausible Violation of the Massachusetts Civil Rights Act ("MCRA") (Count II).[12]

To establish a claim under the MCRA, "a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation,

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[12] Clopper forwarded two theories under the MCRA: (1) A third-party (here, alumni) coerced Harvard to deprive Clopper of his employment contract rights (which includes the right to free expression via Harvard's policy and promises); and (2) Harvard threatened the sick and dying Hammond with loss of his job and Harvard housing to dissuade Clopper from suing Harvard. JA29–36, JA139–140. This appeal focuses on theory (2) without waiving rights to theory (1).

or coercion." *Currier v. Nat'l Bd. of Med. Exam'rs*, 462 Mass. 1, 12 (2012) (enumerating the elements to prevail on a claim under M.G.L.A. c. 12 § 11I). Threatening behavior directed towards a third party should be considered in any conduct that forms the basis of an MCRA claim. *Haufler v. Zotos*, 446 Mass. 489, 503–504 (2006). As a civil rights statute, the act is "entitled to liberal construction of its terms," applying a reasonable person standard. *See Id.* at 505. A "threat" is the "intentional exertion of pressure to make another fearful or apprehensive of injury or harm," *id.*, and threats "need not be directed at the plaintiff." *Id.* at 504. In the context of the statute, "threats" are not confined to "actual or threatened physical acts." *Buster v George W. Moore, Inc.*, 438 Mass. 635, 647–648 (2003). "Coercion," which may be economic, involves "the application to another of such force, either physical or *moral*, as to constrain him to do [something] against his will." *Id.* at 646 (emphasis in original).

Clopper has the constitutional right "to petition the Government for a redress of grievances." U.S. CONST. Amend I. Harvard attempted to—and for a time did—interfere with this right by threatening the "third party" Hammond with his job and housing if Clopper filed this lawsuit.[13] JA25–26, JA139–140.

[13] Although Harvard may argue that it had the right to freely retaliate against its long-term, dying employee with impunity because he was an employee at will, Harvard still had the legal duty to investigate his retaliation and harassment complaints, JA25, pursuant to 34 C.F.R. § 106.8(c). Harvard failed to take Hammond's complaints seriously, and instead retaliated against him in violation of federal law 34 C.F.R. § 106.71(a). JA25.

Harvard knew Clopper would be apprised of the threat. JA25 ¶ 47.

An "objective, reasonable person" who is dying of terminal cancer may feel "threatened" if his employer is ignoring his legitimate Title IX complaints that it is legally obligated to investigate appropriately, and instead is threatening loss of his job—his lifeline—to prevent Clopper from suing. Indeed, Hammond did feel "threatened." JA25. It is plausible that Clopper, who spent the last two years of his life keeping Hammond alive, would feel "morally constrained" from suing Harvard because he knew the "unraveling" and "increasingly frantic" Hammond would suffer *grievous harm* if Harvard followed through on its threats. JA25. Thus, Harvard's threats to deprive Hammond of his job and his Harvard housing—all for refusing to betray his conscience and "play along" with Harvard alumni's false, self-serving narrative in his dying days—achieved Harvard's intended coercive effect on Clopper.

Yet, the District Court erroneously held without explanation that plaintiff "does not plausibly suggest that Harvard used threats, intimidation, or coercion to achieve any alleged interference with his rights, as required by the [MCRA]." ADD1. The District Court then affirmed its dismissal "on the merits", without addressing Plaintiff's arguments. ADD2.

It is more than plausible that Harvard threatened, intimidated, and/or coerced Hammond because he supported Clopper. In response to Harvard's threats, Hammond put a plastic bag over his head and filled it with helium to kill himself. JA26. Regardless, the Court used the wrong standards in dismissing Count

II, and Plaintiff respectfully suggests more fact-finding is required.

III. Clopper Has Viable Claims for Breach of his Employment Contract (Count IV); and Promissory Estoppel (Count VI).

Clopper argued below that a reasonable jury could conclude that an implied-in-fact contract existed between Clopper and Harvard whereby Harvard would honor its free expression policy without retaliation. JA142. Harvard responded that it "could terminate [Clopper] at any time and for any reason," including for the contents of his Play, JA73, evidently unbound by its free expression policy. The District Court agreed: Harvard has no legal duty to protect free expression, notwithstanding its written policy and its many promises to honor that policy. ADD1 ("even if premised on the content of his performance … Plaintiff, after all, was an at-will employee and … could be terminated at any time 'for almost any reason or for no reason at all.'" citing (*Jackson v. Action for Bos. Cmty. Dev., Inc.*, 403 Mass. 8, 9 (1988))).

A. Harvard's Free Speech Policy, and Its Many Promises to Clopper That It Would Respect That Policy, Created An Implied-In-Fact Contract.

The District Court stopped short in its citation of *Jackson* as grounds for dismissing Count IV. JA140. The *Jackson* court continued that if a jury could reasonably conclude that an implied-in-fact contract existed from the "conduct and relations of the parties," then breach of said contract can support an actionable claim for wrongful termination, even in the

employment-at-will context. *See Jackson*, 403 Mass. at 9.

Here, Harvard made an "offer" to Clopper to put on his graphic Play, at the Theatre, about circumcision's deleterious effects on the penis and masturbation. JA13. Clopper "accepted" this "offer" and shared his well-received idea that we should protect children from genital mutilation. *See Clopper's Play*. Harvard "breached" this contract by retaliating against him, despite its many emphatic promises it would not. *Statement of the Case*, Part A, *supra*. A reasonable jury could follow that line of reasoning and find this fact.

The "terms" of this "agreement" included that if Harvard—and in this case some of its alumni—found Clopper's Play "noxious," the "*correct* response" was one rooted in "reason and speech." *Statement of the Case*, Part A.v, *supra*. Harvard's *actual* response was to (1) misstate the rules for what constitutes "protected speech"; (2) apply its misstated rules to Clopper's Play to posture that it was unprotected; (3) terminate Clopper for his protected speech in violation of its policies; and, finally, (4) bully Hammond into an early grave for refusing to help terminate Clopper.

B. Clopper Reasonably Relied on Hammond's Representations that His Play Was "Protected Speech" Per Harvard's Policy and Promises, Because It Was.

A party to a contract can reasonably rely on another's assertion as to what an imperfectly defined term entails—here "protected speech"—when the

asserter either: (a) stands in a "relation of trust and confidence" to the person relying on the assertion; *or* (b) the asserter has special skill or judgment with respect to the subject matter. *See* Restatement (Second) of Contracts § 169(a), 169(b) (Am. Law. Inst. 2020). If a third person can reasonably believe that a principal has authority to make representations for its agent, then the agent is bound to those representations. *See Hudson v. Mass. Prop. Ins. Underwriting Assn.*, 386 Mass. 450, 457 (1982).

Hammond suggested and directed Clopper to conclude his Play with a naked dance and an explicit slideshow to take full advantage of what "protected speech" encompasses in front of a willing and forewarned adult audience. JA 15 ¶ 17. As Clopper's boss and mentor, Hammond stood in a special "relation of trust and confidence" to Clopper; indeed, Clopper trusted and revered Hammond. JA148. Furthermore, notwithstanding Harvard describing Hammond as an "LRC employee," JA73, he was a Harvard-trained linguist, and the longstanding Director of its Language Center. JA24. So, the linguist Hammond did possess "special skill and judgment" in matters of language, most pertinently what constitutes "protected speech." Importantly, because it was reasonable for Clopper to rely on the Harvard principal's [Hammond's] assertion to him that his Play was "protected speech" under Harvard's policy, then it is immaterial whether his Play was "protected" or not. Moreover, Clopper's reliance on Hammond's assertion that his Play was "protected speech" was *unassailably reasonable* because Hammond was correct. Clopper's Play, when "taken as a whole," clearly qualifies as protected speech.

The performance was a highly regarded, 2+ hour long presentation, built on a lecture at Cornell, that incorporated scholarly analysis, raw passion, humor, less than four minutes of a dance involving nudity, and, after Harvard stopped the play, a physical demonstration. *Clopper's Play*. As a whole, the performance conveyed its ultimate point: which is that circumcision, an ancient religious ritual that was introduced to the United States in an attempt to prevent masturbation and hence to suppress sexuality, is a harmful practice that causes deleterious effects (physical and otherwise) to boys and men, and that should be stopped. *Id.*

Yet, Harvard evades its many promises that it would respect Clopper's right to engage in protected speech without retaliation by omitting, in bad faith, the relevant obscenity tests in its argument. JA66. The District Court appears to follow suit. ADD1.

As courts understand, and so does Harvard, not all adult or sexual material constitutes unprotected "obscenity." For a performance to be deemed obscene and thus "unprotected," *all three* of the following conditions must be met: (1) The entire performance, *taken as a whole*, must appeal to the prurient interests (as defined by contemporary community standards); (2) It must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable state law; *and* (3) *Taken as a whole*, the performance must lack serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24–25 (1973).

Not once does Harvard mention the obscenity test; it just offers legal conclusions, without the required

relevant analysis. JA66. Harvard's misleading effort to label Clopper's Play as a "live sex show" nine times in its Motion to Dismiss, JA54–71, does not make it one, much less make it obscene. That is a question for the fact finder. *See Miller,* 413 U.S. at 24. Regardless, when construed in the light most favorable to the Plaintiff, it can be reasonably inferred that hundreds of audience members clapped in unison to a "nude, expressive dance," *not* to a "live sex show" between a human and a balloon.

In another maneuver to avoid the "taken as a whole" mandate in two prongs of the *Miller* test that Harvard promised to honor, Harvard then arbitrarily divides Clopper's Play into "parts." JA66–67 (labeling Clopper's naked dance and explicit slideshow as the "encore.") Harvard then argues the "encore" "part" "added nothing to speech that Clopper already delivered." *Id.* But this argument fails too.

Clopper challenged the socio-sexual norms of the culture, as Harvard's own "contemporary community standards" *routinely encourage doing*.[14] Clopper's four

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[14] Harvard routinely allows its students to run around campus naked, by the hundreds, where a child might see them. The Crimson applauds these streakers for challenging the social norms regarding nudity. *See, e.g.,* https://www.thecrimson.com/article/2010/12/13/harvard-students-scream-primal/; https://www.thecrimson.com/flyby/article/2011/12/10/tips-for-primal-scream/; https://www.thecrimson.com/article/2012/12/14/primal-scream-run/; https://www.thecrimson.com/article/2014/12/12/primal-scream-protest-chaotic-exchange/; https://www.thecrimson.com/article/2016/5/6/primal-scream-spring-2016/; https://www.thecrimson.com/article/2017/5/5/primal-scream-2017/; https://www.thecrimson.com/article/2018/12/12/primal-

minutes of nudity out of a 140-minute play, or less than 3% of the runtime, was more "proper" because it did not take place in public, but rather was limited to an enclosed theatre where the only observers had *paid Harvard* to attend, knowing from *Harvard's advertisements* that the play would contain nudity and sexual content.

So too with the explicit slideshow, Clopper's "final message" not only emphasized his previous discussion on masturbation, but also *accurately* predicted the retaliation that would follow his Play. *See Harvard's Stolen Slideshow* at 0:10, predicting that "powerful interests" would retaliate. Alumni, who are de facto "powerful", kept senior deans "up all night" goading them to get rid of Clopper. JA168. Thus, this explicit slideshow also added to his serious political and educational message while highlighting Clopper's foresight, and thus was protected speech both in isolated "parts" and certainly when "taken as a whole."

In discussing the critical point as to whether a good faith analysis yields the inevitable conclusion that Clopper's Play is "protected speech," and thus enjoys protection via Harvard's policy and its many promises to Clopper to honor that policy, the District Court, yet again, defers to Harvard. By abandoning clear and

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scream-fall-2018/; https://www.thecrimson.com/article/2019/5/10/primal-scream-spring/; https://www.thecrimson.com/article/2019/12/11/primal-scream-winter-2019/

Note, however, when Clopper performs nude in front of an adult-only audience who *paid Harvard* to see an explicit show about penises, The Crimson "castigates" Clopper, arguing that he should have refrained from nudity "for the sake of decency." JA109. Please…

repeated Supreme Court precedent to take a work "as a whole," the District Court instead "doubts" that Clopper's naked dance was protected. ADD1. *The law on obscenity does not permit a piecemeal analysis on discrete "portions" (or "seconds") of the Play*. It requires considering the Play "as a whole."

Clopper's Play, taken as a whole, contends that children should be protected from genital mutilation. Thus, it has the requisite "literary, artistic, political, or scientific value"; hence the performance could not possibly have been obscene.

C. Terminating Clopper for his Protected Speech Breached his Employment Contract (Count IV).

A reasonable jury could conclude that all the elements of an implied-in-fact contract existed between Clopper and Harvard in his *employment contract*. That is, Harvard made many definite "offers" that it would respect its free expression policy, and thus respect Clopper's right to perform without retaliation his adult-only Play about penis functions. Clopper "accepted" those offers and relied upon them by putting on a provocative, yet protected adult-only Play. Clopper fulfilled his end of this implied-in-fact contract by offering his "novel idea," thus fulfilling Harvard's "primary function" of "disseminating ideas." It is plausible that Harvard breached this implied-in-fact contract by: (1) intentionally misstating the applicable rules regarding protected speech it promised to honor; so that it could (2) classify Clopper's Play as obscene "without question," JA66; and then (3) terminate Clopper for it. This plausible

breach constitutes an actionable claim for Clopper's breach of *employment contract* (Count IV).

D. The Sanders Theatre Contract Did Not Prohibit Nudity.

When construing the terms of an express contract—such as the contract Clopper signed with Harvard in his non-employee capacity—the Court must "consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would be commonly understood." *Jackson*, 403 Mass at 13; *see also* Restatement (Second) of Contracts § 202(1) (Am. Law. Inst. 2020) ("if the principal purpose of the parties is ascertainable it is given great weight."); Restatement (Second) of Contracts § 5 cmt. a (Am. Law. Inst. 2020) ("The terms of a promise or agreement are those expressed in the language of the parties or *implied in fact from other conduct*") (emphasis added).

The "*principal purpose*" of the contract was to provide Clopper a venue to fulfill Harvard's "*primary function* of discovering and disseminating [in this instance, Clopper's] ideas." *Statement of the Case*, Part A.v, *supra*. Harvard promised that Clopper would be free to express his ideas "consistent with established First Amendment standards," *id.*, which in Massachusetts, the entertainment ordinance notwithstanding, includes the right to nude, expressive dance. *See Showtime Entertainment, LLC v. Town of Mendon*, 769 F.3d 61, 80 (1st Cir. 2014) (citing *Cabaret Enters., Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 17 (1984)). This right

to dance nude "draws no distinction" between erotic dances (if you can call Clopper's dance that) and their "less prurient expressive counterparts." *Id.*

Clopper reasonably and "commonly understood" that the contract included his right to engage in "protected speech" (i.e., nude, expressive dance), and Clopper had no reason to believe otherwise. If the Court "considers the circumstances surrounding the making of the contract," all weigh in Clopper's favor.

The contract mentions no dress code, ADD6–10, and Harvard never provided Clopper with a "Sanders Theater Policy Book" containing a "no-nudity" provision. JA14, JA143. On the contrary, Harvard placed nude ads of Clopper—ADD5—on its website and in the Theatre itself for six weeks leading up to the Play, profiting from ticket sales without complaint. JA14 ⁋ 14, JA 15 ⁋ 16. Harvard therefore led Clopper to understand that he *could* perform nude at Sanders Theatre. Thus, it was perfectly reasonable for Clopper to rely on the *express terms* of the contract and Harvard's *implied-in-fact conduct* to invest $40,000 into *co-advertising alongside Harvard* a performance with a brief nude scene.

i. An Anonymous, Unconscionable, and Unconstitutional Threat on the Eve of the Performance does not Constitute a Legally Binding Modification to the Sanders Theatre Contract

There is a covenant of good faith and fair dealing implied in every contract. *Weiler v. PortfolioScope, Inc.*, 469 Mass. 75, 82 (2014). When one party threatens not to perform its contractual obligations,

and instead attempts to extort a modification to the contract without a legitimate reason, the extorted modification is a violation of that duty of good faith. *See* Restatement (Second) of Contracts § 176(1)(d) cmt. e (Am. Law. Inst. 2020).

Fifty-eight (58) days and $40,000 after forming the Theatre contract and three (3) days before its performance, an unknown purported authority caused to be "relayed" to Clopper that his adult-only play, about penises, could no longer show a penis, citing Harvard's purported requirement to comply with an entertainment ordinance.[15] *Statement of the Case*, Part C, *supra*; *see also* ADD12.

Complying with an unconstitutional entertainment ordinance, JA138–139, is not a "legitimate reason." And Harvard's last-minute threat to refuse to perform its contractual obligations and cancel Clopper's Play—invoking provision 15 of the contract, ADD8—was impermissible extortion. Clopper did not cave to this last-minute $40,000 threat, ADD11, and Harvard suffered no damages from his brief nude dance. Had the Play not included nudity, the audience would have been defrauded by the advertisements showing Clopper nude pointing to his genitals.

In defense of its violation of its duty of good faith and fair dealing, Harvard belittles 25-year-old

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[15] The Entertainment ordinance in question, M.G.L. ch. 140, § 183A, does not prohibit nudity, it only requires that the holder of the license state whether nudity will be permitted. This ordinance also only applies to in-person performances. *Id.* Thus, the explicit slideshow is irrelevant to the analysis, notwithstanding Harvard shrieking otherwise.

Clopper. JA59 ("Clopper felt that he had invested too much time and money in his pet project, decided it was 'too late to change the Play,' and believed he had a 'right' [to include nudity].") Yes, exactly: this was reasonable reliance on the express terms and the implied-in-fact terms of a contract. Clopper had a Constitutional right to perform a naked dance, even an overtly sexual one. Even Harvard is bound to basic principles of contract law: it promised Clopper he could perform nude at Harvard's theatre, and Clopper relied on the promise; Harvard did not have the right to modify that most essential term of contract at the last minute by prohibiting nudity.

ii. The District Court Incorrectly Construed Ambiguities about the Contract's Terms in a Light most Favorable to Defendants, not Plaintiff.

The District Court held that an anonymous agent at Harvard could introduce a nudity ban after Clopper had spent 58 days and $40,000 advertising (with Harvard too) a nude performance. ADD1. The District Court did not explain why. *Id.*

Clopper pled that Harvard did not provide any indication that nudity was banned when he signed the contract, JA14, nor did it provide him with a "Sanders Theatre Policy Book," ("Policy Book") that purportedly prohibits nudity. JA143. Therefore, a reasonable factfinder could determine that the parties agreed to be bound by the 25 express provisions in the contract, and by *Harvard's Promises* that he could perform nude and without censorship at the theatre, and not by any of the many provisions of the Policy Book,

which Harvard never produced,[16] and especially not by its undisclosed no nudity provision, which Clopper never would have agreed to.

It is outlandish that Harvard could advertise Clopper nude and sell ticket stubs with an image of Clopper nude, ADD5, and then feign outrage that the Play contained nudity and use nudity as an excuse to fire him. In any event, Clopper's claim that Harvard's reason was pretextual must be accepted as true at the motion to dismiss stage.

Regardless, courts must not lose sight of the forest for one naked tree. Harvard does not give a damn about the nudity. As pled, JA16 ⁋ 18, Harvard (1) routinely allows public nudity;[17] (2) excuses even belligerent nudity when it is politically expedient to do so;[18] and (3) considers sexual art to be an important

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[16] Plaintiff's attorney argued Harvard should have expected "some degree of nude depiction" even though the Policy Book "does not encompass nudity." JA36. Harvard called this a "critical concession," JA71, and thus Clopper's case must fail. The District Court agreed ADD1 ⁋ 3 ("[Plaintiff] appears to concede that the Sanders Theatre contract contains a provision expressly prohibiting nudity in performances."). However, Clopper's attorney, unbeknownst to Clopper, was citing a Policy Book published *after* his Play when he put that "concession" in the pleadings. As evidence for this assertion, see the Policy Book Harvard quotes as its "smackdown defense," JA58 n.3; it was published on September 1, 2020, or 854 days *after* Clopper's play. https://perma.cc/RJN9-GA2W at 3. *If* this Policy Book's provision is a material fact, it is certainly an unresolved one, and thus inappropriate for it to be *the* dispositive issue, notwithstanding the District Court making it so.

[17] *See* note 14, *supra*.

[18] Seventeen days before Clopper's Play, a different Harvard community member took narcotics, stripped naked in the street, threw his clothes in a woman's face, refused to converse with the police officers who respectfully engaged him, and then started

"issue of freedom of speech."[19] Yet now, when some alumni were offended, this imperious institution declares that Clopper's Play is "not art," instead of admitting that Dean Smith lacked the spine to resist pressure from above.[20] JA23 ¶ 37.

E. Clopper states a Plausible Promissory Estoppel Claim (Count VI).

To state an actionable promissory estoppel claim, a plaintiff must show that: (1) the Defendant made a representation to the Plaintiff; and that (2) the Plaintiff reasonably relies on that representation; (3) to his detriment. *Sullivan v. Chief Justice for Admin. and Mgt. of the Trial Court*, 448 Mass. 15, 27–28 (2006). Promissory estoppel claims are identical to contract claims, except reliance can replace consideration. *See Rhode Island Hosp. Trust Nat. Bank v. Varadian*, 419 Mass. 841, 850 (1995). Thus, all of Clopper's arguments above in Sections III.A–III.C, *supra*, in support of his breach of contract claim apply here.

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spitting on the EMTs who tried to help. Harvard did not mention this community member's nudity *once* in any of its publicity, because nudity did not forward its politically expedient narrative. *See, e.g.,* Aaron Goldman, *Update on panel's examination of April arrest*, Harvard Gazette, Sep. 6, 2018. https://news.harvard.edu/gazette/story/2018/09/update-on-harvard-panels-examination-of-april-arrest/.

[19] *See e.g.*, CBS News, *Harvard Mag A Sexual 'Bomb'shell*, Feb. 12, 2004. https://www.cbsnews.com/news/harvard-mag-a-sexual-bombshell/. (*unanimous* panel affirming the principle that sexual art is art).

[20] Dean Smith received a $761,770 salary, and it was not to protect Harvard's free expression policy. https://www.harvardmagazine.com/2020/07/harvard-highest-paid-employees.

(1) Harvard *forcefully* promised Clopper many times that it would respect his right to engage in "protected speech." *Statement of the Case*, Part A, *supra*. Clopper's Play is "protected speech." Part III.B, *supra*. (2) Clopper reasonably relied on all *Harvard's Promises*. (3) As to detriment, he lost his job, JA22, his Harvard graduate school plans, JA27, and his best friend, Hammond, JA26.

In rejecting this straightforward breach of promise claim, the District Court overlooks all *Harvard's Promises* and, without explanation, accepts that an unknown agent's last-minute extortion regarding a contract Clopper signed in his non-employee capacity is sufficient reason to crucify Clopper. ADD1.

Harvard waited 69 days to terminate Clopper because it had nothing, so it labelled his naked dance a "live sex show." However, Clopper already had *at least one* tort claim (interference with contractual relations, conspiracy, theft of copyright) against Harvard. Section VI, *infra*.

Plaintiff implores this Court hold Harvard to its many substantive promises. Otherwise, so long as Harvard can articulate *any* pretext, no matter how attenuated or immaterial, no matter how many torts it commits, and no matter how many careers and lives it takes, it can without repercussion throw its express, written, oral, and implied promises in the trash whenever convenient and rely on courts to rule, "nothing to see here, folks."

IV. Harvard Breached the Covenant of Good Faith and Fair Dealing Implied in Every Massachusetts Employment Contract (Count V).

Clopper alleged that Harvard's various tortious and bad-faith acts violated the implied covenant of good faith and fair dealing in both his employment contract and the Theatre contract. JA39. Harvard argued that Clopper failed to allege specific facts that supported his "conclusory legal allegation" so the count should be dismissed. JA74. Clopper then enumerated Harvard's specific bad-faith acts that would sustain a plausible breach of this covenant. JA146. The District Court dismissed this count on the merits, but without discussing Clopper's specific allegations of bad faith, ADD2, which the Court was required to accept as true.

It is well established under Massachusetts law that every employment contract contains an implied covenant of good faith and fair dealing. *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 104 (1977). "[U]nfair, deceptive, or bad faith conduct" can be a basis for a breach of this implied covenant. *See Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 300 (1980). "The scope of the covenant is only as broad as the [in this case, employment,] contract governs," and terminating an employee in "bad faith" can sustain an action, even for at-will employment. *See Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367, 385 (2005). When an employer fails to follow its own policies, a reasonable jury could find that an employer has breached this covenant. *Id.* at 387 (explaining that when a hospital violates its own bylaws, that can constitute a breach).

In other contexts, a plaintiff need not allege "bad faith," but merely the absence of "good faith," and this absence "can be inferred from the totality of the circumstances." *Weiler*, 469 Mass. at 82 (citations omitted). Other supporting factors include when "one party violates the reasonable expectations of the other" to deprive him from "enjoy[ing] the fruits of the contract." *See Chokel v. Genzyme Corp.*, 449 Mass. 272, 276 (2007). "Eva[ding] the spirit of the bargain," or veering from the fidelity of an "agreed common purpose" can also constitute bad faith. *See* Restatement (Second) of Contracts § 205 cmt. a, cmt. d (Am. Law. Inst. 2020).

Starting an aimless and endless "investigation" to find a pretext to terminate Clopper, as alleged, clearly "evades the spirit" of *Harvard's Promises*. JA19–21. Notwithstanding the District Court's one-sentence dismissal of Clopper's conspiracy claims, ADD1 ⁋ 6, Harvard did conspire with Baystate to steal Clopper's intellectual property to find a pretext to terminate him on; *that is a fact*. Part VI, *infra*. This unlawful "deception" is compelling *prima facie* evidence that Harvard did not deal with Clopper in good faith.

As multiple Harvard principals promised Clopper, "the scope of this covenant [Harvard's free speech policy]," per *Ayash*, applied to his Play. *Statement of the Case*, Part A, *supra*. Clopper sought to "enjoy the fruits [of this policy]," per *Chokel*, by engaging in "protected speech." Part III.B, *supra*. Clopper "reasonably expected" that Harvard would honor its free expression policy and glide like a swan above any resulting controversy, too noble to ruffle its feathers over a piece of performance art.

In any event, the "totality of the circumstances" strongly suggest "bad faith." Clopper "reasonably expected" that Harvard (1) would not terminate him for being an activist in his individual capacity, as promised, *Statement of the Case*, Part A, *supra*; (2) would not through extortion try to impose last-minute contractual modifications to his contract for the Theatre, Part III.D, *supra*; (3) would not treat his nude art inconsistently from all other nude incidents, *Id.*; (4) would not try to escape its promise to protect free speech by misstating the rules of protected speech (cynically and deceptively labeling his Play as an "obscene live sex show"), Part III.B, *supra*; (5) would not with threats pressure his boss to terminate Clopper, and ultimately into an early grave when he refused to submit to that pressure, Part II, *supra*; (6) would not pressure his dean to terminate him, *Introduction*, *supra*; and (7) would not share secret information with The Crimson and claim that Harvard and The Crimson acted independently, Part V.C, *infra*. In summary, Clopper reasonably expected that Harvard would be true to its word and it would either do nothing or encourage rational discourse about Clopper's message.

Had Harvard honored its word, perhaps Clopper and his community would not have *suffered* the sudden, violent loss of Hammond: *a good man* who made his last stand for his principles and for his friends. Indeed, Clopper observed his friends and former colleagues heaving with grief, as Clopper wept in Dean Doyle's arms over their fallen brother.

This *evil* was "the cost" Dean Smith paid to satiate Harvard's alumni. JA23 ¶ 37. Or, you can believe Harvard's fiction as the District Court does. ADD1.

I.e., Dean Bob Doyle "simply sought to comply" with "the [patently unconstitutional] applicable rules against [performance] public nudity." JA65.

A jury could conclude there was "bad faith" on Harvard's part (Count V). To rule otherwise, especially prior to discovery, would give Harvard almost infinite leeway to breach such covenants. The District Court erroneously ruled that Plaintiff's claims fail on the merits, without addressing the merits of those claims. ADD2.

V. The Crimson's Headlines Depicting Clopper's Play as a "Nude, Anti-Semitic Rant" Improperly Prepared during Work Hours are False, and Thus Give Rise to an Actionable Defamation Claim (Count VII).

To succeed on a defamation claim, a plaintiff must prove (1) the publication of a (2) false statement (3) of and concerning the plaintiff which was (4) capable of damaging his or her reputation in the community and which (5) either caused economic loss or is actionable without proof of economic loss. *Stanton v. Metro*, 438 F.3d 119, 124 (1st Cir. 2006). If Clopper is a public figure, to succeed on such a claim he must plead the additional element (6) of actual malice as well. *Scholz v. Delp*, 473 Mass. 242, 249 n.8 (2015). Plaintiff pled all six elements with specificity. JA161–168.

The Crimson argued that Clopper's defamation claim should fail because there was no malice, JA96–98, nor falsity. JA90–96. But Clopper pled exceptional malice, JA166–168, and the District Court did not address this element. ADD3. The Crimson employed

a novel legal argument to contend that its headline was true: parse the truth of a statement word by word in isolation, ignoring context: "Nude," "Anti-Semitic," and "Rant." JA91–96 ("When one examines the three allegedly objectionable statements in turn [one by one, word by word], it is apparent that none of the allegedly defamatory statements rise to the level of an actionable tort."). The District Court agreed that it is appropriate to dismiss a defamation count on the pleadings by assessing the truth of a statement "word" "by" "word," in isolation. ADD3 ("*Portions* [individual words] of the third statement ["Nude, Anti-Semitic Rant"] are also demonstrably true.") (explaining the "nude" "*portion*" is true in paragraph 3 and the "rant or anti-Semitic" "*portions*" are unactionable opinions in paragraph 4) (emphasis added).

A. A Reasonable Reader Could Have Interpreted and Did Interpret the Crimson's Headline to Mean that Clopper Went on a Naked, Anti-Semitic Rant, Which is Libelous Because He Did Not.

The District Court ruled that the allegedly libelous headline is not "*reasonably* capable of the defamatory meaning." ADD3 (opining, without citation, defamation's "threshold question [as a matter of law]" of "whether [the] communication is reasonably susceptible of a defamatory meaning," from *Stanton*, 438 F.3d at 124–125). The District Court explained, "[s]tatements must be read in their context . . . and here, the context of the referenced headline

indisputably dispels any defamatory interpretation." ADD3 (emphasis added).[21]

Despite the clear import of the headline, the lower court thus ruled The Crimson was immune to the defamation claims: "The first line of the article, after all, explicitly clarifies that 'Harvard is 'reviewing' reports that University employee Eric Clopper made anti-Semitic comments and *stripped to the nude during a public performance* he gave in Sanders Theatre.'" ADD3 (emphasis in original). The logic is difficult to follow.

Because the Crimson stated that Clopper "made anti-Semitic comments" and that he "stripped to the nude" in the "first line," that somehow "explicitly clarifies" that he did not go on a "nude, anti-Semitic rant"? And, furthermore, this analysis is "indisputable"?

Even if "[t]he first line of the article, after all," somehow functioned as a disclaimer (which is doubtful), "words may be libelous . . . unless they are incapable of a defamatory meaning." *King v. Globe Newspaper Co.*, 400 Mass. 705, 717–718 (1987). In assessing the *mere susceptibility* of a defamatory meaning, "it is not dispositive that a numerical majority of its audience would arrive at a non-defamatory interpretation," but rather whether "'a considerable and respectable segment of the community' would nevertheless read article as

[21] The District Court's one-paragraph analysis of the headline that destroyed Clopper's life assumes that the text of the article is part of the headline's "context," contrary to Restatement (Second) of Torts § 563 cmt. d (Am. Law. Inst. 2020).

discrediting plaintiff." *Stanton*, 438 F.3d at 127 (citing *King*, 400 Mass. at 718).

Contrary to the District Court's conclusion, hundreds of compassionate people from Harvard's community in fact "disputed" the veracity of these hit pieces, including Harvard's own eminently qualified "Professor of Media & Activism" Michael Bronski. JA43 ⁋ 101(c) ("the title implies you are nude though [sic, through] the entire show, which is not true - and gives the casual reader a TOTALLY inappropriate and inflammatory description of the event."); JA42 ⁋ 101(a) (given that *hundreds* of Harvard's liberal community members gave the Play a prolonged standing ovation, it can reasonably be inferred that the Play was not a "naked, anti-Semitic rant"); JA44 (*hundreds* of "overwhelming critical comments" "disputing" the veracity of the Crimson's article with thoughtful and scathing rebuttals of its false description of the event); JA159 (*thousands* of viewers writing Clopper as to how the Play has expanded their perspectives and "changed their lives").[22] Had the District Court accepted Clopper's pleadings as true for purposes of the Motion to Dismiss, it would know of this fervent (and ongoing) "dispute," instead of curtly asserting that Clopper's allegations are "implausible."

Instead of interpreting the truth of a statement "word" "by" "word" in isolation, as The Crimson suggests, without legal authority, and as the District Court ruled contrary to principles of tort law, the

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[22] When a "'communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury.'" *Stanton*, 438 F.3d at 125. Clearly, the Crimson's headlines are susceptible to both meanings, and the District Court erred in holding that it is indisputable otherwise.

appropriate inquiry is whether "one reasonable interpretation of the juxtaposition of [the article's contents]" is defamatory. *Stanton*, 438 F.3d at 131 (holding that placing a picture of a teenage girl next to a suggestive headline met the burden of a defamatory insinuation at the motion-to-dismiss stage). As in *Stanton*, if placing a picture adjacent to a suggestive headline is a close enough juxtaposition to constitute libel, then surely the juxtaposing phrase, "Nude, Anti-Semitic Rant" as a headline is "reasonably capable," per *King*, of communicating to a "respectable segment of the population" that Clopper went on a naked, anti-Semitic rant.

Clopper gave a clothed, impassioned, and *well-received* critique of neonatal genital mutilation, and then he did a wordless, naked dance with a balloon doll (to a receptive audience). Defendant Crimson has not met its burden of showing that its headline is not *susceptible* to a defamatory meaning.

It is plausible that a "respectable segment" of the Harvard community read the Crimson's headline (and *only* its headline), "reasonably interpreted" it as communicating that Clopper went on a naked, anti-Semitic rant, and then "discredited him for it," *as The Crimson intended*.[23] Thus, Clopper has the right to

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[23] As the Restatement (Second) of Torts § 563 cmt. d (1977) notes, The Crimson's *true authors* are aware of, and this Court has recognized, "*the public frequently reads only the headline of the articles* or reads the article itself so hastily or imperfectly as not to realize its full significance." *Stanton*, 438 F.3d at 126 (emphasis added). This rule has grown in significance, considering most articles are digital and readers just scroll through headlines. *See, e.g.* the URL of the alleged libel: https://www.thecrimson.com/article/2018/5/3/eric-clopper-production/ (containing Plaintiff's full name "eric-clopper" to

proceed to discovery on his defamation count (VII) against The Crimson.

B. The Crimson Communicated that Clopper Abused Harvard's Time and Resources to Make his Play, and Harvard Relied on These Falsities to Terminate Clopper.

Clopper alleged that the Crimson falsely accused him of wrongdoing by working on the Play occasionally at work, JA45 ¶ 105, even though Clopper was an exempt-level employee [judged by responsibilities, not hours], ADD18, a "leading performer in every respect," JA23 ¶ 41, and had his manager's permission and *encouragement* to do what little he did for the Play while in the office. JA13 ¶ 12.

To dismiss this allegation, the District Court held, before *any* discovery or admission of evidence, that the statement that "Clopper 'improperly worked on the play during work hours' . . . is not reasonably capable of a defamatory meaning because it is *demonstrably true*." (emphasis added.) ADD3 ¶ 2. The District Court reasoned that the Crimson "reveals no mention of the *propriety* of any work he did on his play during work hours." *Id.* (emphasis in original).

Again, the trial court ruled an alleged and disputed fact "demonstrably true" based solely on pleadings, based on no evidence.

In addition, the District Court ignored Plaintiff's cited authority. Specifically, "a defendant in an action

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continue to harm his reputation from Google search results, as intended).

for libel is liable for what is insinuated as well as for what is explicitly stated." *See, e.g.*, *Poland v. Post Pub. Co.*, 330 Mass. 701, 704 (1953); *see also* JA43–44 ⁋⁋ 101(c)–103 (Media Professor Bronski and others "reasonably interpreted" the Crimson's "insinuations" to be defamatory).

So, although the Crimson's May 4, 2018 headline "Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours," ADD17, does not explicitly state that these were "*improper* work hours," the insinuation could not be louder or clearer. Indeed, Harvard was determined to "hear" these insinuations over the many protests of Clopper's colleagues who supported Clopper, at great risk to themselves—most notably Clopper's sole manager Hammond—by citing Clopper's "excessive use of resources" in his termination letter. *Compare* JA22–24 ⁋ 37–42, *with* ADD20 (Harvard [falsely] claiming it terminated Clopper for abusing Harvard's resources.)

Whether Clopper abused Harvard's resources to make the Play, as the Crimson published, is an unresolved question of fact. The District Court was obliged to, but did not, draw the reasonable inference in Plaintiff's favor that the headline's purpose was to communicate that Clopper was a malfeasant employee who flouted the rules of work and should be terminated for that reason. Because these defamatory insinuations plausibly led to his job loss, and it is an unresolved question of fact whether these defamatory insinuations were true, the defamation count (VII) against the Crimson must proceed to discovery.

C. Harvard Plausibly Acted in Concert with the Crimson; Thus, the Defamation Claim (Count VII) should Proceed against Harvard, and the Conspiracy to Defame Claim (Count X) Should Proceed Against Both Defendants.

The District Court held that even if the Crimson's statements could be attributed to Harvard, they were either true or expressed unactionable opinions. ADD1 ⁋ 5 (assessing the truth of a headline word by word, in isolation). In any event, the District Court held that Plaintiff (not given leave to amend) did not adequately allege Harvard's malice. *Id.*

However, the Crimson's statements were defamatory. Part V.A–B, *supra*. Also, as pled, the Crimson "reporter," who had not seen the show, admitted on an audio recording that he had published a "one-sided story," because "[o]ur cover[age] is mostly around the Harvard angle. Where Harvard is standing regarding your performance." JA18 ⁋ 25. This plausibly implicates Harvard as wanting The Crimson to publish its angle, and not letting Clopper rebut the accusations. Harvard also knew who the true, secret authors of the hit pieces were. JA167. Harvard relayed this information to Hammond while it was still operating under its mistaken belief that Hammond would cooperate to pretextually terminate Clopper to save his job. *Id.*

Harvard points the finger at The Crimson. JA56. The Crimson points the finger at Harvard. JA18. Both claim they are "independent." JA56, JA87. Yet, they shared secret information with one another. JA167. This must constitute the "plausibility" standard at the

motion-to-dismiss stage to allow discovery to determine whether the Crimson was acting as an agent of Harvard (sustaining Count VII against Harvard), and thus sustaining the conspiracy to defame claim against both defendants (Count X).

D. Because the Defamation Claim Should Proceed Against the Crimson, So Too Should the Tortious Interference with Employment Relations (Count IX)

Clopper alleges that the purpose of The Crimson's articles was to assist Harvard in terminating him on a pretext. JA48 ¶ 116. An actionable defamation claim is the key element— "improper means or motive"—to sustain this count. JA171-173. The Crimson argued there was no defamation. JA102. The District Court agreed, holding that this "claim fail[s] because [it] depend[s] on the viability of the nonactionable defamation claim." ADD3 ¶ 5. However, if after *de novo* review, this Court holds that the defamation claim should proceed, so too must the tortious interference with employment contract claim (Count IX).

VI. Harvard Pressured Baystate to Steal Clopper's Intellectual Property, and This Constitutes a Tort (Count VIII) and a Conspiracy to Commit that Tort (Count SX).

Clopper pled Harvard engaged in a premeditated conspiracy to steal his intellectual property ("IP"). JA49. The District Court did not accept this pleading as true and dismissed Clopper's conspiracy claim as implausible. ADD1 ("And as to his conspiracy claim

(Count X), he fails to establish the existence of an underlying tort or plead any facts supporting his conclusory allegation of any common plan or scheme.").

However, Clopper's claim that Harvard entered into a conspiracy to steal his IP is *manifestly plausible*, if not a verified fact. Harvard submitted Clopper's stolen IP to the Court to support its bad-faith argument that his play was obscene. *See generally Harvard's Stolen Slideshow*. Thus, not only can Harvard not meet its burden of showing that Clopper's allegations are "implausible," but Harvard has not articulated, and cannot articulate, an alternate theory as to how it came in possession of this stolen property. Harvard claims all it did is "ask" Baystate for the video, JA79, whereas Clopper persuasively alleges that Harvard threatened Baystate with its "preferred events vendor" status to steal Clopper's IP in its desperation to find a pretext to terminate him on. JA21. If Baystate failed to comply, Harvard might rescind Baystate's preferred vendor status and chances for lucrative contracts with Sanders Theatre performers. *Id.*

Plaintiff concedes that Harvard is correct: he should have pled the tort of theft of copyright instead of theft of chattel for his Tortious Conversion Claim (Count VIII), JA79, but then the District Court should have granted him leave to amend. Regardless, the specific tort is immaterial for sustaining the tort of "Conspiracy to Commit a Tort" (Count X), *See Kurker v. Hill*, 44 Mass. App. Ct. 184, 188–189 (1988), and beside the point.

The District Court should have construed the pleadings in the light most favorable to Plaintiff. As in the numerous other instances recounted in this appeal, it did not as to Counts VIII and X. The District Court construed the pleadings *as narrowly as it could have* to dismiss all his claims. *See, e.g.,* ADD1 ⁋ 6 (dismissing Count VIII, tortious conversion, because Clopper alleged the wrong mode of theft: "plaintiff fails to allege the existence of any *personal, tangible property* over which Harvard exerted dominion.") (emphasis added).

To uphold the District Court's dismissal of Counts VIII and X would signal to large employers, like Harvard, that they are: (1) free to economically coerce smaller, dependent business into committing torts for them; (2) free to interfere with their employees' outside contractual relations; and (3) free to enter into conspiracies to steal their employees' outside work product. Harvard cannot be allowed to break the law with impunity.

Moreover, by brazenly stealing Clopper's slideshow and putting it in the hands of the District Court, Harvard successfully distracted it from considering the merits of his claims and succeeded in getting it to dismiss all tort claims against Harvard as "implausible" without further discussion.

VIII. The District Court Erred in Not Applying the Proper Standard of Review on a Motion to Dismiss.

The District Court erred by not accepting pleadings as true or in the light most favorable to the Plaintiff; dismissing some claims without reasons;

and asserting that Clopper's reliance on *Harvard's Promises* was unreasonable without discussion.[24] The proper course is to evaluate the merits on further proceedings.

Perhaps the judge was offended by Clopper's criticism of circumcision. Or perhaps he was offended by the 4-minute-long masturbation slideshow directed by Hammond that played in the background after Harvard ended the Play, which Harvard stole and submitted to the court in lieu of the entire 140-minute-long performance. However, that slideshow was not designed for the federal judiciary. It was designed for Clopper's adult-only audience who *paid Harvard* to see an explicit sex play about penis functions. And the audience *loved* the Play. Even if Harvard, the judge, and this Court do not like the slideshow, Clopper would still have a case.

Clopper thus makes a persuasive appeal that the District Court ignored well-pled factual allegations; **and** dismissed claims without adequate explanation, analysis, or in some cases even discussion; **and** did not apply the law correctly to these genuine disputes. It is in the interest of justice that this Honorable Court allow his claims against Harvard and The Crimson to proceed.

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[24] The District Court also claimed it "reviewed Plaintiff's explanation for his failure to comply with the court's deadline," ADD2, to sustain it dismissing his case with prejudice on the first day it could, but that is false. It denied Plaintiff's motion to seal, *Id.*, which would have contained his counsel's "explanation." A District Court's decision to remain *willfully ignorant* of a litigant's situation (while claiming it's not) during the COVID crisis is about as strong as evidence as one could have that the Court was not neutral and objective.

CONCLUSION

For the foregoing reasons, Plaintiff Eric Clopper respectfully requests a remand to the District Court, so that his case can proceed to discovery and be heard on the merits.

Respectfully Submitted,

Eric Clopper

By his attorney,

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Andrew DeLaney

Attorney for Plaintiff-Appellant

Dated: March 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on March 23, 2021, I electronically filed the foregoing Brief of Appellant with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case, including counsel listed below, are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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APPENDIX S

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	Case No.: 1:20-cv-11363-RGS

PLAINTIFF'S OPPOSITION TO THE HARVARD CRIMSON'S MOTION TO DISMISS THE COMPLAINT

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STANDARD OF REVIEW

In evaluating The Crimson's Rule 12(b)(6) motion to dismiss the claims against it, the Court must (1) accept the Complaint's factual allegations as true; (2) construe them in the light most favorable to the plaintiff; and (3) determine whether the facts allow a reasonable inference that the defendant is liable for the misconduct alleged." *Ruivo v. Wells Fargo Bank, N.A.*, 766 F.3d 87, 90 (1st Cir. 2014); *Handal v. State St. Bank & Tr. Co.*, 941 F. Supp. 2d 167, 172 (D. Mass. 2013) ("[T]he court accepts as true all well pleaded facts and draws all reasonable inferences in favor of the plaintiff."). "To survive a motion to dismiss, the complaint must allege 'a plausible entitlement to relief.'" *O'Connor v. Jordan Hospital*, No. 10–11416–MBB, 2012 D. Mass. WL 1802308, at 3; *accord*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Stevenson v. Amazon. com, Inc.*, No. 15-13505-FDS, 2016 D. Mass., WL 2851316, at 3. Allegations may be direct or inferential. *Id*. Stated differently, when the plaintiff asserts facts, whether directly or by inference, that can be construed as making a claim against The Crimson even plausible, the Court should not dismiss the claim.

INITIAL REQUEST THAT THE COURT VIEW THE PLAY

The Plaintiff's causes of action against the Crimson and the Crimson's Motion to Dismiss concern a play that the plaintiff Eric Clopper performed at

Harvard's Sanders Theatre on May 1, 2018. So far, however, the court has likely seen only a few minutes of a misappropriated slideshow that played in the background *after the show's conclusion* that almost no audience members saw and that was not representative of the play's contents. That portion of the play is not at issue here. It is important and in the interests of justice that the Court view the rest of the play, which is at issue here because that is what The Crimson wrote about. The bulk of Clopper's performance was an erudite 130-minute long clothed PowerPoint presentation with oration, based on a lecture at Cornell, which took up 97.3% of the play, is available to the public on various streaming websites. The brief nude dance that the 25-year-old Plaintiff included at the behest of his Harvard boss included no oration. The nude dance was 3 minutes and 46 seconds long, representing 2.7% of the play. The entire play, including the brief nude dance, is attached in Sealed Exhibit A.[1] Clopper has received many thousands of messages from viewers around the world as to how his play has changed their lives, and he has

[1] All timestamps refer to Sealed Exhibit A. The clothed portion of the play runs from the start to 2 hr 10 min 10 sec. The nude dance runs from 2 hr 11 min 5 sec to 2 hr 14 min 51 sec. Harvard's Maureen Lane intercepted Clopper following his nude dance and ended his play. Cplt. ¶ 21. Once Lane stopped admonishing Clopper, Clopper stayed in Sanders Theatre to meet the remaining attendees and take pictures with them. While Clopper spoke with his fans, Harvard (or Baystate at the request of Harvard) made an unauthorized screen capture of the slideshow that played in the background. Cplt. ¶ 32. Clopper's Harvard boss conceived, filmed, video edited, and insisted that Clopper include the slideshow after the nude dance, and the 25-year-old Plaintiff conceded to his boss's demands. Cplt. ¶ 17. The video shows that few attendees saw the slideshow and none were offended by it.

raised tens of thousands of dollars to pursue this litigation because of his play. Plaintiff respectfully requests the Court view his play to make an informed decision on the merits of his case.

ARGUMENT

I. THE COMPLAINT STATES A PLAUSIBLE DEFAMATION CLAIM (COUNT VII) AGAINST THE CRIMSON

The Crimson knowingly (that is, with malice) published objectively false and defamatory statements about Clopper and his performance in Sanders Theatre. Cplt. ¶ 104. Clopper did not go on a "nude, anti-Semitic rant," as The Crimson falsely claims, and that is a provable fact. The Crimson's publications about Clopper greatly damaged his reputation and led to Harvard terminating his promising career there. Thus, Count VII of defamation and libel against The Crimson should proceed to discovery and trial.

A. Applicable Law

To succeed on a defamation claim under Massachusetts law, a plaintiff must show that the defendant was at fault for (1) the publication of a (2) false statement (3) of and concerning the plaintiff which was (4) capable of damaging his or her reputation in the community and which (5) either caused economic loss or is actionable without proof of economic loss. *Stanton v. Metro*, 438 F.3d 119, 124 (1st Cir. 2006). The level of fault required varies between negligence (for statements concerning private persons) and actual malice (for statements concerning

public officials and public figures)." *Scholz v. Delp*, 473 Mass 242, 249 n.8 (2015). "Words may be found to be defamatory if they hold the plaintiff up to contempt, hatred, scorn, or ridicule, or tend to impair his standing in the community." *See Eyal v. Helen Broadcasting Corp.*, 583 N.E.2d 228, 232 (Mass. 1991).

Regarding element (2), to succeed on a defamation claim, a plaintiff must show that the defendant published a "false statement at its core." *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015). Generalities are not enough; the defamatory statement must be capable of being proven true or false. *Pan Am Sys., Inc. v. Atlantic Northeast Rails & Ports, Inc.,* 804 F.3d 59, 65 (1st Cir. 2015). And, if the plaintiff made comments of "public concern" — as in this case where the plaintiff questioned America's widespread practice of cutting the genitals of healthy baby boys — then the plaintiff must not only allege that the statements are false, but he must also provide "factual underpinning" to support his claim. *Ayyadurai v. Floor64, Inc.,* 270 F. Supp. 3d 343, 355 (D. Mass. 2017). In addition, "A defendant in an action for libel is liable for what is insinuated as well as for what is explicitly stated." *Poland v. Post Publishing Co.*, 330 Mass. 701, 704 (1953).

It is undisputed that The Crimson published five articles about Clopper and his play. Cplt. ¶ 99. Therefore, elements (1) and (3) are met, leaving elements (2), (4), and (5).

B. The Crimson Published False Statements About the Plaintiff

The five Crimson articles, independently and taken together, all state and insinuate that Clopper acted improperly at Harvard in numerous ways. The Crimson portrayed him as a bad person, as an employee who flouts rules about work, and as a racist who goes on "naked rants." More particularly, the false claims are that: (1) Clopper improperly worked on the play during work hours, Cplt. ¶105; that (2) Clopper is anti-Semitic; and moreover, that (3) Clopper engaged in a "nude, anti-Semitic rant" in Harvard's Sanders Theatre. Cplt. ¶ 101(c).

At the outset, we observe that not only does the Plaintiff allege that these claims are false, but also, as detailed below, Clopper's own boss and superior at Harvard Thomas Hammond verified Clopper's defenses to any alleged improprieties. At enormous personal cost to himself, Hammond went to his grave telling Harvard that the claims were false and that Clopper had done nothing wrong. Cplt. ¶¶ 29, 41, 46–50. In addition, the Crimson admitted that it had only published one side of the story; that is, Harvard's side. Cplt. ¶ 25. Despite admitting that, it refused to publish Clopper's rebuttal, the other side of the story. Cplt. ¶ 67(b). The Crimson has thus itself admitted that it failed to uphold basic journalistic standards, and as The Complaint and this Opposition alleges, its reporting transgressed into libelous defamation with malice.

i. Falsity #1: Clopper Abused Harvard's Resources to Make his Play

The claim that Clopper improperly worked on the play during work hours is false. As Hammond told Harvard during its inquisition of Clopper, it had been Hammond's policy for 14 years that employees could work occasionally on personal projects in the Language Resource Center when it did not interfere with their work or the center's operations; Hammond told Clopper that he could do any and all of the work on the play that he did; Hammond himself encouraged Clopper to work on the play at Harvard when not performing departmental duties on Harvard's time; and Clopper was using vacation time anyway. Cplt. ¶¶ 29, 36.

ii. Falsity #2: Clopper is Anti-Semitic

It is a terrible thing to accuse a person, here Clopper, of being an anti-Semite, a hater of Jews. Anti-Semitism bring to mind vile conduct such as drawing swastikas on synagogues or burning them, and chanting "Jews will not replace us" or attacking them. The accusation that Clopper is an anti-Semite is not only false but also preposterous. As the Complaint states as its first fact, "Clopper is Jewish." Cplt. ¶ 7. Clopper is anti-circumcision, not anti-Semitic, and he has many Jewish friends who are also opponents of circumcision. Cplt. ¶ 101(a). As mentioned, at the Motion to Dismiss stage his disavowal must be accepted as true.

iii. Falsity #3: Clopper Went on a "Nude, Anti-Semitic Rant" in Sanders Theatre

The claim that Clopper engaged in a "nude, anti-Semitic rant" in Sanders Theatre is demonstrably false. The phrase communicates and insinuates that Clopper performed nude throughout the play, whereas he only performed nude for 3.75 minutes or 2.7% of the play. When he did perform his nude dance, he did not speak, and hence it is logically impossible for him to have engaged in a "nude, anti-Semitic rant" as the Crimson reported; thus the claim is false. The vast majority of the play consisted of a scholarly PowerPoint presentation based on a lecture, which was the opposite of a rant, and thus the claim that the play was a "rant" was false. The phrase "nude, anti-Semitic rant" falsely communicates that Clopper was virtually deranged in spewing anti-Semitic hate while nude, which held him up to contempt in the Harvard community and cost him his career there.

As the *Restatement (Second) of Torts* § 563, comment d (1977) notes, and as the First Circuit endorses, "*the public frequently reads only the headline of the articles* or reads the article itself so hastily or imperfectly as not to realize its full significance." *Stanton*, 438 F.3d at 126 (emphasis added). The "reasonable reader" may not even read to the second sentence, and thus the initial impression is most important. *Id.* Thus, the majority of the public is going to "[read] only the headline" and "reasonably interpret" the objectively false and intentionally defamatory message that Clopper engaged in a naked, anti-Semitic rant in Sanders Theatre.

The Crimson asserts as a defense in its Motion to Dismiss that if its headline is "not provably true, [it is] at the very least subjective opinions based on disclosed non-defamatory facts." Mem. Law. Supp. To Dismiss ("MTD") at 10, Dkt. No. 36. This Court held in dismissing Plaintiff's defamation claims against Harvard in relevant part that, "these statements either accurately relay facts (plaintiff *did* perform nude without permission) or express unactionable opinions." Dkt. No. 37. However, for the reasons discussed above, and as evidenced by Sealed Exhibit A, the headline *is* "provably false."[2] Furthermore, expressions of opinions not based on facts are open to defamation actions. *See Nat'l Ass'n of Gov't Emps. v. Cent. Broad.*, 379 Mass. 220, 227 (1979). Thus, even if The Crimson's gross mischaracterization of Clopper's anti-circumcision play as an "anti-Semitic rant" constitutes an "unactionable opinion," it is an indisputable fact that Plaintiff did not criticize circumcision (or say anything critical at all) while naked. Thus, The Crimson's "nude, anti-Semitic rant" "opinion" of Clopper's play gives rise to an actionable defamation claim because it is based on the defamatory falsity that Clopper engaged in any form of "nude ranting."

The Crimson responds that Clopper "is parsing too finely" and that "[e]ven if the headline could somehow be misleading by juxtaposing 'nude' with 'rant' …

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[2] Clopper alleges that he has pled enough facts in the form of video evidence that *proves* that he did not engage in a "nude, anti-Semitic rant." The burden should now shift to defendant to direct the Court to a timestamp in Sealed Exhibit A where Clopper engaged in any conduct that could conceivably be construed as a "nude, anti-Semitic rant." Otherwise, Plaintiff's defamation claims should proceed against The Crimson.

there would be no falsehood for purposes of this motion to dismiss." MTD at 8. To support such a bold assertion, The Crimson cites the rule that, "Defamation law 'overlooks minor inaccuracies and concentrates upon substantial truth.'" *Id.* (citing *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 516 (1991)). But the "substantial truth" of the matter is that Clopper delivered an impassioned, erudite, and well-received refutation of a long-standing religious ritual, which has received critical acclaim a great many times online and in person. As Clopper's letter to The Crimson's editor in response to its articles, which The Crimson refused to publish, reads, in part:

> If I can be forgiven for a lack of modesty, I might also point out that the Crimson's article failed to mention that my performance received a sustained standing ovation – hardly what one would expect for an "employee's nude, anti-Semitic rant."[3]

The Crimson appears to suggest that "nude" and "rant" are so far separated in the headline that they did not communicate to their readers that Clopper went on a "nude rant." MTD at 8. However, The Crimson's admittedly "misleading" juxtaposition of "nude" and "rant" is connected by a single word, the horrific qualifier "anti-Semitic." The question is whether a "reasonable interpretation of the juxtaposition [of the article's contents]" is defamatory. *Stanton*, 438 F.3d at 131 (holding that placing a picture of a teenage girl next to a suggestive headline

[3] Clopper sent his "Letter to the Editor" on May 3, 2018, the day following the "Nude, Anti-Semitic Rant" article was published. The Crimson never responded to Clopper, and instead published four more attack articles about him.

met the burden of a defamatory insinuation at the motion-to-dismiss stage). If merely placing a picture adjacent to a suggestive headline is a close enough juxtaposition to constitute libel, then surely the juxtaposing phrase, "Nude, Anti-Semitic Rant" as a headline "reasonably communicates" one image, i.e. Clopper naked ranting with hatred about his own Jewish people. As Harvard's own Professor of Media & Activism Michael Bronski commented, "the title [headline] implies you are nude though [sic] the entire show, which is not true -- *and gives the casual reader a TOTALLY inappropriate and inflammatory description of the event.*" Cplt. ¶ 101(c) (emphasis added).

The Crimson then tries to escape liability for defamation by asserting that the contents of the article provide context to its headline, MTD at 7, citing the rule that "headlines be interpreted in light of the entire context of the publication." *Id.* (citing *Amrak Productions, Inc. v. Morton*, 410 F.3d 69, 73 (1st Cir. 2005)). However, the "context" of The Crimson's headline only compounds rather than clarifies the article's inaccuracies. The hundreds of members of the Harvard community who saw the play, unlike the Crimson's reporters who did not, posted laudatory comments about the play on the Crimson's public messaging board, and they intensely criticized the Crimson's "coverage" and narrative that Clopper's two hour long tour de force about Jewish circumcision constituted a nude anti-Semitic rant. The Crimson's follow-up article to its "Nude, Anti-Semitic Rant" "review" of Clopper's play provides additional context and insight to The Crimson's true motives. Two days following the "Nude, Anti-Semitic Rant" article, The Crimson falsely claims that Clopper, "Planned [his]

Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours," and suggests that Harvard should terminate him on those grounds, which further implies malice (discussed in the next section). Cplt. ¶ 99. As discussed, Clopper had his boss's permission and was on vacation when preparing his play. Cplt. ¶¶ 29, 37.

"In assessing whether a statement can bear a defamatory construction, '[m]eaning is to be derived as well from the expression used as from the whole scope and the apparent object of the writer.'" *Stanton*, 438 F.3d at 129 (citing Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2.4.2, at 2–19 (2004)). By intentionally leading with the objectively false and defamatory headline of "nude, anti-Semitic rant," it is clear that The Crimson set out to attack Clopper, discredit his well-received anti-circumcision message, and end his Harvard career, instead of reporting the news and "fulfill[ing] its mission of upholding the highest standards of journalistic ethics" as its president claims The Crimson does in its October 7, 2020 article covering news of this lawsuit. Jasper G. Goodman, *Harvard, The Crimson Move to Dismiss Lawsuit Filed by Former University Employee Eric Clopper*, https://www.thecrimson.com/article/2020/10/7/harvard-motion-to-dismiss-clopper-lawsuit/. As the next section shows, The Crimson made these false and defamatory statements with actual malice.

C. The Crimson Acted with Malice Towards Clopper

The Court ruled that plaintiff's defamation claim against Harvard failed in part because, "plaintiff

acted as a limited-purpose public figure with respect to his performance and has not adequately alleged actual malice on the part of Harvard." Dkt. No. 37. Plaintiff concedes that he acted as a public figure in the public controversy about circumcision. However, Clopper *did* plead actual malice against both Harvard and the Crimson, Cplt. ¶¶ 104–105, and with considerable specificity, as shown below.

"[A]ctual malice means that the 'defamatory falsehood was published with knowledge that it was [i] false or [ii] reckless disregard of whether it was false.'" *McNamee v. Jenkins*, 52 Mass. App. Ct. 503, 506 (2001). The Crimson had a video of Clopper's play; as discussed, the video shows that the play was not a "Nude, Anti-Semitic Rant." Therefore, The Crimson had actual knowledge that its statement was false, and thus the requirement of malice is met.

The Crimson also acted with reckless disregard for the truth. Michael Xie and Lucy Wang—the reporters of the "Nude, Anti-Semitic Rant" article—*did not see Clopper's show*. Their only source was a "Benjamin" from Harvard's Hillel – the university's Jewish student group, as Clopper's boss Hammond emailed Clopper in a June 5, 2018 email.

> The fact that HR knows about 'Benjamin' [the Harvard Hillel student who wrote the defamatory article and then had Michael Xie and Lucy Wang affix their names to it] suggests that the Crimson and Harvard are sharing information. This collusion could be important for [your attorneys] to know about. May for example be used as evidence that the Crimson's independence is a claim of

> convenience when Harvard doesn't wish to be held responsible for libelous stories.[4]

The fact that Harvard and The Crimson shared information about sources, combined with the fact that they both claim to be independent, reinforces the conclusion that both had ill will and malicious intent in their "coverage" of Clopper's play.

Malice may be "alleged generally" as long as the plaintiff "lay[s] out enough facts from which malice might be reasonably inferred." *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) and as stated, the standard is that all inferences favorable to the plaintiff must be made at the Motion to Dismiss stage. A reasonable jury could find that the totality of the facts — which include: The Crimson (i) calling Clopper's play a "nude, anti-Semitic rant" in the headline despite having a video showing that that statement was verifiably false; (ii) uncritically accepting an invidious hit piece against Clopper from a likely biased source ("Benjamin" from Harvard's Hillel community) without disclosing the source; (iii) Crimson reporters affixing their names to the article despite never having seen the play; (iv) publishing five attack articles against Clopper; (v) refusing to publish Clopper's letter to the editor; (vi) keeping objectively false articles and headlines up online, "nude, anti-Semitic rant," to this day; (vii) conspiring with Harvard as evidence shows while constantly posturing that both parties are independent; and (viii) requesting an interview from Clopper because it is "really interested in achieving balance and bringing

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[4] Email from Hammond to Clopper on June 7, 2018 at 8:20 am.

your perspective to our coverage" on January 26, 2020, and February 13, 2020, on the eve of what The Crimson likely perceived to be an actionable defamation lawsuit against them from Clopper — all create a reasonable inference of actual malice, especially at the motion to dismiss stage.

D. Clopper Suffered Damages from The Crimson's Libel.

There was no reason for Harvard to instigate an "investigation" against Clopper following his standing-ovation play. Indeed, Harvard never gave Clopper a reason why it was investigating him, and the scope of the investigation continued to increase with time. Cplt. ¶¶ 27, 30. At the time of Clopper's play, he was a star employee. Cplt ¶¶ 38–41. His boss Hammond and Dean Kirwan had already agreed to promote him to "Associate Director of Harvard's Language Center" in the near future. Yet, Dean Kirwan received complaints *throughout the night* about The Crimson's libelous "Nude, Anti-Semitic Rant" headline about his play. Cplt. ¶ 103. Indeed, Dean Kirwan herself said in a May 15, 2018 staff meeting that *this "investigation" started because of the complaints* inspired by The Crimson's coverage.[5] The Complaint further pleads a plausible nexus between The Crimson's coverage and Clopper's ultimate termination of his career and plausible graduate

[5] Hammond emailed Clopper on May 15, 2018 at 10:21 am his recollection of Dean Kirwan's public comments to FAS staff earlier that morning about Clopper's play and The Crimson's coverage about it. Hammond's email recounting Kirwan's comments reads, in part, "There were complaints, many complaints from a variety of sources. As a result, this matter is under review."

school aspirations at Harvard University. Cplt. ¶¶ 106, 107.

II. THE COMPLAINT STATES A PLAUSIBLE CLAIM UNDER THE MASSACHUSETTS CIVIL RIGHTS ACT (MCRA) (COUNT II)

To establish a claim under the act, "a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Currier v. Nat'l Bd. of Med. Exam'r,* 965 N.E.2d 829, 837–38 (Mass. 2012). Unlike its federal counterpart, 42 U.S.C. § 1983, the Massachusetts Civil Rights Act does not require a party to show that a government actor deprived the plaintiff of a constitutional right. *Sena v. Commonwealth*, 629 N.E.2d 986, 993 (Mass. 1994).

Element (1) is met here as Clopper had the constitutional right to engage in protected speech under First Amendment standards as an individual on his own time, and in the manner he did in his play. We have shown that Clopper's anti-circumcision play, performed before a sophisticated Harvard audience expecting nudity, *taken as a whole*, was not obscene, and thus it was protected speech. *See* Ex. A of Dkt. No. 44 at Part I.A.

Element (2) is met here as well. Granted, the plaintiff was an employee at will, but as the Complaint alleges, Harvard in its Free Speech Guidelines encouraged free speech consistent with First Amendment standards, and promised not to

retaliate against the plaintiff for engaging in it. Cplt. ¶ 83. Professor Bronski and Thomas Hammond also told the plaintiff that Harvard would not retaliate against him for performing his play. *Id.* Hammond's boss told him that his job was safe. *Id.* A jury could well conclude that the many express, implied, written, and oral promises made by Harvard and several of its agents materially altered his employment contract with Harvard to encompass protection for performing the play as he did. *See* Ex. A of Dkt. No. 44 at Part II; *see also Jackson v. Action for Bos. Cmty. Dev., Inc.*, 403 Mass. 8, 9 (1988) ("A contract implied in fact may be found to exist from the conduct and relations of the parties."). He also relied upon those promises and is convinced that his reliance was reasonable.

The Crimson attempted to and did interfere with Clopper's employment contract—*which encompassed Harvard upholding his First Amendment rights*—to perform his play without retaliation. But for The Crimson's defamation campaign against Clopper, Harvard would not have instigated its 69-day "investigation" against him, which concluded with his eventual termination.

Element (3) is met. Importantly, Clopper need not prove that The Crimson itself interfered with his rights by "threats, intimidation, or coercion" if the defendants acquiesced to pressure from third parties who did wish to interfere with such rights. *See Redgrave v. Bos. Symphony Orchestra, Inc.*, 502 N.E.2d 1375, 1379–80 (Mass. 1978). Contrary to The Crimson's assertion that "[Clopper] pleads no facts to suggest … that The Crimson interfered with his rights by [this element]," MTD at 16, Clopper has pled facts in the Complaint, and reiterates them here,

demonstrating a plausible inference that The Crimson was acting at the behest of a third party. Because The Crimson did not even see Clopper's play, *it must have been informed by a third-party what to write about the play*, as discussed in more detail in Part IV, *infra*. The Crimson told Clopper that it was just reporting the "one-sided" account of "*where Harvard is standing regarding your performance*." Cplt. ¶ 25 (emphasis added). Furthermore, as stated, Harvard informed Hammond that The Crimson received its [defamatory] headline and articles from a "Benjamin" from Harvard's Hillel. *See* Part I.C, *supra*. The Crimson's "coverage" of Clopper's play therefore interfered with Clopper's implied in fact contract that Harvard would not terminate him for performing his play.

The Crimson next tries to deny Clopper relief under the MCRA by inventing the legal rule that an "'actual or potential physical confrontation accompanied by a threat of harm,' … is a required element of the MCRA claim." MTD at 17 (citing *Planned Parenthood League of Massachusetts, Inc. v. Blake,* 417 Mass. 467, 475 (1994). However, as the 2001 case *Carvalho* explains, the SJC only "suggests" that a "potential physical confrontation" is required, and that a "loss of a contract right" may invoke MCRA liability. *Carvalho v. Town of Westport*, 140 F. Supp 2d 95, 101 (D. Mass. 2001) (citing *Willitts v. Roman Catholic Archbishop*, 411 Mass. 202, 210 (1991)). In any event, the SJC is "conflicted" about whether the exception of tortious interference with contractual relations due to acquiescence to third parties has been overruled. *Id.* Thus, *Carvalho* ultimately holds that, "[adverse employment action] in retaliation for [plaintiff's] public statements are—at the motion to dismiss stage—sufficient to state a claim under [the

MRCA.]" *Carvalho*, 140 F.Supp.2d at 102. Where here the plaintiff has alleged adverse employment action in retaliation for The Crimson's libelous coverage of his public statements, he has thus stated a sufficient claim for relief under the MRCA at the motion to dismiss stage.

III. THE COMPLAINT STATES A PLAUSIBLE CLAIM FOR TORTIOUS INTERFERENCE WITH EMPLOYMENT CONTRACT (COUNT IX)

"In order to make out a claim for interference with advantageous business relations, the plaintiff must prove that (1) he had a business relationship for economic benefit with a third party, (2) the defendants knew of the relationship, (3) the defendants interfered with the relationship through improper motive or means, and (4) the plaintiff's loss of advantage resulted directly from the defendants' conduct." *Kurker v. Hill*, 44 Mass. App. Ct. 184, 191 (1998).

Elements (1) and (2) are met. Clopper was employed by Harvard and thus had a contractual relationship with it and The Crimson knew of said contract, as evidenced by its numerous references to his employment there and its erroneous assertions that he abused Harvard's resources to produce his play. Cplt. ¶ 99.

Element (3) is met. "'[I]mproper means' may consist of a violation of a statute or common law precept." *Kurker*, 44 Mass. App. Ct. at 191 (citing *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 817 (1990)). Thus, if Plaintiff's defamation claims

proceed, as the plaintiff argues they should, then defamation is per se an "improper means" of interfering with his employment at Harvard. It is especially plausible that The Crimson's coverage interfered with Clopper's employment because Clopper had an otherwise stellar career at Harvard, Cplt. ¶¶ 38–41, until after the Crimson published its "nude, anti-Semitic rant" article about him, which instigated his investigation, his termination, and his being blackballed from graduate school at Harvard.

The Crimson points to *Dulgarian v. Stone*, 420 Mass. 851 (1995) to try to deny Plaintiff relief under this count. MTD at 17. However, in *Dulgarian*, a news station *accurately reported* on conflicts of interests between body-repair shops and drive-in appraisal services with the intent to inform the public of this potential deceptive conduct. *Id.* In this case, by contrast, The Crimson *intentionally misrepresented* Clopper's play as a "nude, anti-Semitic rant" and admitted that its coverage was one-sided, thereby actionably holding him up to contempt and scorn in the Harvard community – a community where he had worked for the past seven years; a place Clopper had called home and where he expected to do graduate work, whereas now he has since been ostracized on campus as a persona non grata.

Element (4) is met. Finally, as pled in the Complaint, Harvard's administration, Dean Kirwan, and others received numerous complaints because of the Crimson's "coverage," as The Crimson should have expected. Cplt. ¶¶ 42, 103, 117. Without the Crimson's articles, Clopper's standing-ovation performance would have gone unnoticed on campus until he released his well-received play online. However,

because of The Crimson's misrepresentation of Clopper's play as a "nude anti-Semitic rant," Harvard instituted its investigation against Clopper *expressly because of the complaints that Harvard received as a result of* the Crimson's false, defamatory, and malicious coverage of his play. *Id.* Thus, if Plaintiff's defamation claim against the Crimson proceeds, so too must the tortious interference with advantageous business relations claim (Count IX) because then all four elements of this tort would be met.

IV. THE COMPLAINT STATES A PLAUSIBLE CLAIM FOR CONSPIRACY TO DEFAME (COUNT X)

As to this final count against The Crimson, Massachusetts courts recognize the tort of civil conspiracy, which requires a common design or agreement, which need not be express, between two or more persons to do a wrongful act, with a tortious act in furtherance of such an agreement. *Kurker*, 184 Mass. App. Ct. at 188– 90. "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he … (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Restatement (Second) of Torts* § 876(b), (1977). Massachusetts courts have recognized this tort liability. *See, e.g., Nelson v. Nason,* 343 Mass. 220, 222 (1961) (recovery allowed under concerted action theory of § 876(b) where the defendant's deliberate conduct caused another to engage in tortious activity); *see also Pathe Computer Control Sys. Corp. v. Kinmont Indus., Inc.,* 955 F.2d 94, 98 (1st Cir.1992) ("[in] the tort field, the doctrine appears to be reserved for application to facts which

manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result.") (citing *Stock v. Fife,* 13 Mass.App.Ct. 75, 430 N.E.2d 845, 849 n. 10 (1982)).

Here, if Plaintiff's defamation claim (Count VII) proceeds for the reasons above, then Plaintiff contends so too must his conspiracy claim (Count X) proceed. By the Crimson's own admission, its reporters did not see Clopper's show. Cplt. ¶ 25. Ipso facto, if its May 2, 2018 coverage of Clopper's May 1, 2018 play was libelous, then *The Crimson must have received its defamatory information from a third party*; that is, a third party who "provided substantial assistance or encouragement" to defame Clopper and then convince Michael Xie and Lucy Wang to affix their names to the articles.

Plaintiff respectfully disagrees with the court that he failed to plead "any facts supporting his conclusory allegation of any common plan or scheme." Dkt. No. 37. Harvard told Hammond that a third party wrote the hit piece against Clopper in a June 5, 2018 meeting and then got Xie and Wang to publish it under their names. Hammond then relayed this information to Clopper in a June 7, 2018 email as pled above. *See* Part I.C, *supra*.

Thus, plaintiff's conspiracy to defame implicates both a "Benjamin" as a to-be-named defendant, and perhaps even Harvard University. Regardless, Plaintiff's conspiracy to defame against The Crimson should be allowed to proceed.

A PLEA FOR FAIRNESS

The plaintiff and four attorneys (one who drafted demand letters, two who made an appearance, and one attorney retained to appear at trial) have spent more than 1,000 hours curating and reviewing the facts, interviewing friendly witnesses, doing legal research, writing demand letters, and drafting the complaint. We believe that Harvard retaliated against the plaintiff in violation of Harvard policy and promises by his superiors on whom he reasonably relied, that Harvard and The Crimson defamed him, and that he has meritorious claims against them both. We further believe that the plaintiff has pled all counts in the Complaint as thoroughly as needed and as allowed, insofar as a complaint can only contain a short statement of the facts. We respectfully disagree with the court's dismissal of all claims as to Harvard and its reasoning, and believe that the dismissal is appealable (except as to Count I as we grant that the argument that Harvard is not a state actor is correct).

Speaking openly, the plaintiff and his two attorneys of record were also surprised that the Court dismissed the case at the outset of the litigation, and *with prejudice*, without leave to amend (which we do not believe was needed), only one day after the deadline to file an opposition to Harvard's Motion to Dismiss, and after having seen only seen a 5-minute misappropriated slideshow that rolled in the background after the play had ended and after most of the of the audience had left so almost no one saw it. We were also surprised that the Court did not allow the Plaintiff to file its opposition a few days late, or allow the plaintiff's attorney Michael Vigorito to file an affidavit under seal explaining that that he had all

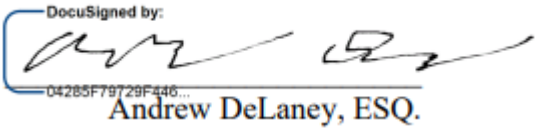
the symptoms of COVID 19 including brain fog, compounded by an illness of a personal nature. Thus, the court ruled that he had not shown excusable neglect without reading his reasons. Let us agree to disagree about the dismissal of the claims against Harvard. We are simply asking that the Court decide the instant claims against The Crimson fairly on the merits after viewing the rest of the play.

CONCLUSION

The Court now has *the full video record* of what transpired in Sanders Theatre. It can see that the play was an erudite and entertaining performance about a controversial topic. The Crimson's articles depiction of the play as a "nude, anti-Semitic rant" improperly prepared during work hours is false. The Crimson even admitted that its articles were one-sided; their articles constituted a series of premeditated, defamatory attacks on his reputation and his career. Moreover, evidence shows that The Crimson colluded with agents of Harvard and others to defame his reputation and call for his dismissal, which led alumni to pressure Harvard to do the same, and Harvard did terminate him and bar him from graduate school. Moreover, The Crimson has refused to take down the defamatory articles, and they are very likely to preclude him from obtaining job and other opportunities in the future that he would otherwise obtain. Therefore, the plaintiff should be allowed to conduct discovery and proceed to trial on all of the counts against The Crimson, and its motion to dismiss should be denied.

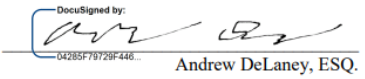
Respectfully Submitted,
Eric Clopper

By his attorney,



CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 3, 2020.



APPENDIX T

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	Case No.: 1:20-cv-11363-RGS

[REVISED] MOTION TO FILE OPPOSITION TO HARVARD UNIVERSITY'S MOTION TO DISMISS AND FOR RELIEF FROM ORDER OF DISMISSAL

The Plaintiff, Eric Clopper, respectfully moves the Court pursuant to Fed. R. Civ. P. 60(b) and 6(b)(1)(B) for relief from the Court's Order entered October 14, 2020 dismissing the Plaintiff's claims against Harvard University with prejudice and to file his opposition to Harvard's motion to dismiss annexed hereto as "Exhibit A". The extension is requested as counsel was temporarily incapacitated due to two

concurrent serious unanticipated illnesses, which resulted in being unable to file the opposition within the deadline. Submitted by mail separately from this motion is the Affidavit of Counsel filed under seal and incorporated herein by reference, which we respectfully request the court to consider before ruling on this present motion.

LEGAL STANDARD

1. Fed. R. Civ. P. 60(b) and 6(b)

On motion and just terms, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect… or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b)(1)-(6). All doubts should be resolved in favor of those seeking relief under Rule 60(b). Wagstaff-EL v. Carlton Press Co., 913 F.2d 56-58 (2d Cir. 1990). The denial of relief of default judgment where non-movant has a meritorious defense would constitute a serious miscarriage of justice. Cobos v. Adelphi University, 179 F.R.D. 381 (1998), citing Wagstaff-EL v. Carlton Press Co., 913 F.2d 56-58 (2d Cir. 1990).

Pursuant to Fed. R. Civ. P. 6(b)(1), "When an act may or must be done within a specified time, the court may, for good cause, extend the time…(B) on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B).

2. Excusable Neglect

Excusable neglect is an equitable doctrine without a precise definition in the Federal Rules of Civil Procedure. See Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership, 507 U.S. 380, 395 (1992). The Pioneer case identifies a four-factor balancing test for determining excusable neglect under Rule 6, which includes: (1) whether the delay in filing was within the reasonable control of the movant; (2) the length of the delay and the delay's potential impact on judicial proceedings; (3) the danger of prejudice to the non-moving party; and (4) whether the movant acted in good faith. Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership, 507 U.S. 380, 395 (1992).

One of the underlying premises of the excusable neglect doctrine is that it exists to prevent victories by default. Newgen, LLC v. Safe Cig, LLC, 840 F.3d 606, 616 (9th Cir. 2016). The court in Newgen observed, "Our starting point is the general rule that default judgments are ordinarily disfavored. Cases should be decided upon their merits whenever reasonably possible." Newgen, LLC at 616. The court noted "the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits". Id. at 616. Similarly, the Rodriguez court observed that a principle of the federal civil procedure system maintains that cases should be decided on the merits as opposed to technicalities, and there is a strong preference for resolving disputes on the merits. Rodriguez v. Village Green Realty, LLC, 788 F.3d 31, 47 (2d. Cir. 2015) *citing* Cargill, Inc. v. Sears Petroleum & Transp. Corp., 334 F.Supp.2d 197, 247 (NDNY 2014).

ARGUMENT

Clopper respectfully requests relief from the Court's Order entering dismissal with prejudice as to Harvard University for excusable neglect under Fed. R. Civ. P. 60(b) and to file his opposition to Harvard University's Rule 12 motion.

The Plaintiff first respectfully requests that the Court provide him relief from the Order dismissing Harvard University with prejudice as a result of excusable neglect on the grounds further described below and for the reasons contained in the Affidavit of Counsel.

The application of the Pioneer balancing test to the present matter suggests that affording the Plaintiff a brief extension of time until October 26, 2020 to file an opposition to Harvard University's Rule 12(b) motion to dismiss is reasonable for excusable neglect. The Court will then be able to consider Plaintiff's substantive and meritorious arguments in opposition prior to concluding that the Plaintiff's case is without merit, and that it warrants dismissal with prejudice.

The opposition deadline fell on October 13, 2020 and the Court's decision on Harvard University's then unopposed motion to dismiss entered on October 14, 2020. Plaintiff's counsel suffered unexpected and serious concurrent illnesses and was unable to timely finalize and file Plaintiff's opposition or request an extension of time to file an opposition, as further described in the accompanying Affidavit of Counsel filed under seal. This medical condition was completely outside the control of the Plaintiff. Moreover, the Plaintiff has acted expeditiously in

requesting relief by requesting an extension under Fed. R. Civ. P. 6(b)(1)(B) a few days after the opposition deadline. The short delay will have a minimal impact on judicial proceedings in this matter, which is an initial stage of litigation.

The Plaintiff will be opposing the other Defendant's, the Harvard Crimson Inc.'s, motion to dismiss, and the Court will be considering those arguments. Plaintiff's allegations and claims against the defendants The Crimson and Harvard University are interrelated, and their defenses are similar, suggesting that the arguments in both of their motions to dismiss should be considered simultaneously. The Crimson also may argue collateral estoppel as to the Plaintiff's claims as a result of the Court's dismissal with prejudice of claims against Harvard University. Denying this motion would prejudice the disposition of Plaintiff's claims as to the Harvard Crimson, Inc., which would be subsequently disposed of on a procedural technicality as opposed to on the merits.

The danger of prejudice to the non-moving party, Harvard University, is minimal since the Court will be deciding the Harvard Crimson's Rule 12(b) arguments after the October 26, 2020 opposition deadline, and Harvard University has already submitted its arguments to the Court. The Plaintiff submits its opposition to Harvard University's motion to dismiss for consideration herewith. Harvard University previously requested an extension to file a responsive pleading specifically to be on the same schedule as the Crimson, as well as for a religious holiday, which the Plaintiff assented to. The Plaintiff acted in good faith by granting that extension and seeking an extension from Harvard University to file its opposition

immediately after the Court entered its ruling, but Harvard denied the request.

Additionally, the Plaintiff has and will advance meritorious arguments for the Court's consideration in opposition to the issues raised in Harvard University's motion to dismiss, and in response to the court's order of dismissal. If Harvard and the court have made compelling arguments as to one or more counts in the Complaint, the Plaintiff will concede them, but the Plaintiff is persuaded that the Complaint contains justiciable claims.

Plaintiff will be prejudiced by dismissing his claims with prejudice before considering factual and legal arguments in opposition to Harvard's motion to dismiss, since the Plaintiff may be permanently barred from seeking relief as to all Defendants on a procedural technicality. The best interests of justice would not be served by disposing of this case with prejudice on a procedural technicality without addressing the merits of the case. The Plaintiff respectfully requests that due to circumstances beyond Plaintiff's control and that of his counsel, the Court hear the arguments for and against dismissal of the lawsuit, and decide the case on the merits.

CONCLUSION

For the foregoing reasons and those contained in the Affidavit of Counsel, the Plaintiff maintains it has advanced reasons under the Pioneer balancing test to establish an incident of excusable neglect, and respectfully requests the Court afford the Plaintiff relief under Rule 60(b) as to its Order dismissing Plaintiff's claims with prejudice, to file its opposition

to Harvard University's motion to dismiss annexed hereto as "Exhibit A", and hear and consider both motions to dismiss simultaneously.

Respectfully submitted,

/s/ Michael Vigorito
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Dated: October 19, 2020

CERTIFICATE OF SERVICE

I, Michael Vigorito, hereby certify that this document has been filed on October 15, 2020, through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and by email to William Fick, 24 Federal St., 4th Floor, Boston MA 02109 (wfick@fickmarx.com).

Exhibit A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	Case No.: 1:20-cv-11363-RGS

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PRESIDENT AND FELLOWS OF HARVARD COLLEGE'S

MOTION TO DISMISS

Dated: October 19, 2020

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO HARVARD'S MOTION TO DISMISS AND IN SUPPORT OF ITS MOTION TO VACATE DISMISSAL OF THE CASE

In evaluating Harvard's Rule 12(b)(6) motion to dismiss the claims against it, the Court must (1) accept the Complaint's factual allegations as true; (2) construe them in the light most favorable to the plaintiff; and (3) determine whether the facts allow a reasonable inference that the defendant is liable for the misconduct alleged." *Ruivo v. Wells Fargo Bank, N.A.*, 766 F.3d 87, 90 (1st Cir. 2014); *Handal v. State St. Bank & Tr. Co.*, 941 F. Supp. 2d 167, 172 (D. Mass. 2013) ("[T]he court accepts as true all well pleaded facts and draws all reasonable inferences in favor of the plaintiff."). "To survive a motion to dismiss, the complaint must allege `a plausible entitlement to relief.'" *O'Connor v. Jordan Hospital*, No. 10–11416–MBB, 2012 D. Mass. WL 1802308, at 3 ; *accord*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Stevenson v. Amazon. com, Inc.*, No. 15-13505-FDS, 2016 D. Mass., WL 2851316, at 3. Allegations may be direct or inferential. *Id.* Stated differently, when plaintiff asserts facts, whether directly or by inference, that can be construed as making a claim against Harvard even plausible, the Court should not dismiss the claim.

I. THE COMPLAINT CONTAINS VIABLE CLAIMS THAT HARVARD VIOLATED THE

PLAINTIFF'S RIGHT TO FREE SPEECH (COUNTS I AND II)

Harvard's violations of the Massachusetts Civil Rights Act insofar as they relate to the violations of Clopper's Constitutional rights ensure that this claim must be allowed. In order to prove a claim under the Massachusetts Civil Rights Act, M.G.L. Ch. 12, a party does not need to show that it was a government actor that deprived the plaintiff of a constitutional right, only that a constitutional right has indeed been violated. *Sena v. Commonwealth*, 629 N.E.2d. 986, 993 (Mass. 1994). Third, Harvard relies heavily on the assertion that nudity was prohibited in the play under the laws of the City of Cambridge, a state actor. As discussed below, nude dancing is constitutionally protected so the prohibition is unconstitutional and invalid. Thus, even though Harvard is not a state actor, Clopper had a right to constitutionally protected free speech at Harvard.

A. CLOPPER'S PLAY TAKEN AS A WHOLE WAS NOT OBSCENITY AND THEREFORE IT IS PROTECTED FREE SPEECH

Harvard materially misrepresents the nature, substance, and character of Clopper's play and of the applicable law in an attempt to support its bold claim that "without question" Clopper's play is obscene, MTD at 11, and not entitled to First Amendment protection. An accurate portrayal of Clopper's performance as a whole and of the law as to what constitutes obscenity leads to the conclusion that the play was not obscene and that it is entitled to constitutional protection.

For a performance to be deemed obscene and outside the bounds of First Amendment protection, all three of the following conditions must be met: 1) It must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable state law; 2) The entire performance, taken as a whole, must appeal to the prurient interests (as defined by contemporary community standards); and 3) Taken as a whole, the performance must lack serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24-25 (1973). In applying this test, the court has ruled that nudity alone does not place otherwise protected material outside the mantle of First Amendment protection. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981). As such, nude dancing has been held to be expressive conduct that falls within the perimeter of the First Amendment's protections. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *Cabaret Entertainments, Inc. v. Alcoholic Beverages Control Commission*, 393 Mass. 13 (1985). Furthermore, even "hardcore sexual activity" (whether it be in the form of "masturbation," "lewd exhibition of the genitals," or "ultimate sex acts") only constitutes obscenity when such activity is unalloyed with some constitutionally recognized form of expression. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293 (2000); *see also* James Weinstein, "Democracy, Sex and the First Amendment," 31 N.Y.U. REV. OF L. & SOCIAL CHANGE 865, 870 n. 19 (2007). Massachusetts courts have ruled that free speech protections for expressive conduct (including adult entertainment) go even further than the First Amendment does. *Showtime Entertainment, LLC v. Town of Mendon*, 769 F.3d. 61, 79-80 (Mass. 2014).

Here, Clopper's performance was not obscenity. Quite to the contrary, the performance was a highly regarded 2+ hour long presentation built on a lecture at Cornell that incorporated scholarly analysis, raw passion, humor, less than four minutes of a dance involving nudity for comic relief, and after Harvard stopped the play, a physical demonstration. As a whole, the performance conveyed its ultimate point: which is that circumcision, a sacred religious ritual that was introduced to the United States in an attempt to prevent masturbation and hence to suppress sexuality, is a harmful practice that causes deleterious effects (physical and otherwise) to boys and men which should be stopped. The audience gave the performance a standing ovation, and to date it has garnered over 187,000 views on Youtube, with a ratio of 6,900 "likes" to 232 "dislikes." We ask the Court to also consider the entirety of the play, including the clothes parts, which is a professional production available for viewing online.[1]

Harvard nonetheless attempts to portray the performance as obscenity by grossly mischaracterizing it as being, in large part, nothing more than a debased public "live sex show" devoid of any other purpose,[2] when the play was an educational tour de force, and nudity in any form constituted less than 3% of the entire performance. Moreover, the acts that Harvard claims are prima facie evidence of the performance as a whole being

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[1] https://www.youtube.com/watch?v=FCuy163srRc/ Note: YouTube has restricted access to viewing Clopper's play, and it requires sign-in with a Google account to view it.

[2] Harvard excerpts Clopper's the most slapstick portion of Clopper's nude dance in furtherance of this mischaracterization.

obscene (exposure of Clopper's penis, and simulated sex acts and masturbation shown in the background as a series of slide, after Harvard had ended the show, and after most of the audience had left), are in fact educational in demonstrating several of the overall points that Clopper was trying to make: that circumcision has a deleterious effect on the physical functioning of the male genitalia, and that (in a tongue in cheek way) there is a bizarre interplay between the state of sexual affairs in America and circumcision. Harvard's argument fails because: 1) The presentation taken as a whole contained so much educational value that the performance cannot possibly be deemed obscene; 2) the nudity and sexual acts at the end of the show did not meet the definition of obscenity; and 3) even if individual acts within the performance constituted obscenity, which they do not, they cannot be treated as a standalone unit for the purpose of rendering the performance as a whole outside the bounds of First Amendment protection.

Furthermore, the performance did not take place in public, but rather was limited to a relatively small theatre where the only participants, most from the Harvard community, were those who had paid money and voluntarily chosen to attend, knowing from the advertisements – which showed Clopper in the nude pointing to his genitals, and actors wearing inflatable penises – that the play would contain nudity and sexual content. As such, for Harvard to claim that Clopper exposed himself publicly, suggesting through innuendo that Clopper and his performance were on par with some perverted street flasher, is specious, if not patently absurd. In fact, the only case law Harvard cites in support of its argument that

lewd public displays (a mischaracterization that it attributes to Clopper's performance) are illegal and outside the bounds of First Amendment protection involves a man who exposed himself on a subway platform, *see Commonwealth v. Maguire*, 476 Mass. 156 (2017), and even in that case, the court reversed the man's conviction for lewd conduct. This merely underscores how little legal merit there is to Harvard's suggestion that Clopper's performance falls outside the bounds of First Amendment protection.

B. CAMBRIDGE'S BLANKET LAW AGAINST NUDITY IS UNCONSTITUTIONAL AND CANNOT BE VALIDLY INVOKED TO RESTRICT CLOPPER'S CONSTITUTIONAL RIGHT TO FREE EXPRESSION

Cambridge's blanket prohibition on nudity is unconstitutional and thus Harvard's reliance on it is void ab initio. Bans on public displays of nudity are unconstitutional unless the bans are narrowly applied only to displays of nudity done on an unsuspecting or unwilling audience. *Commonwealth v. Ora*, 451 Mass. 125 (2008); *Revere v. Aucella*, 369 Mass. 138 (1975).

Here, Cambridge's blanket prohibition against nudity runs afoul of the constitution for overbreadth and lack of any kind of tailoring. Furthermore, as applied to the specific case of Clopper's performance, no constitutionally sound law could reasonably be applied to restrict Clopper's performance since it was show to a sophisticated, intelligent audience that willingly went to a performance that advertised as

being for a mature audience, and where the audience could reasonably expect to hear and see nudity and sexual content as part of the performance. To the extent that Harvard argues that even if the law is unconstitutional, it is absolved of responsibility since they are merely "complying" with Cambridge's law, such an argument is untenable. MTD at 10. The logic behind such an argument is such that wanton violations of the constitution (racial discrimination, violations of civil rights) would go unsanctioned so long as the perpetrator happened to live in a local jurisdiction where it could hide behind unconstitutional local laws. The Court cannot sanction such a result by granting merit to such an argument on the part of Harvard.

C. THE COMPLAINT ALSO CONTAINS A VIABLE CLAIM FOR VIOLATING THE MCRA (COUNT II)

To establish a claim under the act, "a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Currier v. Nat'l Bd. of Med. Exam'rs*, 965 N.E.2d 829, 837-38 (Mass. 2012). We have shown that the first two prongs were satisfied, leaving the third prong. The Court ruled, "nor does [the Complaint] plausibly suggest that Harvard used threats, intimidation, or coercion to achieve any alleged interference with his rights, as required by the Massachusetts Civil Rights Act, M.G.L. ch. 12, ss. 11H, 11I." We respectfully disagree.

First, the complaint alleges that Harvard interfered with Clopper by threats and intimidation in many ways, Cplt. Para. 67(a), and Clopper can confirm he found the interference threatening and intimidating. These included threatening him shortly before he performed the play not to perform nude in it; telling him one day before the play to stop putting up posters advertising his play; by Harvard theatre manager Maureen Lane physically and threateningly blocking him from returning to the stage to make concluding remarks; and by threatening to terminate him for expressing his sincerely help opinion; and by banning him from campus and hence from graduate school.

Second, "Threatening, intimidating, and coercive actions *directed at third parties* should be included in considering any conduct that forms the basis of a claim under the MRCA." *Haufler v. Zotos*, 845 N.E.2d 322, 334 (Mass. 2006). During the investigation, Harvard threatened, bullied, isolated, and threatened his mentor Thomas Hammond. In addition, knowing that Clopper was loyal to Hammond, and to deter Clopper from exercising his right to file this lawsuit, Harvard threatened to fire Hammond. The threat drove Hammond to suicide. Yet, though afraid, held his ground and he did not apologize. He said, "You know what? I stand proudly next to Clopper." *Cptl.* 43–50, 73–76.

II. THE COMPLAINT CONTAINS VIABLE CONTRACT CLAIMS (COUNTS III – VI) AS HARVARD BREACHED NUMEROUS

PROMISES TO THE PLAINTIFF THAT HE REASONABLY RELIED UPON

The Court dismissed most of Clopper's contract claims citing *Jackson v. Action for Bos. Cmty. Dev., Inc.*, 403 Mass. 8, 9 (1988) for the proposition that contracts of employment are usually terminable at will. That is only the starting point, however, for the analysis of a contract claim in the context of at will employment. The *Jackson* case continues, "Of course, there are certain restrictions on an employer's ability to discharge an employee at will." (1) Manifestly, for example, an employer cannot breach an *express promise not to terminate an employee* for engaging in certain conduct. (2) It cannot breach a *contract implied in fact, which is to be determined by whether a reasonably jury could conclude that an implied contract in fact existed.*. *Jackson* at 9. (3) An employer cannot violate *the duty of good faith and fair dealing implied by law* in every contract in Massachusetts. *Id*. (4) It cannot discharge an employee *in violation of public policy*. *Id*. (5) It cannot *discriminate in employment*. *Id*. (6) Even in the absence of a formal contract, "[w]hen a promise is enforceable in whole or in part by virtue of reliance, it is a 'contract,' and it is enforceable pursuant to a 'traditional contract theory' antedating the modern doctrine of consideration." *Loranger Const. Corp. v. E. F. Hauserman Co.*, 376 Mass. 757 (explaining how reliance can constitute an actionable promise under the promissory estoppel doctrine in the absence of a formal contract). (7) provisions of a contract that contain unconstitutional provisions (here, Cambridge law's blanket bar on

nudity) are unenforceable. As discussed below, all of these exceptions to the general rule that employees can be terminated at will apply here.

> The *Jackson* court also began with the view that a court should consider all surrounding circumstances, which this Court has not yet done. Citing precedent dating back to 1897, *Carnig v. Carr*, 167 Mass. 544, 547, the *Jackson* court stated, "in determining a contract's terms 'it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would be commonly understood.'" *Id.* at 13.

> The essence of the Plaintiff's contract claims is that Harvard promised him, expressly and impliedly in fact and law, by words and conduct, that he could do every single thing that he did without fear of having his employment terminated.[3] Plaintiff asserts that he relied upon Harvard's

[3] A subset of express, written promises, verbatim or close to it, by authorized agents of Harvard:

various promises.[4] [5] [6] [7] [8] At the pleadings stage, the Court must accept his assertions as true. Harvard nonetheless terminated Plaintiff for having done what it promised him he could do without losing his job. *Cplt.* ¶ 35. Indeed, the Plaintiff's boss Thomas Hammond -- at the expense of his job, his home, and his life -- repeatedly told Harvard administrators that he had approved everything that Plaintiff did; and that the accusations of misconduct by the Plaintiff, which Harvard reiterated in its termination letter, were untrue; and Hammond refused to fire him. *Cplt.* 46 ¶. In light of Harvard's *many, express written and other promises*, a reasonable jury could conclude that an implied in fact contract existed between Clopper and Harvard that Clopper could perform his provocative play without censorship or retaliation. The only way to prevent an obvious injustice is to allow Plaintiff's breach of promise and contract claims to proceed. They have been pled with considerable and

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[4] We don't intend to censor things…" Clopper's Sanders Theatre Contract, Benjamin Janey, April 25, 2018.

[5] "Provocative plays are welcome at Harvard." "Your play is conservative in comparison." Clopper's Dean, Robert Doyle, April 30, 2018.

[6] "You [Clopper] were just following my instructions." Clopper's boss, Thomas Hammond. June 7, 2018.

[7] "the way to approach it (no matter who you are talking to) as your speech -- as rousing as it may be – is a form of political activism. As such, no matter what you [sic] employment position is at Harvard, it is protected speech … This seems to be a simple case of employment policy and I am sure HR will stand by you." Clopper's supporting faculty member, Michael Bronski. November 2, 2017

[8] Email from Hammond to Clopper on 6/7/2018 stated: "The issue is that you had the right to perform as an individual and we (Harvard) supported that right."

certainly sufficient detail in the Complaint, which Fed. R. Civ. P. 8(a) states must be short.

A. Harvard Encouraged Free Speech, Repeatedly Promised to Protect It, and the Plaintiff Relied on the Promises.

Harvard's free-speech guidelines, which have not changed since 1990, promise that, "[s]peech is privileged in the University community"; that, "[w]e do not permit the censorship of noxious ideas"; and free speech disputes will be resolved "consistent with established First Amendment standards"; and that there is a presumption in favor of free speech. Furthermore, "[hard] choices about appropriate time, place, and manner should have a presumption favoring free speech." Harvard must be judged by its own standards, and the standards that Clopper was relying on when he gave his presentation.

Here, Harvard cannot meet its burden of rebutting the presumption that the Plaintiff engaged in free speech at an appropriate time and place. Professor Bronski told the Plaintiff that he could rely upon Harvard's free speech policy without fear of losing his job, and so did the Plaintiff's own manager Thomas Hammond.

B. Harvard Promised the Plaintiff that He Could Perform Nude With Sexual Content and at Harvard's Sander's Theatre (Count III) Without Fear of Termination (Count IV).

This Court ruled on Defendant's then unopposed motion to dismiss, "Plaintiff does not identify any provision in the Sanders Theatre contract entitling

him to perform nude. Indeed, he appears to concede that the Sanders Theatre contract contains a provision expressly prohibiting nudity in performances." We respectfully disagree for the following reasons.

"Conditions and clauses of a contract may be waived, either expressly or by words and conduct" *Owen v. Kessler*, 56 Mass. App. Ct. 466, 470 (2002). As shown above, Harvard promised to protect the Plaintiff's right to assert his First Amendment rights, see Part I, which included performing nude with sexual content. In addition, Harvard expressly and impliedly promised through words and conduct that he *could* perform nude and include sexual content at Harvard's Sanders Theatre, and the Plaintiff relied upon those promises. *Cplt.* ¶ 17.

Harvard itself advertised an adult-only play with a nude Clopper on the ads and collected ticket sales without complaint for approximately six weeks, until just before the show. *Cplt.* ¶ 18*; Owen¸* 56 Mass App. Ct. at 470 ("a waiver [can be] established by the acceptance of payments and continued dealings between the parties."). In addition, the Plaintiff advertised the show with inflatable penises in Harvard Yard, so Harvard was on notice that there might be a discussion of and depiction of an erect penis in the Clopper's show about penises. *Cplt.* ¶ 15.

Harvard itself suggested and booked Sanders Theatre for the play, and then Harvard advertised and profited off of advertising Clopper's "adult-only," play about "sex," "circumcision," and an "explicit" "love "story" up until the eve of the play. *Id.* Thus, Harvard was at least on constructive notice that

nudity and sexuality would be included in the play, if not express notice. *The document the Plaintiff signed to book the theatre did not prohibit nudity*. Dkt. No. 30-1 Ex. D. Harvard did not provide Clopper with the external document ("Sanders Theater Producer's Handbook") referenced to in Provision 18 of the contract that prohibited nudity, nor did Harvard provide Clopper with any other document outside the four walls of the contract. *Id.* Clopper read the contract carefully and, noting that there was no prohibition on nudity, he "took it." *Cplt.* 18. If Harvard did not want Plaintiff performing nude there, it had a duty to inform him that nudity was not permitted. Instead Harvard and their various agents promised Clopper that he would "not be censored," and that his "play was conservative in comparison" to other programs on campus.[9] *Nudity in the play was integral part of the bargain that the Plaintiff made with Harvard when booking the theatre*. Clopper reasonably and massively relied on the written, oral, and "by conduct" representations by Harvard representatives by investing $40,000—his life's savings and all the donor support he could muster—into putting on the play as he did, which included exercising his Harvard promised First Amendment right to nude, expressive dance. *Cplt.* 78. The Plaintiff states that had he been informed in time that nudity was not permitted, he would have chosen another venue. *Cptl.* 78.

Moreover, Harvard cannot blame Clopper for not knowing that nudity was prohibited. Harvard likely did not realize *itself* that the license for Sanders Theatre did not allow nudity until after tickets had

[9] *See supra* note 4.

been sold and three days before the play was about to be performed. *Cplt.* ¶ 18. That was Harvard's mistake. By that time, it was too late and it would have been unconscionable to change the venue or cancel the show. As a matter of law, "if the court finds the contract or any clause of the contract to have been made unconscionable, it may so limit the application of the unconscionable clause as to avoid any unconscionable result." M.G.L.A. 106 § 2-302.

For a contract or a provision to be unconscionable, it must be both procedurally and substantively unconscionable. *Machado v. System4 LLC*, 471 Mass. 204, 218 (2015) (explaining that "no meaningful choice" and unfair surprise" meet the procedural prong, and "oppressive terms" meet the substantive prong). The procedural prong is met because Clopper had "no meaningful choice." Clopper could sign the Sanders boilerplate contract or nothing. *Cplt.* ¶ 18. Furthermore, there was an "unfair surprise" since Harvard informed Clopper of the "no-nudity" provision contained in an external document never provided to Clopper three days prior to the show after they waived their condition to enforce this Unconstitutional and inconsistent restriction on Clopper's right to free expression. *Id.* The substantive prong is met because it was "oppressive" to demand Clopper change or cancel his show after investing $40,000 into it – an enormous sum of money for Clopper. *Id.* Indeed, the contract allowed Harvard to cancel the show at any time and for any reason, and Harvard would not be liable for any resulting damages to Clopper for cancelling his play at the last minute. Dkt. No. 30-1 Ex. D, Provision 15.

Unconscionable or not, Clopper's boss also instructed him to dance nude and show the final scene. *Cplt.* ¶ 17. There was thus an enforceable contract that the Plaintiff could perform nude with sexual content at Harvard's theatre; the Plaintiff relied upon that promise; and Harvard breached the promise. Thus, Harvard did not have the right, as claimed in its termination letter, to terminate Clopper for his performance at Sanders Theatre.

C. The Complaint States a Viable Claim of Breach of the Covenant of Good Faith and Fair Dealing (Count V).

It is well established under Massachusetts law, that every employment contract contains an implied covenant of good faith and fair dealing. *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 103 (1977). "A breach occurs when one party violates the reasonable expectations of the other." *Chokel v. Genzyme Corp.*, 449 Mass. 272, 276 (2007). Harvard tries to narrow the covenant so restrictively as to preclude Clopper's claim under it. MTD at 19 ("The covenant, however, does not supply terms that the parties were free to negotiate but did not." *Chokel*, 449 Mass. at 276 (citing *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 388 (2004)). However, *Uno* concerned a real estate transaction between two sophisticated business entities. Clopper had no bargaining power with his employment contract with Harvard. Furthermore, his contract—or at least his reasonable understanding—included Clopper's right to engage in protected speech per First Amendment standards outside of work without retaliation.

Thus, this is not a "tag-along" claim, MTD at 19; there are ample facts that support it. Among the subset of "reasonable expectations" that Clopper had and Harvard violated were, without limitation, that: (1) Harvard would not terminate him for activities outside work; (2) Harvard would honor it many promises to respect Clopper's right to express himself consistent with First Amendment standards without retaliation; (3) if Harvard were to "investigate" him, it would tell him what for, it would conduct the investigation expeditiously, and it would not procure a stolen video of him masturbating and share it with his friends and colleagues during said "investigation," (4) it would not terminate him for following his boss's orders; (5) it would not conspire to defame him with the student press, as explained further in Part III below; (v) and it would not have threatened Hammond to prevent Clopper from filing this action before the Court.

D. The Complaint States a Plausible Claim of Promissory Estoppel (Count VI).

We have shown that the Plaintiff has pled a plausible claims for breach of contract. Even had the formal elements of a contract—offer, acceptance, and consideration—been technically absent, however, Clopper would still be entitled to recovery under the equitable doctrine of promissory estoppel. It provides for enforcement of a promise that a defendant made [here, Harvard] with the intent to induce reliance by a plaintiff [here, Clopper], where the plaintiff relied on that promise to his detriment. *See Nardone v. LVI Servs., Inc.*, 94 Mass. App. Ct. 326, 330 (2018).

In dismissing the Plaintiff's promissory estoppel claim, the Court reasoned that the Plaintiff "does not sufficiently plead the elements of promissory estoppel. He does not allege, for example, that Harvard (or any authorized or apparent agent of Harvard) made a clear or definite promise that he could perform nude." We respectfully suggest that the Complaint does so allege. It alleges that Harvard's Free Speech Guidelines promised that "speech consistent with First Amendment standards" would be protected, which has included nude expressive dance for the last 42 years. *Com. v. Sees*, 374 Mass. 532, 537 (1978); that Harvard through its conduct impliedly and expressly promised that he could perform nude at Sanders Theatre, *Cplt.* ¶ 17; *see also supra* note 4; that Professor Bronski suggested that he perform an edgy play, approved the advertisements showing the Plaintiff in the nude, and told him that he had the right to perform his play without fear of retaliation; that his boss approved every word and action in the play – indeed his boss instructed him to perform nude and the final scene with sexual content was his boss's idea – and told him that he could perform the play at Harvard's Sanders theatre the way he did without fear of retaliation. *Id.*

It cannot be stressed enough that the Plaintiff, an idealistic 25 year old at the time the play was performed, "massively relied" (his own words) upon these promises in performing his play. He trusted that promises by the university, a Harvard professor, his dean, and his boss meant something. In reliance, Clopper invested all the money he had and his reputation in performing the play. He believed Harvard's promises that he could put on

his controversial play in the pursuit of "discovering and disseminating [important] ideas," and that if anyone found his message "noxious," Harvard meant what it said when it wrote, "We do not permit censorship of noxious ideas. We are committed to maintaining a climate in which reason and speech provide the correct response to a disagreeable idea."

The Court's order of dismissal then states, "And even if plaintiff had made such an allegation [of allowing a brief nude dance that constituted less than 3% of the play], the Complaint does not establish *that reliance on such a promise would have been reasonable* under these circumstances, where the Sanders Theatre contract contained an express prohibition to the contrary." We respectfully suggest that this line of reasoning fails.

As discussed above, the extra-contractual provision may have been waived or unconscionable. Furthermore, "apparent or ostensible authority results from conduct by the principal which causes a third person reasonably to believe that a particular person … has authority to enter into negotiations or to make representations as his agent." *Hudson v. Mass. Prop. Ins. Underwriting Assn.*, 386 Mass. 450, 457 (1982).

A jury could find that it was reasonable for the 25-year-old Clopper to rely on the promises and assurances of the senior faculty member Bronski, long-time director Hammond, the long-time Dean Doyle, and other Harvard agents that he could "dance nude," "perform a rousing performance

without retaliation," put on a "provocative play" that "was conservative in comparison," and that he "**would not be censored**." *See supra* note 4. Plaintiff contends that the totality of these assurances constitute actionable and binding promises from legitimate principals of Harvard. To add to the gravity of this reliance, Clopper revered and trusted Hammond, and Hammond went to his grave defending Clopper's right to perform the play as and where he did.

To rule that Clopper's reliance was unreasonable would lead to the untenable conclusion that Harvard's guidelines promising to protect free speech mean nothing, and that promises senior faculty members and even one's boss that Harvard will honor that policy mean nothing. It would follow that it is unreasonable to trust promises by Harvard. If Harvard does not like someone's message, it can feel free to retaliate against the person in any way it likes with impunity in the ways complained of in the Complaint, including blackballing him from attending its graduate school at a deep discount. The Plaintiff already has good evidence of that and other retaliation – the claims are not speculative – and at the pleading stage, the Court must accept the claims as true.

III. THE PLAINTIFF'S COMPLAINT CONTAINS PLAUSIBLE ALLEGATIONS THAT HARVARD DEFAMED HIM (COUNT VII).

Clopper's Complaint properly lays out a cause of action for defamation against Harvard since it acted in concert with the Harvard Crimson to publish

defamatory statements about his performance. Under Massachusetts law, a plaintiff alleging libelous defamation must establish six elements: that the defendant: 1) Published a written statement, 2) of and concerning the plaintiff, that was both 3) false, and 4) defamatory, that 5) the defendant was at fault, and 6) causing damage to the plaintiff. *Corellas v. Viveiros*, 410 Mass. 314, 319 (1991).

A. HARVARD DEFAMED CLOPPER BY INFLUENCING THE HARVARD CRIMSON

By working in concert with the Harvard Crimson to label Clopper's performance as a "nude, anti-semitic rant," Harvard engaged in defamation against Clopper since the allegation is objectively false and falls outside the protection sometimes given to mere expressions of opinion. Under Massachusetts law, expressions of opinion that are not based on assumed or known facts and that therefore imply that there are undisclosed facts on which opinion is based are open to defamation actions. *Nat'l Assoc. of Gov't Emps. v. Cent. Broad Corp.*, 379 Mass. 220, 227 (1979). Here, when Harvard administrators encouraged the Harvard Crimson to publish an article bearing the headline that Clopper's presentation was a "nude, anti-semitic rant," Harvard became responsible for the dissemination of two categorical, defamatory falsehoods. The first is that the presentation, nor any part of it, could not in any conceivable way be accurately described as a "nude, anti-semitic rant." During the short portion of the performance where Clopper is nude, no words were spoken. As such, it is a factual impossibility for the characterization of

the performance as a "nude, anti-semitic rant" to be accurate. In describing it as such, Harvard therefore portrays Clopper's presentation as something it was not. It gives off the inflammatory impression that Clopper's entire performance was a nude rant excoriating Jewish people, rather than what it actually was: by and large a clothed and passionate presentation against circumcision, with some small degree of nudity at the end of the performance. While the Harvard seems to make little note of this and while the court may initially see this as a distinction without a difference, there is a key distinction between being portrayed as a naked madman intent on doing nothing more than frothing venom against the Jewish people (how Harvard characterizes Clopper), and someone who incorporates nudity, passion and edgy material as a way of adding color to a performance presenting a legitimate point of view: opposition to circumcision.

The second categorical falsehood is that the performance was an anti-Semitic rant. Under the definition adopted by the State Department, anti-Semitism is defined as the following: "A certain perception of Jews, which may be expressed as hatred of Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities." There is nothing in this working definition that brings criticism of Jewish practices, no matter how excoriating that criticism may be, within its ambit. Instead, the working definition is limited to attacking the Jewish people, their property, and their institutions. Here, Clopper concededly

launches a vigorous verbal attack against circumcision, and the role that it plays in the Jewish religion. His attack on it, however, no matter how vigorous and vituperative it might be, never veers into the kind of broadside attack on the Jewish people as a whole that constitutes the definition of anti- Semitism. In fact, even the most inflammatory points of Clopper's performance that Harvard is able to point to, insofar as they allegedly show anti-Semitism on the part of Clopper, are limited in their scope to excoriating their role in the practice of circumcision and excoriating the practice of circumcision itself, not their very existence as a people.

Harvard's argument that, notwithstanding the latter point, labelling Clopper's performance anti-Semitic is the expression of opinion protected from a defamation lawsuit, is without merit. Based on the clearly defined working definition of anti-Semitism, it cannot be a matter of mere opinion. Given that Clopper only made statements critical of circumcision and did not delve into the kind of attacks on the Jewish people that are required under the definition, the imputation of anti-Semitism onto his performance suggests that there is some underlying, invidious actual anti-Semitism Clopper engaged in beyond his passionate excoriation of the practice of circumcision and Jewish involvement in it. For the foregoing reasons, Harvard cannot claim that labelling Clopper's performance anti-Semitic is mere opinion.

B. HARVARD ACTED WITH ACTUAL MALICE

The Court's dismissal of the defamation count states that plaintiff acted as a limited- purpose public figure with respect to his performance and has not adequately alleged actual malice on the part of Harvard. In Paragraph 104 of the defamation count (Count VII) of the Complaint against The Crimson and Harvard, however, the Plaintiff alleged, "the Crimson displayed actual malice in their actions towards Clopper." Paragraph 100 avers that Harvard senior administrators encouraged the Crimson to publish those claims, and it is therefore that Harvard, as well as the Crimson, displayed actual malice. The complaint could be amended but it seems unnecessary.

Harvard knew that the portrayal of Clopper's performance that it helped facilitate in the Harvard Crimson was a false and defamatory one, and therefore it easily meets the actual malice standard required of a defamation claim, even if Clopper is a limited purpose public figure. To survive a Rule 12(b)(6) motion to dismiss, a claim pleading malice need only plead with generality, rather than specificity. *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012). Actual malice requires that the defendant acted with actual knowledge of the falsity of the statement or with reckless disregard for the truth. *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968). Here, it represents a logical impossibility for Harvard not to have known that the portrayal of Clopper's performance that it helped facilitate in the Harvard Crimson was in fact a false one. It makes reference to

the performance, and had access to videos of the performance, thereby proving that it knew the contents of the performance and chose to help have a patently false representation of it published in the Crimson anyway.

IV. THE COMPLAINT CONTAINS PLAUSIBLE ALLEGATIONS OF TORTIOUS CONVERSION (COUNT VIII) AND CONSPIRACY TO TORTIOUSLY INTERFERE WITH CLOPPER'S EMPLOYMENT CONTRACT BY DEFAMING HIM (COUNT X)

The Court dismissed the claim (Count VIII), stating that plaintiff fails to allege the existence of any personal, tangible property over which Harvard exerted dominion. However, in Paragraph 113, the Plaintiff alleged that his Play, which is intellectual property.

The Court dismissed Plaintiff's conspiracy claim (Count X) stating, "he fails to establish the existence of an underlying tort or plead any facts supporting his conclusory allegation of any common plan or scheme." Notwithstanding Harvard's attempt to intone that Massachusetts has never recognized the tort of civil conspiracy, however, Massachusetts courts actually do recognize such a tort, which requires a common design or agreement, which need not be express, between two or more persons to do a wrongful act, with a tortious act in furtherance of such an agreement. *Kurker v. Hill*, 44 Mass. App. Ct. 184, 189-90 (1988).

The Complaint alleges that Harvard and the Harvard Crimson engaged in a common plan to defame Clopper when Harvard administrators encouraged the Harvard Crimson to publish defamatory articles about Clopper and instructed reporters what to say. Hammond confirmed this, writing to Clopper on June 7, 2018 that, "the Crimson and Harvard are sharing information," engaging in "collusion," and that "the Crimson's independence is a claim of convenience when Harvard doesn't wish to be held responsible for libelous stories."

CONCLUSION

For the foregoing reasons, Plaintiff prays that the Court grant its motion to vacate the judgment and allow the Plaintiff's claims to proceed.

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 19, 2020.

/s/ Michael Vigorito

APPENDIX U

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	Case No.: 1:20-cv-11363-RGS

PLAINTIFF'S MOTION FOR RELIEF FROM ORDER OF DISMISSAL AND TO EXTEND DEADLINE TO FILE OPPOSITION TO HARVARD'S UNIVERSITY'S MOTION TO DISMISS

The Plaintiff, Eric Clopper, respectfully moves the Court pursuant to Fed. R. Civ. P. 60(b) and 6(b)(1)(B) for relief from the Court's Order entered October 14, 2020 dismissing the Plaintiff's claims against Harvard University with prejudice and to extend the deadline for filing his opposition to Harvard's motion to dismiss until October 26, 2020. The extension is

requested as counsel was temporarily incapacitated due to two concurrent serious unanticipated illnesses, which resulted in being unable to file the opposition within the deadline. Submitted by mail separately from this motion is the Affidavit of Counsel filed under seal and incorporated herein by reference, which Plaintiff respectfully requests the court to consider before ruling on this present motion.

LEGAL STANDARD

1. Fed. R. Civ. P. 60(b) and 6(b)

On motion and just terms, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect… or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b)(1)-(6). All doubts should be resolved in favor of those seeking relief under Rule 60(b). Wagstaff-EL v. Carlton Press Co., 913 F.2d 56-58 (2d Cir. 1990). The denial of relief of default judgment where non-movant has a meritorious defense would constitute a serious miscarriage of justice. Cobos v. Adelphi University, 179 F.R.D. 381 (1998), citing Wagstaff-EL v. Carlton Press Co., 913 F.2d 56- 58 (2d Cir. 1990).

Pursuant to Fed. R. Civ. P. 6(b)(1), "When an act may or must be done within a specified time, the court may, for good cause, extend the time…(B) on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B).

2. Excusable Neglect

Excusable neglect is an equitable doctrine without a precise definition in the Federal Rules of Civil Procedure. See Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership, 507 U.S. 380, 395 (1992). The Pioneer case identifies a four-factor balancing test for determining excusable neglect under Rule 6, which includes: (1) whether the delay in filing was within the reasonable control of the movant; (2) the length of the delay and the delay's potential impact on judicial proceedings; (3) the danger of prejudice to the non-moving party; and (4) whether the movant acted in good faith. Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership, 507 U.S. 380, 395 (1992).

One of the underlying premises of the excusable neglect doctrine is that it exists to prevent victories by default. Newgen, LLC v. Safe Cig, LLC, 840 F.3d 606, 616 (9th Cir. 2016). The court in Newgen observed, "Our starting point is the general rule that default judgments are ordinarily disfavored. Cases should be decided upon their merits whenever reasonably possible." Newgen, LLC at 616. The court noted "the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits". Id. at 616. Similarly, the Rodriguez court observed that a principle of the federal civil procedure system maintains that cases should be decided on the merits as opposed to technicalities, and there is a strong preference for resolving disputes on the merits. Rodriguez v. Village Green Realty, LLC, 788 F.3d 31, 47 (2d. Cir. 2015) *citing* Cargill, Inc. v. Sears Petroleum & Transp. Corp., 334 F.Supp.2d 197, 247 (NDNY 2014).

ARGUMENT

Clopper respectfully requests relief from the Court's Order entering dismissal with prejudice as to Harvard University for excusable neglect under Fed. R. Civ. P. 60(b) and to file his opposition to Harvard University's Rule 12 motion.

The Plaintiff first respectfully requests that the Court provide him relief from the Order dismissing Harvard University with prejudice as a result of excusable neglect on the grounds further described below and for the reasons contained in the Affidavit of Counsel.

The application of the Pioneer balancing test to the present matter suggests that affording the Plaintiff a brief extension of time until October 26, 2020 to file an opposition to Harvard University's Rule 12(b) motion to dismiss is reasonable for excusable neglect. The Court will then be able to consider Plaintiff's substantive and meritorious arguments in opposition prior to concluding that the Plaintiff's case is without merit, and that it warrants dismissal with prejudice. The opposition deadline fell on October 13, 2020 and the Court's decision on Harvard University's then unopposed motion to dismiss entered on October 14, 2020. Plaintiff's counsel suffered unexpected and serious concurrent illnesses and was unable to timely finalize and file Plaintiff's opposition or request an extension of time to file an opposition, as further described in the accompanying Affidavit of Counsel filed under seal. This medical condition was completely outside the control of the Plaintiff. Moreover, the Plaintiff has acted expeditiously in

requesting relief by requesting an extension under Fed. R. Civ. P. 6(b)(1)(B) a few days after the opposition deadline. The short delay will have a minimal impact on judicial proceedings in this matter, which is an initial stage of litigation.

The Plaintiff will be opposing the other Defendant's, the Harvard Crimson Inc.'s, motion to dismiss, and the Court will be considering those arguments. Plaintiff's allegations and claims against the defendants The Crimson and Harvard University are interrelated, and their defenses are similar, suggesting that the arguments in both of their motions to dismiss should be considered simultaneously. The Crimson also may argue collateral estoppel as to the Plaintiff's claims as a result of the Court's dismissal with prejudice of claims against Harvard University. Denying this motion would prejudice the disposition of Plaintiff's claims as to the Harvard Crimson, Inc., which would be subsequently disposed of on a procedural technicality as opposed to on the merits.

The danger of prejudice to the non-moving party, Harvard University, is minimal since the Court will be deciding the Harvard Crimson's Rule 12(b) arguments after the October 26, 2020 opposition deadline, and Harvard University has already submitted its arguments to the Court. The Plaintiff, if granted an extension, will file its opposition to Harvard University's motion to dismiss on the same date, October 26, 2020. Harvard University previously requested an extension to file a responsive pleading specifically to be on the same schedule as the Crimson, as well as for a religious holiday, which the Plaintiff assented to. The Plaintiff acted in good faith by

granting that extension and seeking an extension from Harvard University to file its opposition immediately after the Court entered its ruling, but Harvard denied the request.

Additionally, the Plaintiff has and will advance meritorious arguments for the Court's consideration in opposition to the issues raised in Harvard University's motion to dismiss, and in response to the court's order of dismissal. If Harvard and the Court have made compelling arguments as to one or more counts in the Complaint, the Plaintiff will concede them, but the Plaintiff is persuaded that the Complaint contains justiciable claims.

Plaintiff will be prejudiced by having his claims dismissed with prejudice before considering factual and legal arguments in opposition to Harvard's motion to dismiss, since the Plaintiff may be permanently barred from seeking relief as to all Defendants on a procedural technicality. The best interests of justice would not be served by disposing of this case with prejudice on a procedural technicality without addressing the merits of the case. The Plaintiff respectfully requests that due to circumstances beyond Plaintiff's control and that of his counsel, the Court hear the arguments for and against dismissal of the lawsuit, and decide the case on the merits.

CONCLUSION

For the foregoing reasons and those contained in the Affidavit of Counsel, the Plaintiff maintains it has advanced reasons under the Pioneer balancing test to establish an incident of excusable neglect, and

respectfully requests the Court afford the Plaintiff relief under Rule 60(b) as to its Order dismissing Plaintiff's claims with prejudice, and allow the Plaintiff an extension of time until October 26, 2020, to file its opposition to Harvard University's motion to dismiss, and hear and consider both motions to dismiss simultaneously.

Respectfully submitted,

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Dated: October 16, 2020

CERTIFICATE OF SERVICE

I, Michael Vigorito, hereby certify that this document has been filed on October 16, 2020, through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and by email to William Fick, 24 Federal St., 4th Floor, Boston MA 02109 (wfick@fickmarx.com).

APPENDIX V

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	Case No.: 1:20-cv-11363-RGS

ASSENTED-TO MOTION TO SUBMIT AFFIDAVIT OF COUNSEL UNDER SEAL

The Plaintiff, Eric Clopper, respectfully moves, with the assent of Harvard University's counsel, to file under seal the Affidavit of Counsel in connection with the Plaintiff's Rule 60(b) and 6(b) motion. As grounds for this motion, counsel states that the Affidavit of Counsel contains sensitive medical information that is not appropriate for filing on the public docket. Counsel intends to submit the Affidavit by paper filing to the Court.

Local Rule 7.1 Certification

The undersigned counsel certifies that on October 15, 2020, he conferred with counsel for the Defendant, Harvard University, concerning the request to seal. Counsel for Harvard University indicated assent to seal the Affidavit of Counsel, but reserves all rights to oppose Plaintiff's motion.

Respectfully submitted,

/s/ Michael Vigorito
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Dated: October 16, 2020

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APPENDIX W

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	CIVIL ACTION NO.: 1:20-CV-11363-RGS

MEMORANDUM IN SUPPORT OF MOTION OF THE HARVARD CRIMSON, INC., TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM

PRELIMINARY STATEMENT

On May 1, 2018, Plaintiff Eric Clopper presented a 2-hour and 20-minute one-person performance in Harvard University's Sanders Theater. His intention was to convey what he himself describes as a "heavy message" (Cmplt., ¶ 20): that the widespread practice of circumcision, a form of "genital

mutilation" that was originally a "social phenomenon limited to the Jewish people" (Cmplt., ¶ 19), "is the most obvious and evil lie in human history" (Cmplt., ¶ 22).

Plaintiff Clopper alleges that Harvard University (the "University") shut down the performance shortly before its conclusion, following his performance of a nude dance. By the next day, the University had commenced an investigation of his behavior, which ultimately led to the termination of Clopper's employment with the University. In this action, Plaintiff sues the University for wrongful termination in violation of his contractual and First Amendment rights.

Not content to sue only his former employer, Plaintiff has also brought claims against *The Harvard Crimson*, a student newspaper published by The Harvard Crimson, Inc., a Massachusetts corporation owned and operated independent of the University. He alleges that by reporting on criticism that his performance was "anti-Semitic" and a "rant," *The Crimson* published false information that defamed him, interfered with his free speech rights, caused the University to fire him, and conspired with the University to defame him.

Plaintiff's Complaint fails to state any viable claims against *The Crimson*, and therefore must be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

FACTUAL BACKGROUND[1]

The Harvard Crimson, Inc. is a Massachusetts nonprofit corporation whose officers and directors are all Harvard College students. *See* 2019 Annual Report (G.L. c. 180), located at Secretary of the Commonwealth, Corporations Division, ID No. 042426396, at https://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx . It publishes thecrimson.com and, until the recent pandemic,[2] a print newspaper distributed free of charge to Harvard students (daily during the academic year) (collectively, "*The Crimson*").

This action arises out of Plaintiff's May 1, 2018, presentation at Harvard University's Sanders Theatre, titled "Sex & Circumcision: An American Love Story." Plaintiff published a video recording of his presentation on YouTube. *See Sex & Circumcision: An American Love Story by Eric Clopper, available at* https://www.youtube.com/watch?v=FCuy163srRc (posted July 19, 2018; visited Oct. 5, 2020).[3]

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[1] Solely for the purposes of this motion, *The Crimson* accepts as true the well-pleaded factual allegations of the Complaint, but only to the extent not contradicted by the Complaint's attachments or by matters the Complaint incorporates by reference.

[2] While the print publication has been suspended since the start of the pandemic in March 2020, *The Crimson* continues in full operation on its website.

[3] A rough transcript of the play, automatically generated from YouTube, is attached to the accompanying Affidavit of Robert A. Bertsche ("Bertsche Aff.") as Exhibit 6. Counsel has not edited or attempted to remove transcription errors from this automatically

The Crimson published three articles focusing on Plaintiff's performance and the University's response to it. True copies of those articles are attached to the Affidavit of Robert A. Bertsche ("Bertsche Aff.") as exhibits 1-3, respectively. They are as follows:[4]

1. *Harvard 'Reviewing' Employee's Nude, Anti-Semitic Rant in Sanders Theatre*, May 3, 2018, by Lucy Wang and Michael E. Xie, Crimson Staff Writers. (Bertsche Aff., Ex. 1.) The article quotes a University spokesperson as saying Harvard is "reviewing" reports that Clopper "made anti-Semitic comments and stripped to the nude" during his performance. It cites "[v]ideos obtained by The Crimson" in which Clopper was "offering denunciations of circumcision that at times morphed into attacks against Judaism more

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generated transcript, and submits it simply for the Court's convenience, to help provide a rough textual guide to the lengthy YouTube video at https://www.youtube.com/watch?v=FCuy163srRc .

[4] Two other articles, also referenced in the Complaint, made brief allusions to the Clopper controversy: *Harvard 'Investigating' After Swastika Found at School of Public Health*, May 12, 2018, by Luke W. Vrotsos, Crimson Staff Writer (Bertsche Aff., Ex. 4) (noting in final paragraph that a "Harvard employee gave a performance in Sanders Theatre May 2 in which he stripped to the nude and made anti-Semitic comments," and that "Harvard is currently 'reviewing' that performance."); and *Editorials: Expanding the Diversity Conversation: In the wake of the Presidential Task Force on Inclusion and Belonging, as well as incidents this past year, administrators must consider the diversity of Harvard's diversity initiatives*, May 24, 2018, by The Crimson Editorial Board (Bertsche Aff., Ex. 5) (noting in ninth paragraph that "Harvard employee Eric Clopper provoked outrage in his one-man show at Sanders Theatre, 'Sex and Circumcision: An American Love Story,' by making anti-Semitic claims, such as that of the perceived 'demonstrably evil influence' of Judaism in the United States. Clopper defended his freedom of expression and the ideal of ideological diversity, while detractors accused him of bigotry.").

generally." The article provides further details from the performance, and also quotes Clopper, interviewed by *The Crimson*, describing his performance as including a "two-hour lecture"; defending what he referred to as "the anti-semitic comments" contained within it; and acknowledging that the performance ended with him dancing onstage, fully nude.

2. *Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours*, May 4, 2018, by Lucy Wang and Michael E. Xie, Crimson Staff Writers. (Bertsche Aff., Ex. 2.) The article reports that Clopper (as he acknowledges in the Complaint, at ¶ 37) "planned and filmed promotional videos" for his performance in his workplace, during work hours. It quotes the University spokesperson saying Harvard, in her words, was "reviewing" the nudity and the "anti-Semitic content." It notes that in the performance, Clopper referred to Judaism as an "unmasked genital mutilation cult." It also quotes from an interview in which Clopper acknowledges to *The Crimson* that he had done some of the work in his University workplace, and describes his show as "more of a political and ideological speech, in like, where does religion have the right to carve their religion into your body, essentially."

3. *Editorial: Against 'Sex and Circumcision: An American Love Story': Clopper should not have brought nudity and anti-Semitism to Sanders Theatre*, May 9, 2018, by The Crimson Editorial Board. (Bertsche Aff., Ex. 3.) This editorial, described as representing "the majority view of The Crimson Editorial Board," describes why those editors believe Clopper had falsely promoted his performance and had expressed "bigotry" and "anti- Semitism," and also

inquired whether or not the University had known that Clopper intended to "strip naked"—adding that if the University did know, "it should have taken action to prevent him from doing so."

ARGUMENT

I. Count VII Fails to State a Claim for Defamation.

Under Massachusetts law, "[d]efamation is the publication … of a statement concerning the plaintiff which is false and causes damage to the plaintiff." *Yohe v.* Nugent, 321 F.3d 35, 39- 40 (1st Cir. 2003), quoted in *Ayyadurai v. Floor64, Inc.,* 270 F. Supp. 3d 343, 355 (D. Mass. 2017). Because the tort "requires a false statement at its core," *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015), "defamatory statements are not punishable unless they are capable of being true or false," *Pan Am Sys., Inc. v. Atlantic Northeast Rails & Ports, Inc.* 804 F.3d 59, 65 (1st Cir. 2015). If they are true, or incapable of being proved true or false, the statements are not actionable. *Id.* It is plaintiff's burden to show that statements are materially false, *id.*: "To survive a motion to dismiss, a complaint challenging statements about a matter of public concern[5] must not only allege that the

[5] To qualify as a matter of public concern, the speech … must touch on issues in which the public (even a small slice of the public) might be interested, as distinct, say, from purely personal squabbles." *Pan Am*, 804 F.3d at 66. Issues of public concern can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Levinsky's, Inc. v. Wal-Mart Stores, Inc.,* 127 F.3d 122, 132 (1st Cir. 1997). Clearly the question of the medical, ethical, sexual, and religious propriety of circumcision—including Clopper's view that it is "a form of genital mutilation" (Cmplt. ¶¶ 19, 101), are such a matter of

statements are false, but also provide 'factual underpinning(s) to support that claim.'" *Ayyadurai*, 270 F. Supp. 3d at 358.

A. *The Crimson* Did Not Make Any False, Defamatory Statements of Fact.

To survive a motion to dismiss, a complaint for defamation must give evidence of a specific statement made by a defendant that could be considered defamatory. *See Canney v. City of Chelsea*, 925 F. Supp. 58, 70 (D. Mass. 1996) (granting motion to dismiss because complaint failed to provide evidence of specific defamatory statement). A defamation plaintiff is limited to its complaint in defining the scope of the alleged defamation, because a defamation defendant is entitled to knowledge of the precise language challenged. *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 n.6 (1st Cir. 1992) (declining to consider statements not identified in the complaint). Put simply, a court is not required to "comb through" a plaintiff's complaint to identify defamatory statements, *Flanders v. Mass Resistance*, No. 1:12-CV-00262- JAW, 2013 WL 2237848, at *2 (D. Me. May 21, 2013), much less comb through a defendant's news articles to do so.

Plaintiff's Complaint fails to meet this fundamental standard. Count VII, alleging defamation, gets no more specific than to identify

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public concern. *See also* Wikipedia,"Circumcision controversies," at https://en.wikipedia.org/wiki/Circumcision_controversies (noting that circumcision "has often been, and remains, the subject of controversy on a number of grounds").

three "buckets" of allegedly false and defamatory statements: "(i) that Clopper, a Jewish man, is anti-Semitic;[6] (ii) that Clopper improperly brought nudity to Sanders Theatre;[7] and (iii) that Clopper had engaged in a 'nude, anti-Semitic rant' in Sanders Theatre." (Cmplt. ¶ 101.) When one examines the three allegedly objectionable statements in turn, it is apparent that none of the allegedly defamatory statements rise to the level of an actionable tort.

1."Nude"

Plaintiff acknowledges in his complaint that toward the end of his presentation, he "performed a nude dance to Britney Spears' *Toxic* music video with an inflatable love doll named 'Britney.'" (Cmplt. ¶ 20.) As he points out, the nudity should have come as no surprise to his audience, because he had publicized the event in advance using posters that "showed Clopper naked with his genitals obscured by a censor bar and 'EXPLICIT CONTENT' warnings on them, thus communicating to potential playgoers that there would be nudity." (Cmplt. ¶ 15.) As advance publicity,

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[6] Plaintiff misrepresents the content of *The Crimson's* articles. Nowhere do any of the articles say Clopper himself is "anti-Semitic"; rather, they characterize many of his statements during the public performance as being anti- Semitic—an utterly reasonable and supportable characterization. (*See* Ex. 6 (transcript).)

[7] Again, nowhere did *The Crimson* explicitly write that Clopper acted "improperly"; rather, it noted that Harvard was investigating whether the nudity was in violation of contractual and municipal standards (Exs. 1, 2), and, in an editorial, expressed the *Crimson* editors' *opinion* that Clopper "*should not* have brought nudity … to Sanders Theatre" (Ex. 3 (emphasis added)).

he had also hired actors "to wear seven-foot inflatable penis costumes in Harvard Yard." (*Id.*) Indeed, it was the nudity in plaintiff's presentation that allegedly led University representatives to interrupt his performance, conduct an investigation into plaintiff's actions, and ultimately terminate his employment. (Cmplt. ¶¶ 20-21, 35) (alleging that his "nude dance" and the "sexual content" of his presentation were cited in his termination letter). The *Crimson*'s statement that Clopper performed "nude" (Ex. 1) was indisputably true, as was its statement that his presentation "contain[ed] nudity" (Ex. 2). Moreover, to the extent that it might under other circumstances be deemed defamatory to say that a presenter performed "nude," in this case plaintiff's actions could not have harmed his reputation to a greater degree than plaintiff's own pre-event publicity that previewed the nude performance.

Whether a statement is capable of defamatory meaning is a question of law for the Court, and therefore determinable on a motion to dismiss. *Amrak Prod'ns, Inc. v. Morton,* 410 F.3d 69, 72 (1st Cir. 2005) (affirming Rule 12(b)(6) dismissal). It is to be determined with reference to the context in which the statement was made. *Id.* at 73. In particular, the meaning of an allegedly defamatory headline must be interpreted "in light of … the entire text of the article," *id.*, citing *Foley v. Lowell Sun Pub. Co.,* 404 Mass. 9, 11 (1989) (affirming dismissal of defamation claim where text of article accompanying the contested headline made clear that plaintiff had been arrested, not convicted, for assault); *see also Lemelson v. Bloomberg L.P.*, 253 F. Supp. 3d 333, 339 (D. Mass. 2017). Here, *The Crimson*'s articles fully explained what was meant by the word "nude" in the headline:

that Clopper "stripped to the nude" during the performance (Ex. 1, ¶ 1) and that it "concluded in full nudity" (*id.*, ¶ 12), as Clopper himself acknowledged: "In terms of * the nudity, that was about the last 20 seconds and that was meant as the punchline of a recurring trope throughout. …I think there's nothing intrinsically wrong about … nudity…." (Ex. 1, ¶ 15.)

Clopper nevertheless protests that to call his presentation a "nude … rant" (*see* Ex. 1) is "a patent falsehood," because "[h]e said no words during his brief nude dance," and therefore could not be said to have been nude simultaneous with his "ranting." (Cmplt. ¶ 101(c).) He is parsing too finely. Even if the headline could somehow be considered misleading by juxtaposing "nude" with "rant," and even if any such impression were not offset by the text of the articles themselves, still there would be no falsehood for purposes of this motion to dismiss. Defamation law "overlooks minor inaccuracies and concentrates upon substantial truth." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991); *see also Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 133 (1st Cir. 2000) (acknowledging that "substantial truth" is sufficient to counter an allegation of defamatory falsehood).

2.“Rant”

Merriam-Webster defines "rant" to mean "a bombastic extravagant speech" (https://www.merriam-webster.com/dictionary/rant); an Urban Dictionary contributor says a speaker "rants" when he "talk[s] for a long time in a passionate manner" (https://www.urbandictionary.com/define.php?te

rm=Rant). Nowhere in Plaintiff's Complaint does he dispute that he spoke, alone on stage, for some two hours and twenty minutes, and both his Complaint and the writings on his website, https://www.clopper.com/, make it evident that he proudly is passionate about the subject matter of circumcision. In any event, the First Circuit has recognized that statements are not punishable as defamation unless they are capable of being proven true or false, and "rhetorical hyperbole" or statements using words "in a loose, figurative sense" are also shielded from liability. *Pan Am Sys., Inc. v. Atlantic Northeast Rails & Ports, Inc.*, 804 F.3d 59, 65 (1st Cir. 2015). Describing plaintiff's lengthy one-person show as a "rant" clearly falls in both categories.[8]

3."Anti-Semitic"

Whether a statement is a fact or opinion is a matter of law for the court to decide. *See Piccone*, 785 F.3d 766 (1st Cir. 2015); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000). Opinions, such as theories and subjective views, are constitutionally protected unless they imply the existence of false and defamatory facts. *See Phantom Touring,* 953 F.2d at

[8] Plaintiff seems to concede as much in his presentation: He describes himself as "sputtering in rage." *See* Ex. 6, 125:01–125:47 ("I do not enjoy sputtering in rage as you have seen and you have felt but that rage that rage is embedded in my being in my fucking core perhaps I should be up here preaching forgiveness but I cannot find it the Jews in my case my own fucking father raped me he gave his rage to me let's not allow them to rape the next generation of children whether Jew or Gentile all children deserve protection.").

730*; Piccone,* 785 F.3d at 771. This principle finds its rationale in the U.S. Supreme Court's observation in the seminal case of *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

"Most courts that have considered whether allegations of racism, ethnic hatred or bigotry are defamatory have concluded for a variety of reasons that they are not. The most important reason is the chilling effect such a holding would cast over a person's freedom of expression." *Ward v. Zelikovsky*, 136 N.J. 516, 533, 643 A.2d 972, 982 (1994).

Statements in a newspaper that someone has anti-Semitic views is not actionable if the facts on which the statement is based are disclosed. *Nat'l Ass'n of Gov't Employees/Int'l Bhd. of Police Officers v. BUCI Television, Inc.*, 118 F. Supp. 2d 126, 130 (D. Mass. 2000). Similarly, accusations of discriminatory beliefs based on disclosed facts are not actionable. *See Nat'l Ass'n of Gov't Emp., Inc. v. Cent. Broad. Corp.*, 379 Mass. 220, 226–27 (1979) (associating someone with "communism" is protected because it was based on disclosed non-defamatory facts and was too vague to be cognizable as the subject of a defamation action); *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (accusations of racism are only actionable if the statements imply the existence of undisclosed, defamatory facts); *Williams v. Kanemaru*, 130 Haw. 304, 309 P.3d 972 (Haw. Ct. App. 2013) (accusation of racism based on disclosed facts not actionable as defamation); *Weidlich v. Rung*, No. M2017-00045-

COA-R3-CV, 2017 Tenn. App. LEXIS 714, *17 (Tenn. App. Oct. 26, 2017) (accusing someone of being a "white supremacist" was protected as an opinion based upon disclosed facts and did not imply the existence of unstated defamatory facts).

As those cases and others make clear, an opinion can be defamatory only if it falsely implies the existence of undisclosed defamatory facts. Put another way, "A speaker can immunize his statement from defamation liability by fully disclosing the non-defamatory facts on which his opinion in based." *Piccone*, 785 F. 3d at 771. *See also McKee v. Cosby*, 874 F.3d 54, 63 (1st Cir. 2017) (statement did not give rise to a libel claim because the speaker disclosed non-defamatory facts underlying the assertions; thus, readers could draw conclusions from the information provided); Restatement (Second) of Torts § 566 (an opinion is punishable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion").

When viewed with this legal backdrop in mind, it is clear that the statement that Clopper made anti-Semitic statements during his play and engaged in a "nude, anti-Semitic rant" are, if not provably true, at the very least subjective opinions based on disclosed non-defamatory facts. The *Crimson* articles note that the newspaper obtained videos showing Clopper, during his presentation, "pacing around the Sanders stage" and "offering denunciations of circumcision." (*See* Bertsche Aff., Ex. 1.) The articles offer other uncontested (and incontestable; see Ex. 6) statements supportive of the adjective "anti-Semitic." The Crimson noted, for example, that in his presentation Clopper said that Jews "are an unmasked genital

mutilation cult" who had "raped" him; that Judaism had a "demonstrably evil influence" on the United States; that he vowed to "expend every breath in my body" to "tear this covenant to pieces"; that his play marked his "official declaration of war on our fucking covenant" and contained his promise that he would recruit an "army from our generation to wage it"; and that he will "force" Jewish individuals to "comply" with his demand that they stop circumcising their children. All of those statements are literally and contextually accurate excerpts from Clopper's presentation. (*See* Transcript at Bertsche Aff., Ex. 6.)[9]

Because the use of the word "anti-Semitic" to describe Clopper's presentation is not provably false, and because it is based on accurate facts contained in the *Crimson* articles themselves, it is language protected by the First Amendment, and the plaintiff's libel claim must be dismissed.

B. The Complaint Does Not Plausibly Allege, As it Must, That *The Crimson* Acted With Reckless Disregard for the Truth.

Even if Clopper could somehow establish that *The Crimson*'s statements amounted to a provably false

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[9] Clopper made many other comments during his presentation that could reasonably be perceived as anti-Semitic. *See, e.g.,* Ex. 6, 117:41–117:58 ("[W]e cannot and will not tolerate Judaism in its current form[.] [W]ere you [*sic*] done tolerating cults that ritually mutilate their children's genitals."); Ex. 6, 122:59–123:19 ("[I]f you are an American man if you take your penis in your hand you will see a scar where you've been raped of essential elements of your humanity because of the demonstrable evil influence Judaism has on this country.").

assertion of fact, still his libel claim must be dismissed, because he cannot produce clear and convincing evidence that *The Crimson* published the statements with actual malice—that is, with knowledge that they were false or with reckless disregard of whether they were false or not. *Sindi*, 896 F.3d at 14, citing *Gertz,* 418 U.S. at 342; *see also Alharbi v. Beck*, 62 F. Supp. 3d 202, 206 (D. Mass. 2014). He faces this "heavy burden," *id.*, because he is, by his own admission, a limited-purpose public figure for purposes of defamation law. Since the public-figure determination is a question of law for the court, *Pendleton v. City of Haverhill*, 156 F.3d 57, 68 (1st Cir. 1998), it is an entirely appropriate basis upon which this Court may dismiss Count VII for failure to state a claim upon which relief can be granted.

A limited-purpose public figure is one who "voluntarily injects himself" into a particular public controversy and thereby becomes a public figure for a limited range of issues. *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 13 (1st Cir. 2011). Clopper fits precisely into this category. His Complaint admits that "after studying the practice for years, Clopper became one of a large and increasing number of people, including Jews, adamantly opposed to non-consensual circumcision or genital cutting." (Cmplt. ¶ 8.) "It is Clopper's mission in life to help end what he considers to be a harmful and unlawful traditional practice that harms babies and mutilates their genitals for life." (*Id.*) He has lectured on the topic of circumcision, including at Cornell University, and then turned his lecture into the play that is at the heart of this lawsuit. (Cmplt., ¶¶ 9, 11.) He promoted the play extensively across Harvard's campus (Cmplt. ¶ 15), going so far as to hire actors "to wear seven-foot

inflatable penis costumes in Harvard Yard and hold picket signs of these same posters." (*Id.*) He recorded online videos of himself taking group portraits with "dozens of citizens around Cambridge" while promoting the play, *id.,* and his performance attracted an audience consisting of "hundreds of individuals from the Harvard community and beyond." (Cmplt. ¶ 19.) Clopper also posted the play online, where "thousands of YouTube viewers" added a "like" rating to his play. (*Id.*)

Clopper, therefore, is a limited-purpose public figure because he "thrust" himself in the "forefront" of the public issue of circumcision, seeking to "influence its outcome" by holding himself out as an authority on the subject, speaking at length about it in front of large crowds, and sharing his views on it through online public forums. *See McKee*, 874 F.3d at 62 (quoting *Gertz*, 418 U.S. at 345).

As a public figure, Clopper faces a particularly onerous burden when pleading a defamation claim. To survive a motion to dismiss, a public figure must allege "well-pled facts"—not merely legal "buzzwords"—that "plausibly support" an inference that a defendant published the statements with actual malice. *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012). As the federal district court for the Southern District of New York has noted, Rule 12(b)(6) should play a "particularly important role in testing the plausibility of a plaintiff's defamation claim" because of the "difficulty of proving actual malice . . . as well as the fact that actual malice must be proven by clear and convincing evidence in order for a plaintiff to succeed." *Biro v. Conde Nast*,

963 F. Supp. 2d 255, 278 (S.D.N.Y. 2013), *aff'd*, 807 F.3d 541 (2d Cir. 2015).

Clopper's only, weak, attempt to plead actual malice in the Complaint comes in his assertion that the videos seen by *The Crimson* do not support the characterization of his presentation as a "nude, anti-Semitic rant." That question, however, is one for this Court to make, based on the facts, not on unsupported conclusions or "information and belief" allegations. Clopper does not contest the authenticity or veracity of the videos. Rather, Clopper disagrees with *The Crimson*'s interpretation of his comments as seen on the videos. This does not constitute actual malice. *See Nat'l Ass'n of Gov't Employees/Int'l Bhd. of Police Officers v. BUCI Television, Inc.*, 118 F. Supp. 2d 126, 131 (D. Mass. 2000) (the defendant's "rational interpretation" of a plaintiff's "ambiguous comments" "does not create a jury question of actual malice.").

II. Count II Fails to State a Claim Against *The Crimson* Under the Massachusetts Civil Rights Act, Because the Crimson Did Not Engage in Coercive Conduct and Did Not Interfere With a Recognized Constitutional Right.

To establish a claim under the Massachusetts Civil Rights Act ("MCRA"), M.G.L. 12 § 11(I), a plaintiff must prove: (1) that the defendant engaged in threats, intimidation, or coercion, and that (2) the defendant's activities interfered with, or were an attempt to interfere with (3) the plaintiff's exercise or enjoyment of some constitutional or statutory right. *Currier v. Nat'l Bd. of Med. Examiners*, 462 Mass. 1, 12 (2012).

Clopper complains that *The Crimson* violated the MCRA by interfering with his constitutional right to free speech by "threats, intimidation, or coercion." (Cmplt. ¶ 67.) He also claims that—in the absence of "threats, intimidation, or coercion"—*The Crimson* is liable under the MCRA because it "acquiesced to pressure from third parties" to interfere with his rights. (Cmplt. ¶ 72.)

Although he cites the elements of the cause of action (Cmplt., ¶¶ 67, 72), Clopper fails to state a viable claim because he cannot establish that *The Crimson* interfered with his recognized constitutional rights. Quite to the contrary, a finding that *The Crimson* is liable under the MCRA would violate the newspaper's own free speech rights. Clopper also fails to identify threatening, intimidating, or coercive conduct in which *The Crimson* allegedly engaged.

A. *The Crimson* Did Not Interfere With A Recognized Constitutional Right.

A threshold requirement of the MCRA is that the plaintiff interfered with a right "secured by" statute or by the Constitution of the United States or Massachusetts. *Roman v. Trustees of Tufts Coll.,* 461 Mass. 707 (2012). Clopper alleges that *The Crimson* interfered with his constitutional right to free speech in seven ways (Cmplt. ¶¶ 66, 67(b)), but none of the instances to which he points can support the weight he puts on them. None, even if true, would constitute interference with a recognized constitutional right.

Clopper asserts first that he has a constitutional "right to be free from defamation," allegedly infringed by *The Crimson*'s coverage of the aftermath of his

performance. (Cmplt. ¶ 67(b)(vi).) Specifically, he alleges that *The Crimson* interfered with his free speech rights by (1) "claiming that he did not have the right to say what he said during the Play" and (2) "claiming that he did not have the right to express himself by dancing nude." (Cmplt. ¶ 67(b)(i), (ii).) Of course, the *Crimson* articles make no such claims; they merely report on his activities and the University's response to them (and, in one case, the *Crimson* editors' assessment of them). (*See* Bertsche Aff., Exs. 1-3.) In any event, these claims fail because there is no such thing as a constitutional or statutory "right to be free from defamation," as Clopper characterizes it. (*See* Cmplt. ¶ 72.) *Pendleton v. City of Haverhill*, 156 F.3d 57, 62–63 (1st Cir. 1998) (an interest in reputation is not a "liberty" or "property" interest protected by the constitution).

Clopper also purports to have a constitutional right to publish a rebuttal in *The Crimson*, a private, non-governmental entity—a "right" that he says was violated when *the Crimson* denied his and his attorney's demand that they be permitted to commandeer the newspaper's editorial columns for their own. (Cmplt. ¶ 67(b)(iii), (iv), (v)). The U.S. Supreme Court has definitively ruled that there is no such right. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (compelling a private newspaper to print candidates' rebuttals is an impermissible burden on "editorial control and judgment"); *Redgrave v. Bos. Symphony Orchestra, Inc.*, 855 F.2d 888, 906 (1st Cir. 1988) ("We have no reason to think that the Massachusetts Legislature enacted the MCRA in an attempt to have its courts, at the insistence of private plaintiffs, oversee the editorial judgments of newspapers."). Clopper's claims

that *The Crimson* violated his right to free speech by infringing his right to privacy and acquiescing to pressure from third parties also fail.[10]

Most fundamentally, as the First Circuit has recognized, to impose MCRA liability on *The Crimson* would have the unconstitutional effect of infringing on the newspaper's own rights under the First Amendment and Article XVI of the Massachusetts Declaration of Rights. *Redgrave v. Bos. Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 488 U.S. 1043 (1989). In *Redgrave*, the First Circuit held that a state constitutional defense may bar MCRA liability. *Id.* at 904, 910 (constitutional protections apply when the expression of one private person threatens to interfere with the expression of another). *The Crimson*'s right to be free from compelled speech includes the "editorial freedom" to choose what it does or does not print. *Id.* at 904 (the freedom for newspapers to "pick and choose among ideas, to winnow, to criticize, to investigate, to elaborate, to protest, to support, to boycott, and even to reject is essential if 'free speech' is to prove meaningful"); *see also Tornillo*, 418 U.S. at 241. The MCRA cannot constitutionally be enforced in such a way as to deprive *The Crimson* of its own free speech rights. *Id*. at 904 (expressing "grave concerns" about the state entering the marketplace of ideas in order to restrict speech that may have the effect of "coercing" other speech).

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[10] Both of these claims must be dismissed because Clopper presents no facts supporting an allegation that his privacy was infringed, nor any facts—other that unsupported "information and belief" speculation—that *The Crimson* acquiesced to third-party pressure. (Cmplt. ¶ 67(b)(vi), (vii).)

B. *The Crimson* Did Not Engage In Threatening, Intimidating, Or Coercive Conduct.

Clopper's MCRA claim also fails because he pleads no facts to suggest, let alone prove, that *The Crimson* interfered with his rights by "threats, intimidation or coercion." Gen. Laws c. 12, § 11(I). He does not allege any "actual or potential physical confrontation accompanied by a threat of harm," which is a required element of a MCRA claim. *See Planned Parenthood League of Massachusetts, Inc. v. Blake*, 417 Mass. 467, 475 (1994).[11]

III. Count IX Fails to State a Claim Against *The Crimson* For Tortious Interference Because *The Crimson*'s Statements Were True And Not Made With Improper Means Or Motive.

In Count IX, Clopper alleges that *The Crimson* interfered with his employment contract by making false accusations against him with the improper motive of assisting Harvard, which resulted in his termination. (Cmplt. ¶ 116.) This claim fails because, as discussed above, Clopper cannot prove that any of *The Crimson*'s statements are false. (See I.A, above.)

The claim also fails because Clopper does not adequately plead that *The Crimson* acted with

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[11] Even in the absence of "threats, intimidation or coercion," Clopper's MCRA claim fails because Clopper does not present facts showing how Harvard or any third party pressured *The Crimson*. (*See* Cmplt. ¶¶ 68, 72; *see also* n.10, above.)

improper means or motive. *See The Hertz Corp. v. Enter. Rent-A-Car Co.*, 557 F. Supp. 2d 185, 196 (D. Mass. 2008) (improper conduct may include ulterior motives (*e.g.*, wishing to do injury) or wrongful means (*e.g.* deceit or economic concern)); *see also Dulgarian v.Stone*, 420 Mass. 843, 851 (1995). In *Dulgarian*, the Supreme Judicial Court dismissed an intentional interference claim against a television station because there was no indication that it acted improperly or was motivated by any purpose other than reporting on a newsworthy topic. *Id.* at 852. The claim against *The Crimson* should be dismissed under the same principle.

IV. Count X Fails to State a Claim for Conspiracy Because *The Crimson* Engaged in No Underlying Tortious Conduct.

In Count X, Clopper claims that *The Crimson*, together with Harvard, Michael Xie, Lucy Wang, and "other still unnamed individuals" conspired to defame him.[12] (Cmplt. § 121.) This claims fails because it is premised upon the same facts as Clopper's failed defamation claim. As explained above, *The Crimson* made no false, defamatory statement of fact, and in any event Clopper failed to plead facts that would support a plausible finding of actual malice. Clopper's claim of "conspiracy to defame" must be dismissed. *See Paquette v. Nashoba Reg'l Sch. Dist.,* No. CV 05-40099-FDS, 2006 WL 8458640, at *9 (D. Mass. Mar. 30, 2006) (a party

[12] Plaintiff erroneously cited M.G.L. 274 § 7, the criminal conspiracy statute. (Cmplt. § 121.) The Crimson has construed this, instead, as a claim for civil conspiracy.

cannot be liable for conspiracy to defame if the party did not commit defamation).

THE HARVARD CRIMSON, INC.

By its attorneys,

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Dated: October 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that this document has been filed on October 5, 2020, through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and by email to Andrew DeLaney, 6 South Street, Morristown, NJ 07690 (andrewdelaney21@gmail.com).

/s/ Robert A. Bertsche
Robert A. Bertsche.

APPENDIX X

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants.	No.: 20-CV-11363-RGS LEAVE TO FILE EXCESS PAGES GRANTED 9/29/2020 [D.E. 27]

MEMORANDUM IN SUPPORT OF DEFENDANT PRESIDENT AND FELLOWS OF HARVARD COLLEGE'S MOTION TO DISMISS

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Introduction

On May 1, 2018, before a public audience in Harvard University's historic Sanders Theatre, Plaintiff Eric Clopper delivered a 130-minute presentation condemning male circumcision. As an encore, Clopper appeared nude on stage and engaged in simulated sex acts with an inflatable doll. Clopper also played a stop-motion video in which he repeatedly inserted his erect penis into the doll's mouth and ejaculated on its face. At the time, Clopper worked for Defendant President and Fellows of Harvard College ("Harvard" or the "University"), but after receiving numerous complaints and conducting an extensive review, Harvard terminated Clopper.

Now, Clopper brings this action against Harvard (and *The Harvard Crimson*, an independent student newspaper), alleging that Harvard interrupted his performance and then retaliated against him by terminating his at-will employment and frustrating his plans to attend Harvard's School of Engineering and Applied Sciences.

The Complaint fails to state constitutional, statutory, contractual, or tort claims against Harvard. Clopper's contention that he had a "right" to engage in live, naked, simulated intercourse with an inflatable doll on Harvard property, and display a still more explicit pornographic video, has no support in the law. These activities are not "free speech" protected by the First Amendment or any employment contract with the University. Moreover, as the Complaint concedes, both Cambridge's entertainment license and the Sanders Theatre's policy prohibit nudity, and Harvard

told Clopper in advance of the event that his performance could not include nudity.

Clopper's lawsuit should be dismissed for failure to state any cognizable legal claim.[1]

Background[2]

Plaintiff Eric Clopper is an outspoken opponent of neonatal male circumcision, Cplt. ¶ 8, which he describes as a "Satanic ritual" promoted by Jews, whom he calls a "genital mutilation cult" governed by an "evil ideology." YouTube Video at 1:56, 2:02, & 2:06. Clopper's self- proclaimed "mission in life" is to stop circumcisions for baby boys. *Id.* ¶ 8.

On July 17, 2017, Clopper started a full-time position as an at-will employee in Harvard's Language Resource Center ("LRC"). *Id.* ¶ 2. A few months later,

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[1] Clopper posted a truncated video recording of his Sanders Theatre presentation (minus the encore proceedings) on YouTube. *See Sex & Circumcision: An American Love Story by Eric Clopper*, *available at* https://www.youtube.com/watch?v=FCuy163srRc (posted July 19, 2018; visited Sept. 28, 2020) ("YouTube Video"). To ensure this Court has a complete, accurate record of what Clopper said and did on May 1, 2018, Harvard submits under seal three additional video footage exhibits depicting the event. Exhibit A is the video that Clopper played during the "encore" (including the "stop motion" pornography). Exhibits B and C document Clopper's nude dance and simulated sex with the inflatable doll. Citations to the recordings refer to the timestamp by hour and minute ("H:MM").

[2] The following facts are taken from the Complaint, which are assumed to be true for the purpose of this Motion only, as well as documents attached to or incorporated by reference in the Complaint. *See O'Brien v. Deutsche Bank Nat'l Tr. Co.*, 948 F.3d 31, 35 (1st Cir. 2020).

in October 2017, Clopper delivered a lecture at Cornell University in which he spoke against circumcision. *Id.* ¶ 9. The Complaint does not allege that the lecture included any public nudity, much less a live sex show.

After Clopper returned to the Harvard campus, he showed a video recording of his Cornell lecture to Michael Bronski, a professor in Harvard's Women, Gender, and Sexuality Department. *Id.* ¶ 10. Bronski encouraged Clopper to turn his lecture into a play, titled "Sex & Circumcision: An American Love Story," with "more theatrical components." *Id.* ¶ 11.

Clopper discussed the idea with his boss, Thomas Hammond, the LRC's director, and Hammond decided to help Clopper. *Id.* ¶ 12. Hammond is now deceased, *id.* ¶ 49, but the Complaint alleges that he "approved" the play and served as its "stage manager." *Id.* It further alleges that Hammond "urged" Clopper to include a "nude dance" and "educational slideshow relating to masturbation." *Id.* ¶ 17.

On March 1, 2018, Clopper and Foregen, a non-profit organization that researches "regenerative medical therapies for circumcised men," entered into an agreement with Harvard to reserve the Sanders Theatre for May 1, 2018. *Id.* ¶ 13; *see* https://www.foregen.org. The contract, which the Complaint incorporates by reference, licensed Clopper and Foregen to use the Sanders Theatre on the specified date and time. Ex. D.

In the "Rules and Policies" section, the contract stated that use of the theater is subject to the licensee's compliance with all federal, state, and local laws as well as Harvard's regulations and the Sanders

Theatre Policy Book. *Cplt.* ¶ 18. Both Cambridge's entertainment license and the Sanders Theatre's Policy Book prohibited public nudity. *Id.* ¶ 78; *see also* Sanders Theatre Producer's Handbook at 3 ("Our Entertainment License from the City of Cambridge does not encompass nudity").[3]

On March 14, 2018, Tina Smith, the Sanders Theatre's Box Office Manager, began advertising Clopper's play. *Cplt.* ¶ 10. An online notice appeared on the website for Harvard's Office of the Arts, and "print ads" were placed "in the Sanders Theatre complex." *Id.* The promotional materials indicated that Clopper's play was "adult only" and would include "explicit content." *Id.*

With respect to that explicit content, the Complaint vaguely alleges:

> Harvard made many express and implied promises to Clopper— verbally and in writing— that he would be free to express himself in his explicit Play without retaliation because of protection of free expression described by Professor Bronksi, Clopper's manager Hammond, Harvard's outgoing president Drew Faust, Harvard's incoming president Lawrence Bacow, and Harvard's Free Speech Policy.

Id. ¶ 16.

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[3] *Available at* https://sites.fas.harvard.edu/~memhall/PDF/SandersTheatreProducerHandbookNA.pdf.

Clopper publicized his play by placing posters around Harvard's campus. *Id.* ¶ 15. The posters featured Clopper, naked, with his genitals obscured by a "thin censor bar." *Id.* He also hired actors to appear in Harvard Yard in inflatable penis costumes, hold signs, and take pictures with passers-by. *Id.* Clopper "believe[d]" that the explicit nature of his play was obvious from these promotional efforts and that, if Harvard "had an issue," it should have alerted him. *Id.* ¶ 16.

Yet, the Complaint acknowledges that on April 28, 2018, Harvard did just that. *Id.* ¶ 18. By email, Ruth Polleys, the Manager for the Office for the Arts, told Clopper:

> Due to the nature of the posters advertising the event, I've been asked to let you know that *zoning laws and our Entertainment License with the City of Cambridge do not permit nudity as part of any event*. The May 1 event may well not include nudity, but we want to be sure—and want to be sure the Entertainment License for Sanders remains in compliance.

Ex. E (emphasis added). By email, Clopper responded:

> I understand your concerns about the posters. My publicist has been very aggressive with them. Apparently, this is what is known in the publicity business as "implied nude"—slightly embarrassing to walk around campus and have the tourists pointing at me and then at the

> posters! It's an edgy show, but *we'll stay within the bounds of propriety*, no worries.

Id. (emphasis added).

Despite Harvard's warning that nudity was prohibited and Clopper's assurance that his play would not include nudity, the Complaint asserts that Clopper believed that he had a "right to include nudity in the Play." Cplt. ¶ 18*; see also id.* (acknowledging "Harvard's essentially last- minute command to avoid nudity"). In short, Clopper admits that he disregarded Sanders Theatre's policy and Harvard's instruction, because Clopper felt that he had invested too much time and money in his pet project, decided it was "too late to change the Play," and believed he had a "right" to stage a live simulated sex show and pornographic video before an unwitting public audience. *Id.*

Although the Complaint refers to a "play," its allegations describe a lengthy performance that proceeded in two distinct parts. During the first part, which ran for more than two hours, Clopper delivered a lecture, with a PowerPoint presentation, in which he equated circumcision with "torture" and attacked Judaism as "an evil ideology." *Id.* ¶ 22; YouTube Video at 1:35, 1:56. At the end, Clopper bowed and exited the stage. During the second part, Clopper returned to the stage, totally naked and holding a life-size inflatable sex doll. Cplt. ¶ 22; Sealed Exs. B & C. For the next five to ten minutes, he cavorted with the doll, simulating sex acts, and then projected a self-made pornographic video on the screen behind the stage. *See* Sealed Exs. A at 0:7-0:10; B & C.

While the music video for Britney Spears' *Toxic* played on the screen behind the stage, Clopper "performed a nude dance" with the doll, which he called "Britney." Sealed Ex. B. That dance involved Clopper having or simulating vaginal sex with the doll and exposing his genitals to the audience. *Id.* Then, on the screen, Clopper presented a stop-action video in which he repeatedly inserted his erect penis in the doll's mouth, masturbated, and ejaculated on the doll's face. Sealed Ex. A at 0:7-0:10. The Complaint characterizes this aspect of the performance as a "love story," adding that it "provided much-needed comic relief." Cplt. ¶ 20.

Immediately after Clopper appeared naked on stage, engaged in simulated sex acts with the doll, and displayed his pornographic video, Maureen Lane, Harvard's production assistant and venue representative, "rushed toward Clopper" and "scream[ed] at him for his nude dance." *Id.* ¶ 21. The theatre lights flashed on and off, indicating the show was over, and the audience began to leave. *Id.* The Complaint alleges that, as a result, Clopper was unable to get dressed, return to the stage, and deliver "his final message." *Id.*

Not surprisingly, and as intended by Clopper, his performance drew significant attention. On May 2, 2018, *The Harvard Crimson* published an article by two student reporters, titled "Harvard 'Reviewing' Employee's Nude, Anti-Semitic Rant in Sanders Theatre." Cmplt. ¶ 24. The article quoted an email from Rachael Dane, Director of Media Relations for Harvard's Faculty of Arts and Sciences ("FAS"), who said only that Harvard was "'reviewing' reports" about Clopper's anti-Semitic comments and nude

performance. *Id.* ¶ 26.[4] On May 4, 2018, *The Crimson* published another article, "Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours," which repeated Dane's statements about Harvard's ongoing "review."[5] A few days later, on May 9, 2018, the Editorial Board published an opinion piece that, again, quoted Dane, *id.*, and went on to "castigate" Clopper for "us[ing] his position to deliver a tirade prominently featuring nudity and anti-Semitism to an audience that was given no fair warning to expect either."[6]

Later, *The Crimson* published two other pieces, one article and one editorial, that mentioned Clopper's show, *id.*, but did not feature any statements from Harvard about Clopper, his anti-Semitic comments, or his nude performance.

From April 23, 2018, through May 4, 2018, including the night of his event, Clopper was on paid time-off from his job at the LRC. *Id.* ¶ 27. When

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[4] *Available at* https://www.thecrimson.com/article/2018/5/3/eric-clopper-production/ ("We take seriously a report of this nature, as it appears to violate the terms of Sanders Theatre's entertainment license with the City of Cambridge," Dane wrote in an e-mail to *The Crimson*. "We are currently engaged in a review of these reports to determine whether Harvard was provided with an accurate account of the content of Clopper's show, prior to its production.").

[5] *Available at* https://www.thecrimson.com/article/2018/5/4/clopper-used-university-space/ ("Spokesperson Rachael Dane later announced Wednesday the Faculty of Arts and Sciences is 'reviewing' the nudity and 'anti-Semitic content' included in the show, titled 'Sex & Circumcision: An American Love Story.'").

[6] *Available at* https://www.thecrimson.com/article/2018/5/9/editorial-against-sex-and- circumcision/.

Clopper returned to work, he was placed on administrative leave and told by Dean Robert Doyle that Harvard was conducting "a careful review" about whether Clopper had misrepresented his plans, violated rules against public nudity, and delivered an anti-Semitic diatribe followed by an obscene performance. *Id.*

Over the next few months, Harvard conducted an extensive investigation. *Id.* ¶ 29. Dean Doyle and Ann Marie Acker, an administrator in Harvard's HR Department, met with Clopper, and Gary Cormier, Director of Harvard's HR Consulting, solicited input from LRC employees and the FAS community. *Id.* ¶¶ 29-30.

As the investigation proceeded, Clopper "fear[ed]" that "powerful interests"—the Jews— had "compromised" "the integrity of Harvard's administration." *Id.* ¶ 31. As a result, on May 17, 2018, he filed a complaint with Harvard's Office of Labor and Employee Relations ("OLER"). OLER considered an employment investigation to be "premature," because at that time, Harvard had not yet taken any adverse employment action against Clopper. *Id.*

On July 12, 2018, at the conclusion of its lengthy investigation, Harvard terminated Clopper from his at-will employment in the LRC. *Id.* ¶ 35. The termination letter cited several reasons, including Clopper's sexually explicit display in the Sanders Theatre as well as his "misrepresentations and misleading statements to Harvard LRC colleagues and to Sanders Theatre staff members regarding the content of the Show." *Id.*; *see* Ex. F. The letter said

nothing about Clopper's statements about Judaism or circumcision. The Complaint alleges that Clopper was "surprised" by Harvard's decision because he had been the LRC's star employee. Cplt. ¶¶ 37-41. The Complaint alleges that, after Harvard terminated his employment, it "focused its energies on Hammond." *Id.* ¶ 43. Clopper contends that Harvard retaliated against Hammond for assisting Clopper (before the show) and refusing to terminate Clopper (afterwards). On September 17, 2018, Harvard sent Hammond a "Final Written Warning" concerning his involvement in Clopper's play. *Id.* ¶ 48. Around the same time, Clopper, who had no money and no job but "increasing debts," moved into Hammond's apartment, which Hammond rented from Harvard. *Id.* ¶ 47.

On February 7, 2019, Brian Magner, OLER's Associate Director, sent Clopper the "final results" of the investigation concerning the play. *Id.* ¶ 51. Clopper contends that the decision "failed to address" two of his allegations against Harvard. *Id.*

Before his live sex show at Sanders Theatre on May 1, 2018, Clopper had plans to attend Harvard's School of Engineering and Applied Sciences ("SEAS"). *Id.* ¶¶ 52-53. Clopper claims he initially pursued a job at Harvard to take advantage of its tuition assistance program, *Id.* ¶ 52, and based on what Clopper describes as his "outstanding qualifications," he "anticipated that he would be accepted into Harvard's [SEAS] program" in the fall of 2018. *Id.* ¶ 53.

The Complaint alleges that, on February 25, 2018, more than two months before Clopper put on his

performance, an unnamed professor on the SEAS admissions committee told Clopper that "a fellow faculty member of the Jewish faith had blackballed … Clopper presumably for his prior anti-circumcision advocacy." *Id.* ¶ 54. This professor invited Clopper to audit his course, Introduction to Data Science, and to reapply for the following year. *Id.* But due to HUPD's campus ban, Clopper was unable to attend the class. *Id.*

According to Clopper, this confluence of events—his termination from the LRC, ban from campus, and withdrawal from data class—"meant that he would not be admitted" to Harvard's graduate program. *Id.* ¶ 55. Instead, Clopper enrolled in law school and sued Harvard. *Id.*

Argument

I. Legal Standard

To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In making that assessment, this Court may look to the facts alleged in the pleadings, the documents attached as exhibits or incorporated by reference, and matters of which judicial notice can be taken. *See Nollet v. Justices of the Trial Ct. of Mass.*, 83 F. Supp. 2d. 204, 208 (D. Mass. 2000), *aff'd*, 248 F.3d 1127 (1st Cir. 2000).

Although all factual allegations in a complaint must be accepted as true, that doctrine is not applicable to legal conclusions. *See Aldabe v. Cornell Univ.*, 296 F. Supp. 3d 367, 371 (D. Mass. 2017) (citing

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "Threadbare recitals of the legal elements which are supported by mere conclusory statements do not suffice to state a cause of action." *Id.*; *see Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) (quoting *Iqbal*, 556 U.S. at 668) (holding that court "need not accept as true legal conclusions from the complaint or 'naked assertion[s]' devoid of 'further factual enhancement'").

II. The Complaint fails to allege that Harvard violated Clopper's First Amendment rights (Count I).

To state a First Amendment claim, a complaint must allege that, "acting under the color of state law," the defendant "deprived the [the plaintiff] 'of rights, privileges, or immunities secured by the Constitution or laws of the United States" and, also, that such conduct "was committed by a person acting under color of state law.'" *Martinez-Velez v. Simonet*, 919 F.2d 808, 810 (1st Cir. 1990) (quoting *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). Here, Clopper asserts Harvard violated his "right to free speech" by enforcing the terms of its entertainment license with Cambridge, which prohibited nude performances in the Sanders Theatre, and by "us[ing] this reasoning as justification for interrupting Clopper's play." Cplt. ¶ 61. But the Complaint fails to allege that Harvard's conduct was "state action" or that Clopper's live sex show, including simulated intercourse with an inflatable doll and display of a pornographic video, was "protected activity." It also fails to establish that the applicable rules against public nudity, with which Harvard simply sought to comply, were improper

content-based restrictions on Clopper's speech about circumcision.

A. Harvard did not act "under the color of state law."

The First Circuit has clearly and repeatedly held that for purposes of constitutional claims, Harvard is not a state actor. *See Rice v. Pres. & Fellows of Harvard Coll.*, 663 F.2d 336, 337 (1st Cir. 1981) (affirming dismissal of equal protection claims) (following *Krohn v. Harvard Law School*, 552 F.2d 21, 23 (1st Cir. 1977)) (explaining that Harvard is neither "a public institution" nor "sufficiently intertwined with the Commonwealth of Massachusetts so as to meet the 'state action' requirement"); *Doe v. Harvard Univ.*, No. 93-2051, 1994 U.S. App. LEXIS 28320, at *2- 3 (1st Cir. Oct. 12, 1994) (affirming dismissal of disability discrimination claims).

Ignoring this case law, Clopper alleges that Harvard, a private, non-profit, educational institution, violated his free speech rights endeavoring to obey the terms of its "entertainment license with the City of Cambridge." Cplt. ¶¶ 60-61. Clopper concedes the license "prohibit[ed] nudity" in the Sanders Theatre, but he contends it is "void under the First Amendment." *Id.* Clopper's bald assertion that Cambridge's regulation of public nudity is unconstitutional does not make it so. The Complaint fails to cite the relevant terms of the "entertainment license," much less explain what protected speech was unlawfully proscribed. Moreover, steps taken by Harvard to ensure its own compliance with an entertainment license do not transform the private college into a state actor. *See Jackson v. Metro. Edison*

Co., 419 U.S. 345, 350 (1974) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State."). That erroneous contention would turn every restaurant with a liquor license into state actors subject to constitutional claims.

B. Clopper's live sex show with an inflatable doll before a public audience was not protected activity under the First Amendment.

"Given the absence of state action, the court need not reach the second element of a § 1983 claim, deprivation of a federally protected right." *Maloney v. Bd. of Trs. of Clapp Mem. Library*, No. 14-cv-30054-KAR, 2016 U.S. Dist. LEXIS 38664, at *27 (D. Mass. Mar. 24, 2016). Nevertheless, the Complaint fails to allege that Clopper's sex show was protected activity.

The First Amendment does not protect obscenity. *See Miller v. California*, 413 U.S. 15, 24-25 (1973). Without question, a public performance that includes simulated sex acts by a naked man with an inflatable doll, accompanied by a video in which the man exposes his erect penis, penetrates the doll's mouth, and ejaculates on the doll's face, contains obscenity. Clopper's shocking display "appeal[ed] to the prurient interest," was "patently offensive in light of community standards," and "lacked serious literary, artistic, political, or scientific value." *United States v. Obscene Printed Matter*, 668 F. Supp. 50, 53 (D. Mass. 1987). It included "ultimate sexual acts, normal or perverted, actual or simulated," as well as "masturbation" and "lewd exhibition of the genitals," all of which the Supreme Court has identified as

"plain examples" of obscenity, which the First Amendment does not protect. *Miller*, 413 U.S. at 25-26 (holding "live sex and nudity" cannot be "exhibited … without limit" in "public places"). Moreover, the "encore" added nothing to speech that Clopper had already delivered about circumcision,[7] and those political views, which Clopper expressed at length, did not give him carte blanche to engage in obscene activity, especially before a public audience. *Close v. Lederle*, 424 F.2d 988, 990 (1st Cir. 1970); *cf. Ginzburg v. United States*, 383 U.S. 463, 470-71 (1966) (noting as factor in pre-*Miller* obscenity test, whether material "would tend to force public confrontation with the potentially offensive aspects of the work").

Nor do *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), change the constitutional analysis. Those cases grudgingly recognized that "erotic dancing" may constitute expressive conduct protected at the margins of the First Amendment, but they provide no cover for Clopper.

> Any argument that one has a right to view live sex acts is belied by *Barnes* … and *Pap's A.M.* … both of which held that local authorities may, consistent with the First Amendment, ban totally nude dancing. Indeed, *these cases support the view that live performance of hardcore sexual activity such as sexual intercourse or oral sex is not even within the coverage of the First Amendment.* If nude dancing "is expressive conduct within the outer

[7] It is noteworthy that Clopper chose not to include this material in the rendition of his performance that he posted on YouTube, free from any control by Harvard.

> perimeters of the First Amendment, though … only marginally so," *Barnes*, 501 U.S. at 566 (plurality opinion), or activity "only within the outer ambit" of the First Amendment, *Pap's A.M.*, 529 U.S. at 289 (plurality opinion), then it is certain that hardcore sexual activity unalloyed with some constitutionally recognized form of expression such as dance falls well outside of the First Amendment's ambit.

James Weinstein, "Democracy, Sex and the First Amendment," 31 N.Y.U. REV. OF L. & SOCIAL CHANGE 865, 870 n.19 (2007) (emphasis added). To the extent that nude dancing marks "the outer perimeters of the First Amendment," *Barnes*, 501 U.S. at 566, Clopper's nude display of simulated sex acts accompanied by a video in which he inserted his erect penis into an inflatable doll before a public audience was well beyond the constitutional pale.

Although Clopper relies on *Cabaret Entertainments, Inc. v. Alcoholic Beverages Control Commission*, 393 Mass. 13 (1985), he misconstrues Massachusetts law on the regulation of public nudity. *See* Cplt. ¶ 59. In *Cabaret*, the SJC recognized public nudity (specifically, nude dancing) may be "regulated" in venues that "are licensed to sell alcoholic beverages without violating the U.S. Constitution." *Id.* at 16. But it did not hold that a person has a constitutional right to expose himself in public. Indeed, lewd public displays are illegal in Massachusetts, *see Commonwealth v. Maguire*, 476 Mass. 156, 158 (2017) (discussing M.G.L. c. 272, § 16, which prohibits "open and gross lewdness and lascivious behavior"), and the

First Amendment permits governments to regulate public nudity "to protect morals and public order," *Barnes*, 501 U.S. at 569.

C. The Cambridge prohibition on public nudity at the Sanders Theatre, with which Harvard complied, is a valid, content-neutral regulation.

The First Amendment permits broad bans on public nudity, even when accompanied by expressive activity, when such prohibitions do not "target" particular viewpoints. *See Pap*, 529 U.S. at 290 (upholding ordinance that "ban[ned] all public nudity, regardless of whether that nudity is accompanied by expressive activity" and did not "target" nudity with any particular message).

To the extent that Harvard merely sought to comply with Cambridge's prohibition on public nudity, in the Sanders Theatre and elsewhere, that local law is a reasonable, content-neutral restriction and, thus, constitutional. *See Taub v. City & Cty. of San Francisco*, No. 15-16415, 696 Fed. Appx. 181, 182-83 (9th Cir. 2017) (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). Here, it made no difference that Clopper is vehemently opposed to circumcision. His performance would have run afoul of local law, even if it had been a celebration of circumcision, because he not only appeared without clothes, but also engaged in graphic, simulated sex acts on stage. Even if the law were ultimately ruled unconstitutional (Cambridge is not a defendant in this litigation), Harvard cannot violate the First Amendment by taking action to comply. Nor does the Constitution require Harvard to maintain an employment or student relationship with

a person who has conducted himself in this manner. The actions taken by Harvard—termination from employment and, allegedly, withholding of admission to a graduate program—do not violate the First Amendment.

III. The Complaint fails to allege that Harvard violated Clopper's civil rights by threat, coercion, or intimidation, either directly or through any third-party (Count II).

To plead a violation of the Massachusetts Civil Rights Act ("MCRA"), a plaintiff must allege that, by threats, coercion, or intimidation, the defendant interfered with the plaintiff's exercise of a constitutional or statutory right. *See Currier v. Nat'l Bd. of Med. Exam'rs*, 462 Mass. 1, 12 (2012). A MCRA claim mirrors a § 1983 claim, except the Massachusetts law does not require state action. *See Bell v. Mazza*, 394 Mass. 176, 181 (1985). Here, the allegation that Harvard unlawfully "interfered" with Clopper's "right" to perform nude at the Sanders Theatre does not state a MRCA claim. Clopper was not engaged in "protected activity," and Harvard did not engage in "threats, coercion, or intimidation." Nor did Harvard improperly "acquiesce" to alleged "outside pressure" from "Jewish individuals and groups." Cplt. ¶¶ 68-71.

A. Clopper had no right to present a live sex show to a public audience in the Sanders Theatre, and he suffered no damages.

For the reasons stated above, *see* Part II.B. *supra*, Clopper had no "right" to perform an explicit, public

show, including live simulated sex acts with an inflatable doll and display of a pornographic video. Put simply, an individual has no constitutional or statutory right to expose oneself in an obscene public display, even if he aims to make some political or artistic point.

B. Harvard did not engage in "threats, intimidate, or coercion."

The MCRA "explicitly limit[s]" its reach to "situations where the derogation of secured rights occurs by threats, intimidation, or coercion." *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 645 (2003) (quoting *Bally v. Northeastern Univ.*, 403 Mass. 713, 718 (1989)). In interpreting the MCRA, "the Supreme Judicial Court has suggested that a showing of an 'actual or potential physical confrontation accompanied by a threat of harm' is a required element of a claim." *Carvalho v. Town of Westport*, 140 F. Supp. 2d 95, 101 (D. Mass. 2001) (citing *Planned Parenthood League of Mass., Inc. v. Blake*, 417 Mass. 467, 474 (1994)). Here, however, the Complaint does not allege any "actual or potential physical confrontation" between Harvard and Clopper or any threat of "physical harm."

C. Harvard did not improperly acquiesce to third-party pressure.

In an effort to overcome the lack of any physical confrontation in this case, Clopper contends that Harvard violated the MCRA by bowing to outside pressure from the Jewish community to fire Clopper after his play. Cplt. ¶ 71 (citing *Redgrave v. Boston*

Symphony Orchestra, 399 Mass. 93 (1987)). That gambit fails.

As a legal matter, "the validity of the contract exception" to the MCRA's physical- confrontation requirement is "questionable." *Carvalho*, 140 F. Supp. 2d at 101. The SJC has characterized *Redgrave* as involving "not a contract dispute, but rather a physical confrontation accompanied by threats of harm." *Id.* (citing *Blake*, 417 Mass. at 473 n.8). Clopper's misreading of *Redgrave,* which could transform countless mine-run contract cases into civil rights actions, ignores the SJC's guidance that the MCRA "was not intended to create, nor may it be construed to establish, a 'vast constitutional tort.'" *Buster*, 438 Mass. at 645 (quoting *Bell*, 394 Mass. at 182).

Regardless, such a claim would fail in this case. Unlike Vanessa Redgrave, who had a contract with the BSO to perform for a fee, Clopper had no "contractual right" to put on a live sex show at the Sanders Theatre or, following his performance, to continue his at-will employment in the LRC. *See infra* Section IV. Because Clopper was "employed 'at-will,'" he had "no contract right to [his] position[]" and cannot rely on *Redgrave* to maintain a MCRA claim. *Webster v. Motorola, Inc.*, 418 Mass. 425, 430 (1994) (affirming dismissal of MCRA claim where "defendants allegedly attempted to interfere with the plaintiffs' rights by threatening the loss of their 'at-will' positions," because such "interference" is "not actionable conduct").

IV. The Complaint fails to allege that Harvard breached a contract with Clopper for his use of the Sanders Theatre (Count III), an employment agreement with Clopper (Count IV), or the implied covenant of good faith and fair dealing that is inherent in any such Massachusetts contracts (Count V).

A contract claim requires the breach of a valid, binding agreement. *See Brooks v. AIG Sunamerica Life Assur. Co.*, 480 F.3d 579, 586 (1st Cir. 2007). Here, however, the Complaint fails to plead Harvard agreed that Clopper could perform a live sex show at the Sanders Theatre or that he could continue to work in the LRC in its aftermath. *See Hannigan v. Bank of Am., N.A.*, 48 F. Supp. 3d 135, 140 (D. Mass. 2014) (allowing motion to dismiss contract claim).

A. The contract for use of the Sanders Theatre prohibited nude performances.

Clopper and Foregen entered a contract with Harvard's Office for the Arts for use of the Sanders Theatre. Cplt. ¶ 13. That contract, which the Complaint incorporates by reference, set forth the following "rule and policies":

> Licensee and Licensee's use of the Space [i.e., the Sanders Theatre] shall be subject to Licensee's compliance with all federal, state, and local laws and any policies, rules, and regulations that the Memorial Hall/Lowell Hall Complex or Harvard may promulgate from time

> to time, including those stated in … the Sanders Theatre Policy Book … [and] any correspondence from the Memorial Hall/Lowell Hall Complex Program Manager.

Ex. D. The Sanders Theatre Policy Book included a "[s]pecial note regarding nudity" that states: "Sanders Theatre serves primarily as a lecture and concert facility. *Our Entertainment License from the City of Cambridge does not encompass nudity*." *Supra* n.3 (emphasis added). Clopper acknowledges that Harvard's license and the Theatre's policy prohibited public nudity. Cplt. ¶ 8. That critical concession precludes his contract claim. Put simply, there was no agreement with Harvard for Clopper to perform nude at Sanders Theatre, much less to simulate sex acts with an inflatable doll on stage and screen a pornographic stop-motion video.

If anyone violated the contract for use of the Sanders Theatre, it was Clopper, who not only broke the rules against nudity but also misled Harvard about his event. The Complaint summarizes discussions, via email, in which Harvard told Clopper that nudity was prohibited. *Id*. ¶ 18. Ruth Polleys, Program Manager in Harvard's Office of the Arts, advised Clopper: "Due to the nature of the posters advertising the event, I've been asked to let you know that zoning laws and our Entertainment License with the City of Cambridge do not permit nudity as part of any event." Ex. E. In response, Clopper falsely assured Polleys that his performance would *not* involve nudity:

> *I understand your concerns about the posters.* My publicist has been very aggressive with them. Apparently, this is what is known in the

> publicity business as "implied nude" – slightly embarrassing to walk around campus and have the tourists pointing at me and then at the posters! It's an edgy show, but *we'll stay within the bounds of propriety*, no worries.

Id. (emphasis added)

To the extent that Clopper contends other people made "implied promises" about his show, Cplt. ¶¶ 16-17, the Complaint fails to state a contract claim against Harvard. As a matter of law, an oral representation cannot override the clear terms of the written contract. *See Coll v. PB Diagnostic Sys.*, 50 F.3d 1115, 1124 (1st Cir. 1995). Regardless, alleged comments by Bronski and Hammond, who supposedly encouraged and assisted Clopper, Cplt. ¶¶ 67, 78, 83, could not bind Harvard, because those individuals had no authority. *See Hudson v. Mass. Prop. Ins. Underwriting Assn.*, 386 Mass. 450, 457 (1982) ("Apparent or ostensible authority results from conduct by the principal which causes a third person reasonably to believe that a particular person … has authority to enter into negotiations or to make representations as his agent."); *see also Normandin v. Eastland Partners, Inc.*, 68 Mass. App. Ct. 377, 385 (2007). The Complaint does not allege—nor could it—that Harvard engaged in conduct that would have caused a reasonable person to believe that, on Harvard's behalf, a FAS professor or LRC employee could sanction live nudity and pornographic content in the Sanders Theatre, despite an express contractual provision and Harvard's policies (and Cambridge's laws) against public nudity.

B. Clopper was an at-will employee of Harvard, and his termination did not breach any employment agreement.

Under Massachusetts law, "an employment at-will contract can be terminated at any time for any reason or for no reason at all." *Folmsbee v. Tech Tool Grinding & Supply, Inc.,* 417 Mass. 388, 394 (1994); *see Pearson v. John Hancock Mut. Life Ins. Co.*, 979 F.2d 254, 258 (1st Cir. 1998) (holding "at-will employment" can be "scrap[ped]" by either party "at any time, without notice or cause"). For that reason, "subject to limited exceptions for violations of public policy or to prevent unjust enrichment to an employer … an at-will employee cannot succeed on a breach of contract claim arising from a change in the terms and conditions of her employment," including termination. *Merricks v. Savers, Inc.*, No. 11-cv-10956-DJC, 2012 U.S. Dist. LEXIS 1568, at *15 (D. Mass. Jan. 6, 2012) (citing, *e.g.*, *Bergeson v. Franchi*, 783 F. Supp. 713, 717-18 (D. Mass. 1992) (dismissing at-will employee's contract claim)). Because Clopper was an at-will employee, Harvard could terminate him at any time and for any reason. Thus, even if Harvard fired Clopper for staging his obscene and offensive play, as Clopper alleges, *see* Cplt. ¶ 84, his claim for breach of his employment agreement would fail.

C. Harvard did not breach the implied covenant of good faith and fair dealing in any of the alleged contracts.

Every contract in Massachusetts is subject to an implied covenant of good faith and fair dealing, and a breach of that implied convent occurs when one party violates the reasonable expectations of the other. *See*

Chokel v. Genzyme Corp., 449 Mass. 272, 275-76 (2007).

The covenant, however, does not supply terms that the parties were free to negotiate, but did not, *see id.*, nor does it "'create rights and duties not otherwise provided' for in the contract," *id.* (quoting *Ayash v. Dana-Farber Cancer Ctr.*, 443 Mass. 367, 385 (2005)). Thus, Clopper's "allegation" that, under Massachusetts law, the implied covenant broadly "protects employees for asserting legally guaranteed rights," such as free speech rights, *see* Cplt. ¶ 89, is incorrect.

Here, Clopper's tag-along implied covenant claim adds nothing to his case. The Complaint does not allege any fact that would independently establish a breach of the implied covenant separate from any contract. Instead, it generically asserts, "[b]y the conduct complained of [in] this Complaint," meaning the entire pleading, "Harvard breached the implied covenant of good faith and fair dealing in the contracts between Harvard and Clopper." *Id.* ¶ 88. That conclusory legal allegation without any "further factual enhancement" is insufficient, *Maldonado*, 568 F.3d at 268: the Complaint does not specify what "conduct" or how it "violat[ed]" the implied covenant.

V. The Complaint fails to allege Harvard made any enforceable promise that Clopper could perform nude at the Sanders Theatre (Count VI).

Promissory estoppel is an equitable doctrine that provides for enforcement of a promise that a defendant made with the intent to induce reliance by a plaintiff,

where the plaintiff relied on that promise to his detriment. *See Nardone v. LVI Servs., Inc.*, 94 Mass. App. Ct. 326, 330 (2018).

To be enforceable, a promise must be "definite and certain." *Santoni v. Fed. Dep. Ins. Co.*, 677 F.2d 174, 179 (1st Cir. 1981). A plaintiff's alleged reliance on a "vague representation" is insufficient, because such reliance is "certainly not reasonable." *Michelson v. Dig. Fin. Servs.*, 167 F.3d 715, 725-26 (1st Cir. 1999). Here, the Complaint fails to allege Harvard made any "definite and certain" promise that Clopper could perform "nude and otherwise" and that it would not "retaliate against him … for doing so." Cplt. ¶ 93. Vague references to "many express and implied promises made to [Clopper] expressly and impliedly, orally and in writing," by Bronski, Hammond, "Harvard's free speech policy," and "the speeches of the outgoing and incoming Harvard presidents" are insufficient. Absent factual allegations about who said what, when, and how such statements could be imputed to the University, there can be no valid claim that Clopper relied on any specific "promise."

Further, the fact that Clopper signed a written agreement with Harvard precludes his promissory estoppel claim, for two reasons. First, "an oral statement made in the face of a written contract" does not constitute "a 'promise' or 'commitment' for promissory estoppel purposes," because "the existence of a written contract demonstrates the parties' intention that it [will] govern[.]" *Trent Partners & Assoc. v. Dig. Equip. Corp.*, 120 F. Supp. 2d 84, 104-05 (D. Mass. 1999) (quoting *Rhode Island Hosp. Trust Nat'l Bank v. Varadian*, 419 Mass. 841, 850 (1995)).

Second, to invoke promissory estoppel, a plaintiff "must have *reasonably* relied on the alleged promise to his detriment." *Coll*, 50 F.3d at 1124 (emphasis in original) (quoting *Hall v. Horizon House Microwave*, 24 Mass. App. Ct. 84, 93 (1987)). When an oral representation "conflicts with" a written document, such as a contract, "reliance on the oral representation is generally held to be unreasonable." *Id.* (citing *Trifiro v. N.Y. Life Ins. Co.*, 845 F.2d 30, 33-34 (1st Cir. 1988)). As noted above, Clopper concedes that his written agreement to use the Sanders Theatre, which incorporated the Policy Book, expressly prohibited public nudity. He could not, therefore, have reasonably relied on an alleged promise to the contrary.

VI. The Complaint fails to allege that Harvard defamed Clopper (Count VII).

To state a claim for defamation, a plaintiff must allege the defendant "published a false statement about him to a third-party that either caused him economic loss or was the type that is actionable without proof of economic loss." *Phelan v. May Dep't Stores Co.*, 443 Mass. 52, 55-56 (2004). The plaintiff must also allege the defendant acted with the requisite intent, from negligence (for a private person) to actual malice (for a public figure). *See Ravnikar v. Bogojavlensky*, 438 Mass. 627, 630 (2003) (discussing varying "levels of fault required" for defamation).

A. The Complaint does not allege that Harvard made any defamatory statements.

Clopper complains about several critical articles in *The Harvard Crimson* concerning his performance. Cplt. ¶¶ 24-26, 99. The Complaint does not allege, however, that *Harvard* published these articles. To the extent the articles quote statements from Rachael Dane, FAS's Director of Media Relations, the Complaint fails to allege that her statements were false or defamatory. To the contrary, the Complaint concedes that *The Crimson* reported—*accurately*—that Harvard was "reviewing" what transpired at the Sanders Theatre on May 1, 2018. *See id.* ¶ 99; *see also id.* at ¶¶ 28-30.

Nevertheless, the Complaint alleges that Harvard is somehow responsible for three statements published in five articles by *The Crimson*: (1) Clopper performed "nude," (2) his performance was a "rant," and (3) it included anti-Semitic remarks. *See* Cplt. ¶¶ 99-101. These statements were neither false nor defamatory.

First, there was no falsity. It is undisputed that Clopper appeared fully nude, with his genitals exposed, on the stage before a public audience in the Sanders Theatre at the end of his performance. *Id.* ¶ 20 ("Clopper performed a nude dance[.]"); *see* Sealed Exs. B & C. Indeed, the core of this case is Clopper's erroneous assertion that he had constitutional and contractual rights to perform nude. It is also undisputed that Clopper "rant[ed]" about circumcision. He characterized himself as "sputtering with rage" and his performance as his "official

declaration of war on [the Jewish] covenant." YouTube Video at 2:03-2:05.

In addition, the assertion that Clopper or his performance was "anti-Semitic" expresses an opinion, which is not actionable. *See Egiazaryan v. Zalmayez*, 880 F. Supp. 2d 494, 512 (S.D.N.Y. 2012) (dismissing defamation claims and holding "accusations" of anti-Semitism are "expressions of opinion"); *cf. Nat'l Assoc. of Gov't Emps. v. Cent. Broad. Corp.*, 379 Mass. 220, 229 (1979) (holding "communist" was "too vague to be cognizable as the subject of a defamation action"). "Under the First Amendment, opinions based on disclosed facts are absolutely privileged, …. even when an opinion is extremely derogatory, like calling another person's statements 'anti-Semitic.'" *McCafferty v. Newsweek Media Grp.*, 955 F.3d 352, 357 (3d Cir. 2020). Here, the relevant facts were fully disclosed, by *The Crimson* in its articles and by Clopper on stage.

Clopper's public statements, which were accurately reported, speak for themselves. For example, during his performance, Clopper called Judaism "an evil ideology" that is "hideous and duplicitous enough to fool an entire nation" to perpetrate the "unspeakable evil" of circumcision, which Clopper called "a Satanic ritual." YouTube Video at 2:02-2:03. He repeatedly insisted that Jews have "too strong a grip" and wield "a demonstrably evil influence on this country." *Id.* at 2:03. He also claimed, "the Jews … raped me" and exhorted his audience "not [to] allow them to rape the next generation of children." *Id.* at 2:05. Invoking the most traditional of anti-Semitic tropes, Clopper threw cash

from the stage and shouted the Jews "can keep their money." *Id.* at 1:58.

B. Clopper is a "limited-purpose public figure," and Harvard did not act with "actual malice" toward him.

In defamation cases, "the requirement of actual malice" has been extended "to an otherwise private figure who 'voluntarily injects himself or is drawn into a particular public controversy,' thus becoming a limited-purpose public figure[.]" *Lemelson v. Bloomberg, L.P.*, 903 F.3d 19, 23 (1st Cir. 2018) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

"The First Circuit uses a two-pronged test to determine whether a defamation plaintiff fits the limited purpose public figure category." *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 13 (1st Cir. 2011). First, would "a reasonable person … have expected persons beyond the immediate participants in [a] dispute to feel the impact of its resolution"? *Id.* at 13. Second, did they "attempt[] to 'influence the resolution' of that controversy"? *Id.*; *see Alharbi v. Beck*, 62 F. Supp. 3d 202, 209 (D. Mass. 2014) (holding people are "limited purpose public figures" if they "affirmatively sought out press coverage in order to influence public perception of their respective controversies").

In the debate over circumcision, Clopper is—and wants to be—a limited-purpose public figure. *See* https://www.clopper.com (touting Clopper's anti-circumcision activism and soliciting

donations to fund litigation against Harvard). The controversy certainly impacts persons beyond Clopper and his audience, and he has aggressively tried to influence its resolution. Indeed, that was the *raison d'etre* for his appearance in the Sanders Theatre, and Clopper has sought public attention both before and after his performance.

"Because of the First Amendment interests implicated by a claim of defamation by a public figure, the standard for pleading actual malice 'is a daunting one.'" *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002). "Even where a plaintiff establishes an extreme departure from professional norms, the standard for actual malice is not met unless the plaintiff can establish that the defendant actually entertained serious doubts about the truth of the publication at issue." *Id.*

To survive a Rule 12(b)(6) motion to dismiss to dismiss, a limited-purpose public figure must "la[y] out enough facts from which malice might reasonably be inferred." *Lemelson*, 903 F.3d at 24 (citing *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012)); *see, e.g.*, *Frachini v. Bangor Publ'g Co.*, No. 1:18-cv-00015-GZS, 2020 U.S. Dist. LEXIS 66200, at *8 (D. Me. Apr. 15, 2020) (dismissing defamation claim for failure to plead actual malice). In this case, however, the Complaint fails to allege that Harvard acted with actual malice in making any defamatory statements about Clopper or his performance.

VII. The Complaint fails to allege that Harvard tortiously converted Clopper's tangible property (Count VIII).

To plead tortious conversion, a plaintiff must allege the defendant intentionally or wrongfully exercised dominion or control over the plaintiff's personal property, thereby substantially interfering with the plaintiff's use of his property. *See Kelley v. Laforce*, 288 F.3d 1, 11-12 (1st Cir. 2002) (citing *Third Nat'l Bank v. Cont. Ins. Co.*, 388 Mass. 240, 383 (1983)).

Conversion applies only to tangible property, not intellectual property. *See Blake v. Prof'l Coin Grading Serv.*, 898 F. Supp. 2d 365, 386 (D. Mass. 2012) (collecting cases). But here, the Complaint fails to allege Harvard converted any "chattel" of Clopper. Rather, under the erroneous guise of tortious conversion (a *tangible* property claim), the Complaint improperly asserts copyright infringement (an *intangible* property claim). *See* Cplt. ¶ 110 ("Clopper had an automatic copyright of the entirety of the Play . . ."). Even assuming Clopper owned a copyright, he "[held] no ordinary chattel" with respect to his nude show, *Dowling v. United States*, 473 U.S. 207, 215 (1985), and thus, there was nothing for Harvard to convert.

Further, Harvard did not substantially interfere with Clopper's ability to use the "property" he claims Harvard converted, *i.e.*, the performance.[8] The

[8] Indeed, as noted above, Clopper subsequently posted a video of his Sanders Theatre performance on YouTube and he retained sufficient control over the "property" that he was able to omit his

Complaint states only that Baystate, a separate entity which is not named as a defendant, "made a perfect digital copy of the Play and other materials by taken a 'screen' capture of the material on Clopper's laptop," and it characterizes Baystate's conduct as "inconsistent with Clopper's ownership of these materials." Cplt. ¶¶ 111-12. The Complaint fails to allege, however, that Harvard did anything (other than "ask" Baystate for "a copy of Clopper's Play"); to specify what "other materials" were supposedly taken from "Clopper's laptop"; or to explain how making an after-the-fact copy of the recording substantially interfered with Clopper's ability to present the performance at any other venue or to distribute his own copies.

VIII. The Complaint fails to allege that Harvard conspired with The Crimson or any other party to commit any tort against Clopper (Count X).

A. Clopper erroneously asserts a criminal conspiracy claim.

Invoking G.L. c. 274, § 7, the Complaint alleges that Harvard conspired with Baystate to "steal the play" and with *The Crimson* to defame Clopper. *See* Cplt. ¶¶ 39, 119-123. Notwithstanding the Complaint's ambiguous and erroneous legal assertion that "[t]he statute provides for civil and criminal penalties," *id.* ¶ 123, section 7 provides for "punishments," including imprisonment, for "[a]ny person who commits the crime of conspiracy," and

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nude dance with the sex doll and the pornographic video he presented as an "encore."

Clopper cannot sue Harvard pursuant to that penal law.

B. The civil conspiracy analogue would not apply, because there was neither an underlying tort against Clopper nor a conspiracy with *The Crimson*.

To the extent Clopper intended to plead a *civil* conspiracy, that claim would fail. Massachusetts has never explicitly recognized the tort of civil conspiracy, *see Kurker v. Hill*, 44 Mass. App. Ct. 184, 189 (1988), and at a minimum, the Complaint would have to allege "'a common plan to commit a tortious act.'" *Id.* (quoting *Stock v. Fife*, 13 Mass. App. Ct. 75, 82 n.10 (1982)). Here, because there was no tort (violation of the First Amendment, defamation, or conversion), there could be no civil conspiracy. Further, the Complaint fails to allege any "common plan." For example, allegations that Harvard emailed a statement to *The Crimson*, which then reported on Clopper's performance and Harvard's "review" of it, does not establish concerted tortious action. If a claim for conspiracy could be stretched to that extreme, every person quoted in a critical news article could be sued for conspiring to defame.

Conclusion

For the foregoing reasons, Defendant President and Fellows of Harvard College respectfully requests that the Court dismiss this civil action for failure to state a claim.

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

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Dated: September 29, 2020

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 29, 2020

/s/ William Fick

APPENDIX Y

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ERIC CLOPPER Plaintiff, v. HARVARD UNIVERSITY; PRESIDENT AND FELLOWS OF HARVARD COLLEGE (Harvard Corporation); THE HARVARD CRIMSON; and JOHN DOES 1-10, Defendants	Case No.

COMPLAINT AND JURY DEMAND

1. The Defendants named in the Complaint caused and are liable for the harm suffered by the Plaintiff, Eric Clopper, as detailed below when Harvard University terminated his employment.

PARTIES

2. The Plaintiff, Eric Clopper ("Clopper"), is a private individual who resided in Massachusetts from February 2015 to June 2019, and who now resides in

Washington, D.C. He started working for Harvard University on May 23, 2011 on an intermittent basis, and he worked full-time for Harvard University's Language Resource Center ("LRC") from July 17, 2017 through July 12, 2018.

3. The Defendant, Harvard University ("Harvard"), is a university and a corporation incorporated by a Massachusetts Colony charter dated 1650, with a principal place of business in Cambridge, Massachusetts.

4. The Defendant, President and Fellows of Harvard College, also known as the "Harvard Corporation" ("Harvard Fellows"), is Harvard University's governing board.

5. The Defendant, The Harvard Crimson, Inc. (the "Crimson"), is a Massachusetts corporation and newspaper doing business in Massachusetts.

JURISDICTION AND VENUE

6. The court has jurisdiction over this Complaint for diversity as all Defendant parties have places of business or reside in the Commonwealth of Massachusetts (and all events complained of occurred within the Commonwealth), and the Plaintiff, Eric Clopper, is a resident of Washington, DC. In addition, there is federal question jurisdiction over the Plaintiff's First Amendment right to free speech.

THE FACTS

CLOPPER'S BELIEFS ABOUT CIRCUMCISION AND THE GENESIS OF HIS PLAY TO SHARE HIS BELIEFS, EXPRESSED AS A PRIVATE INVIDIVIDUAL

7. The Plaintiff, Eric Clopper (hereinafter "Plaintiff" or "Clopper"), is Jewish.

8. After studying the practice for years, Clopper became one of a large and increasing number of people, including Jews, adamantly opposed to non-consensual circumcision or genital cutting. It is Clopper's mission in life to help end what he considers to be a harmful and unlawful traditional practice that harms babies and mutilates their genitals for life.

9. Clopper was invited to give a lecture about circumcision at Cornell University in October of 2017; he titled his lecture "Circumcision in the US: Identifying Truths & Trends in Genital-Cutting Cultures." Clopper's lecture contained graphic depictions of both circumcised and intact penises and frank discussions of how circumcision damages the penis for both masturbatory and sexual purposes.

10. Clopper paid to have his Cornell lecture videotaped and then showed his videotaped lecture to Harvard's Professor Michael Bronski of Harvard's Women, Gender, and Sexuality Department. Bronski was impressed and agreed to help Clopper deliver a lecture on the same topic with bigger scale at Harvard.

11. After some brainstorming, Clopper and Bronski decided the lecture should be turned into a play by incorporating more theatrical components. They

named the play "Sex & Circumcision: An American Love Story" (the "Play").

CLOPPER RELIED ON SUPPORT, ENCOURAGEMENT, AND HELP FROM HIS MANAGER AND HARVARD TO DELIVER HIS EDUCATIONAL, ADULT-ONLY, EXPLICIT PLAY ABOUT CIRCUMCISED PENISES

12. Clopper's manager was Thomas Hammond ("Hammond"), the Director of Harvard's Language Resource Center. Hammond was also impressed with Clopper's Cornell lecture and decided to help him produce the Play at Harvard. Hammond approved everything Clopper did in connection with the Play. He gave Clopper permission to work on the Play occasionally at Harvard; he approved the advertising; he approved every word and action in the Play. Indeed, Hammond assisted in conceiving and producing the entirety of the Play's content and served as stage manager when Clopper performed the Play.

13. On March 1, 2018, Clopper reserved Harvard's Sanders Theatre, a large and historic venue, for his Play for May 1, 2018. The contract specified that Clopper and a charitable organization are licensees and the contract price was $4,020.00, which Clopper personally paid to Harvard as consideration to perform at Sanders Theatre. The contract made no mention of prohibition of nudity, nor was Clopper made aware of any restriction on nudity, and had Harvard informed him of any such prohibition, Clopper would have chosen another venue for the Play.

14. Harvard's Box Office Manager Tina Smith began promoting Clopper's Play on March 16, 2018 on Harvard's Office of the Arts website. The title of Clopper's Play, "Sex & Circumcision: An American Love Story," made clear that the Play would include "sex," "circumcision," and a "love story." There were also "EXPLICIT CONTENT" warnings on every advertisement Harvard hosted online and on the printed ads Harvard placed in the Sanders Theatre complex itself. The ticketing site also included the disclaimer that the play was "Not Appropriate for Children." The pictures Harvard used to advertise the Play showed a nude Clopper pointing to his genitals, which were obscured by a thin censor bar (Exhibit 1).

15. Clopper advertised the Play by placing posters around campus as is customary for university presentations and events. These posters were variations of the nude picture of Clopper that Harvard was using to advertise they play; they showed Clopper naked with his genitals obscured by a censor bar and "EXPLICIT CONTENT" warnings on them, thus communicating to potential playgoers that there would be nudity. Clopper further communicated there would be graphic depictions of penises in his play about circumcision by hiring actors to wear seven-foot inflatable penis costumes in Harvard Yard and hold picket signs of these same posters. On April 28, Professor Bronski informed Clopper that "all of my students who say [sic] the parade of men thought it was great." Online videos show Clopper taking group portraits with dozens of citizens around Cambridge smiling and laughing with his group of actors and appreciating what Bronski described as "innocent, sexual material" in an April 29 email.

16. Clopper believes that if Harvard had an issue with the content of his Play, Harvard should have informed him that his "explicit" play about "sex" and "circumcised [penises]" was unacceptable on campus, before he invested his life savings to advertise it and perform it at Harvard. Instead of taking issue with the content of Clopper's Play, Harvard advertised Clopper's explicit, adult-only Play and collected money from its ticket sales without complaint. Furthermore, Harvard made many express and implied promises to Clopper – verbally and in writing – that he would be free to express himself in his explicit Play without retaliation because of protection of free expression described by Professor Bronski, Clopper's manager Hammond, Harvard's outgoing president Drew Faust, Harvard's incoming president Lawrence Bacow, and Harvard's Free Speech Policy.

17. Clopper invested his life's savings, went into debt, and solicited charitable contributions from opponents of circumcision to create, advertise, stage, and perform the Play. The Play cost Clopper and his donors approximately $40,000. Clopper relied on the promises of Harvard officials and Harvard's Free Speech Policy that his free speech rights were comprehensive and that they would be respected when he delivered his anti-circumcision Play as a private individual to a willing adult audience. Clopper's manager Hammond even urged Clopper to take full advantage of his protected speech by including a nude dance and an educational slideshow relating to masturbation.

18. Three days before his Play on April 28, 2018, Harvard informed Clopper by email that his Play "may well not include nudity." Clopper believed that

he had the right to include nudity in the Play: nudity was an essential part of the message about circumcision, which involves exposing boys' and men's sex organs and amputating part of them; the Play was about "sex" and "circumcised [penises]; a Harvard professor and Clopper's boss helped Clopper create the Play with nudity in it and approved it; Harvard's policies encourage and protect free speech and Clopper was told he could rely upon them; Harvard condones and even encourages nudity and sexual art in other situations; Harvard disseminated advertisements disclosing nudity and sexual content; and the written contract for Sanders Theatre did not prohibit nudity. Again, if it had, Clopper would have chosen a different venue. Clopper also believed including nudity in the Play helped present his messages more powerfully. The inflatable penises and advertisements alerted theatregoers that there would be nudity and penises in the Play. In addition, Clopper had invested his life savings and donor's money in the Play and it was far too late to change the Play, the schedule, or the venue. Harvard's essentially last minute command to avoid nudity would infringe upon his contractual rights and his constitutionally protected right to free speech that Harvard promised to protect and had supported since the inception of the Play. *Cabaret Enterprise v. Alcoholic Beverages Control Commission*, 468 N.E.2d 612, 614-615 (Mass. 1984) (holding that nude dancing is a protected form of speech under Article 16 of the Massachusetts Constitution). Based on this, Clopper responded that the Play would be "within the bounds of propriety".

CLOPPER DELIVERED HIS PLAY ON MAY 1, 2018 TO MULTIPLE STANDING OVATIONS

19. Clopper's May 1, 2018 Play was 140 minutes long. The first 135 minutes largely followed a lecture format and went smoothly. In the first 130 minutes, Clopper explained how circumcision can be considered a form of genital mutilation. Clopper showed how circumcision was a social phenomenon limited to the Jewish people, but through the consistent efforts of a dedicated minority, the practice had expanded to all of America. The audience of hundreds of individuals from the Harvard community and beyond gave Clopper a standing ovation.

20. From approximately the 130- to 135-minute mark, Clopper performed a nude dance to Britney Spears' *Toxic* music video with an inflatable love doll named "Britney." "Britney" was the big reveal of the "love story" Clopper had hinted at throughout the Play. Clopper's nude dance provided much-needed comic relief after the heavy message Clopper had just delivered to the audience. The audience laughed and clapped in unison to the song; some gave Clopper a standing ovation after the dance.

21. Immediately following the nude dance, Harvard's "Production Assistant/Venue Representative" Maureen Lane sprinted towards Clopper, arms raised, screaming at him for his nude dance. The lights flashed on and off, which many members of the audience interpreted as the end to the Play, so many people started filing out of the theatre. However, Clopper's Play was not over.

22. From the 135 to 140-minute mark, Clopper intended to get dressed and share a final message about the irreconcilable doctrines of circumcision, which he considers to be genital mutilation, and modern-day human rights. As Clopper shared this message, an explicit "love scene" between him and "Britney" was supposed to play, thus highlighting the irrational status quo in contemporary culture that acts of genital mutilation against infants are tolerated, but harmless sexual acts such as masturbation or procreative sex that actually create the infant are vilified in America. This final "love scene" concluded with the message that "[circumcision] is the most obvious and evil lie in human history," and that Clopper "imagine[s] that some powerful interests may not appreciate [his] Play."

23. Clopper indicated multiple times throughout his Play that he was speaking only for himself and not for Harvard. Clopper believes that anyone who had seen the Play's advertisements would be adequately prepared for an adult-only Play that contained frank and explicit scenes about sex, circumcised penises, and a satirical love story.

THE HARVARD CRIMSON

24. The following day, on May 2, 2018, Harvard's student newspaper named The Harvard Crimson ran an article titled "Harvard 'Reviewing' Employee's Nude, Anti-Semitic Rant in Sanders Theatre", written by Michael Xie and Lucy Wang.

25. Clopper was shocked at what he perceived to be a gross and malicious misrepresentation of the Play.

Clopper spoke with one of the student reporters, Michael Xie, the following day. During their consensually recorded conversation, Xie had admitted that neither he nor Ms. Wang had seen his Play, but that:

> Our cover[age] is mostly around the Harvard angle. Where Harvard is standing regarding your performance. So, I guess it may seem a little more one-sided just due to the fact that Harvard is kind of taking a one-sided stance on this, as opposed to looking at the entire thing broadly.

Clopper did not know that "Harvard" took positions on the content of presentations shared within the university's walls. He also did not know that Harvard had editorial influence over the student newspaper, The Crimson. Speaking for The Crimson, Xie admitted that Harvard drove one-sided coverage of Clopper's Play.

26. The Harvard Crimson, presumably still under the influence of Harvard, went on to publish two more direct attack articles against Clopper: "Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours" (May 4, 2018); and "Against 'Sex and Circumcision: An American Love Story'" (May 9, 2018). The Harvard Crimson also published two more articles mentioning Clopper, 1as an example of anti-Semitism: "Harvard 'Investigating' After Swastika Found at School of Public Health" [gratuitously referring and linking to a story about Clopper's performance] (May 12, 2018); and "Expanding the Diversity Conversation" (May 24, 2018).

HARVARD'S RETALIATION FOR CLOPPER'S SPEECH AS A PRIVATE INDIVIDUAL

27. Clopper had scheduled and took vacation time from April 23, 2018 through May 4, 2018. On May 4, Clopper's Dean Robert Doyle informed Clopper that he would be placed on paid administrative leave because Harvard, "need[s] to conduct a careful review of the events leading up to and including the show that took place at Sanders Theatre on Tuesday evening, May 1."

28. Harvard did not inform Clopper why it had suspended his employment or for what he was being investigated, and the scope of the investigation continued to expand with time.

29. The first and only meeting Clopper had with Harvard during the 69-day "investigation" of him was on May 9, 2018. Dean Doyle and HR representative Ann Marie Acker questioned Clopper to discern whether he violated work policy by impermissible use of Harvard's time or resources for his Play, as claimed in the May 4, 2018 Crimson article. Clopper's manager Hammond informed Dean Doyle via email that Clopper's behavior was in line with the department's policies for the last fourteen years, and that "[i]n fact, the truth of the situation runs in the opposite direction: Eric did some work for the Center while he was technically on vacation [because Clopper] would rather spend the vacation time to be sure he was not abusing Harvard's time."

30. Harvard, unable to establish a pretextual work policy violation by Clopper, on the following day, May 10, expanded the scope of its "investigation."

Harvard's Director of HR Consulting Gary Cormier emailed all staff and students of the LRC to "offer an opportunity to speak me [sic] confidentially in FAS HR if you would like to discuss any continued concerns related to the event that took place in Sanders Theatre on May 1st by an FAS colleague (Eric Clopper) or any of the activities related to that event." Harvard thereby solicited members of the community who had not previously complained for material to use against Clopper.

CLOPPER FILED COMPLAINT WITH HARVARD'S OLER

31. Fearing that the integrity of Harvard's administration had been compromised by the "powerful interests" Clopper had mentioned in his Play, Clopper filed a formal complaint with Paul Curran, a Harvard-employed lawyer and the director of Harvard's Office of Labor and Employee Relations ("OLER"). In this official complaint, Clopper alleged, *inter alia*:

> a. Harvard violated its own free speech policy, as well as Clopper's free speech protections afforded to him by the US and MA state constitutions; and
>
> b. Harvard conspired with Baystate [the events production company Clopper hired on Harvard's recommendation] ("Baystate") to steal an unauthorized recording of his copyrighted Play in order to conduct a pretextual investigation and to retaliate for his anti-circumcision beliefs.

32. In the official complaint to OLER, Clopper explained with great specificity his grievances with how this "investigation" was being carried out, including, but not limited to, how Harvard had stolen a recording of the Play. Without Clopper's permission, Baystate, the events management company for the Play, took a digital screen capture of his copyright protected presentation slides from his laptop, and provided it to Harvard to supply further ammunition against Clopper in its disciplinary review. The OLER complaint stated:

> "There are many ethical problems with this, but there are also actionable legal ones as well. Baystate was contracted by me, not by Harvard. But, they are unquestionably motivated to toady to Harvard because they want to continue as a preferred events vendor for Harvard's premier venue(s). This is yet another example of Harvard's bullying behavior, in my view. Baystate, and now Harvard, are sharing likely illegally obtained explicit videos of me with my friends and colleagues, without my consent, under the guise of some vague "review." I am deeply distressed emotionally and otherwise by this behavior, which seems almost criminal to me. How is this different from the distribution of "revenge porn"?"

33. OLER's Curran responded approximately three weeks later on June 5, 2018 that there "has not been any action taken with respect to [Clopper's] employment" while Clopper remained under suspension and "investigation," and "therefore it

would be premature at this point to conduct an investigation of your May 17 complaint."

34. In an email on July 3, 2018, Clopper implored Curran to begin OLER's investigation without further delay, "because of grave concerns about the integrity of the FAS administrators assigned to carry out this review. I fear that they will continue to engage in unethical, perhaps even illegal, activities in their zeal to terminate my employment." Curran ignored Clopper's last plea to settle things amicably before Harvard terminated his employment.

CLOPPER'S TERMINATION FOR HIS PROTECTED SPEECH

35. During Harvard's protracted 69-day "investigation," its focus continued to shift for want of any violation that would withstand scrutiny. On the 69-day mark, on July 12, 2018, Harvard called Clopper into a meeting where Dean Doyle read Clopper's termination letter in a barely audible voice. Clopper's termination letter cited three reasons for Harvard's decision to terminate him:

a. Clopper's nude dance;

b. The sexual content in Clopper's Play; and

c. The amorphous allegation that Clopper had engaged in "excessive, disruptive, and distressing" behavior in the LRC workspace prior to his show.

36. Clopper was surprised to see the content of his show cited as reasons for his termination, especially since he performed the Play in his individual capacity;

his Harvard-employed boss approved everything in the Play and even directed portions of it; and Harvard's Free Speech policy promised Clopper that Harvard will allow him to express his personal beliefs "consistent with First Amendment standards."

37. Clopper was surprised to see the allegation of "disruptive" behavior in the LRC workspace by individuals who had never met him or seen him work there. Clopper's work reviews were uniformly positive with no mention of disruptive behavior. As stated, Clopper's boss approved his work on the Play. The allegation of disruptive behavior is pretextual. Hammond informed Clopper that Dean Doyle told him that *the dean of the college at the time, Michael Smith, had decided to terminate Clopper, whatever the cost*.

38. Dean Leslie Kirwan had decided to hire Clopper for his full-time role on July 11, 2017. She emailed Dean Doyle and Hammond later that day that she, "had sensed a wisdom in Eric beyond his years."

39. One week before his Play on April 24, 2018, Den Doyle, Dean Kirwan's subordinate and Hammond's boss, Dean Doyle gave Clopper a money bonus for excellent work since his hiring, and stated, "I truly wish that there was a bigger fund, so that I could provide a bonus to match your performance."

40. On June 4, 2018, Dean Kirwan hosted her annual picnic for all of the departments she oversees. One of Clopper's colleagues who still works at Harvard wrote "ERIC" on his nametag to express his support for Clopper. Others began to join him, similarly affixing "ERIC" nametags to their chests.

41. *Six weeks after the Play*, on June 14, 2018, Thomas Hammond gave Clopper his annual performance review. Hammond called Clopper a "leading performer in every respect" and the "de facto associate director" of the department. Two Harvard faculty members and a technical colleague gave Clopper very positive feedback as well.

42. During this 69-day "investigation," Harvard had solicited complaints about Clopper directly from Harvard students after Harvard drove negative coverage about him in their student newspaper The Crimson. Some students complained because of what they read in The Crimson. So, it is possible Harvard is referring to these solicited student complaints in their allegations of misbehavior. Harvard did not give Clopper the opportunity to respond to or defend himself against any such student complaints.

HARVARD'S SUBSEQUENT RETALIATION AGAINST HAMMOND

43. Shortly after terminating Clopper on July 12, 2018, Harvard management focused its energies on Hammond, who, as stated, was Clopper's stage manager for the Play and supported Clopper's right to perform the Play. Harvard began trying to collect "evidence" of alleged mistakes and/or malfeasance by Hammond, such as requiring medical documentation relating to his absences for his hospitalizations, which it had never done before.

44. Furthermore, at the end of 2017, Harvard had decided to build a new Language Resource Center ("LRC") because of Clopper's recent hiring. The goal was to make a "flagship center" to bring language

learning into the 21st century. Hammond and Clopper were the only two full-time employees of the LRC, and accordingly Harvard management consulted with them extensively during the planning and design stages. Hammond and Clopper were invited to all the design meetings from late 2017 until the Play. Following the May 1, 2018 Play and while Clopper's employment was suspended, Harvard stopped inviting Hammond to some critical management meetings concerning his center's future, even though Hammond had been the director of the LRC for the previous fourteen years.

45. Harvard then hired PhD sociologist Adonica Lui in mid-August to "help" Hammond run his department. Dean Doyle informed Hammond of this new hire on July 24, 2018. According to Hammond's text messages to Clopper on that day, it was "entirely clear" to Hammond that Harvard hired someone who "duplicates [his] skill set" and that Harvard had "basically replaced me." Harvard then required Hammond to submit a detailed list of his job duties to Harvard and train Lui how to do them.

46. Hammond suspected that Harvard excluded him from meetings about his center's future as retaliation for having refused to terminate Clopper, and for having filed a complaint to his office's Title IX representative Sandy Stergiou on June 25, 2018 alleging that Harvard had created a hostile workplace environment because Harvard had compelled him to view stolen, sexually explicit materials of Clopper. Hammond's Title IX complaint went unacknowledged. Hammond emailed Clopper on September 8, 2018 that it was clear to him that Harvard was retaliating against him for "having the temerity to complain."

47. Prior to the Play, in March 2018, Hammond took time off from work for surgery. After getting the surgical results, Hammond had informed Clopper that he had cancer, possibly terminal. After the Play, Hammond informed Dean Doyle that he had potentially cancerous masses growing in his lungs. Clopper had no money, had increasing debts, and no job following his suspension and investigation. Clopper's apartment lease ended in September 2018, so Clopper accepted Hammond's offer to live in the additional room in his Harvard-owned apartment until Clopper could get back on his feet.

48. During September 2018, Harvard's retaliatory efforts against Hammond continued to increase despite Hammond's loyal service to the institution for over 20 years and his failing health. Hammond began to unravel as he grew increasingly frantic that he would be terminated, evicted from his Harvard-owned apartment, and left without health insurance or palliative care if his cancer proved terminal. On September 17, 2018, Harvard sent Hammond – a Harvard graduate, a 20-year member of the Harvard community, and the director of the LRC for the previous 14 years – a "Final Written Warning" for his "involvement in events leading up to Eric Clopper's Sanders Theater performance." Hammond believed this letter foreshadowed his impending termination.

49. The following week on September 24, 2018, Hammond committed suicide using an asphyxiating breathing hood fed and filled by helium gas.

50. Clopper found his friend and mentor Hammond deceased in his apartment bedroom. With instructions from the 911 operator, Clopper performed CPR on

Hammond's corpse until the medics arrived to pronounce him dead. When the Harvard University police arrived, they informed Clopper that he was banned from Harvard's campus and must leave the apartment, carrying what of his possessions he could.

HARVARD'S OLER INVESTIGATION, WHICH TOOK 267 DAYS TO COMPLETE, IGNORED CLOPPER'S CLAIMS

51. On January 7, 2019, Clopper emailed Brian Magner, a Harvard-employed lawyer and an Associate Director of OLER, asking OLER to conclude its investigation of his complaint dated May 17, 2018 within one month because his complaint had gone unresolved by Harvard for over seven months. On February 7, 2019, Magner sent Clopper the results of OLER's "investigation." OLER's review failed to address or even acknowledge Clopper's two allegations that:

> a. Harvard had violated its own free speech policy, as well as Clopper's free speech protections afforded to him by the US and MA state constitutions; and
>
> b. Harvard conspired with Baystate to steal an unauthorized recording of his copyrighted Play in order to conduct a pretextual investigation to censor his anti-circumcision beliefs.

BLACKBALLED FROM GRADUATE SCHOOL AT HARVARD

52. A primary reason relied on by Clopper to take the full-time, managerial position at Harvard was its Tuition Assistance Program (TAP). Through TAP,

employees receive a 90% tuition discount, including for Harvard's Graduate School of Engineering and Applied Sciences (SEAS).

53. Clopper applied to SEAS Data Science Program for the Fall of 2018. Clopper had outstanding qualifications. He was a leading physics graduate from Colgate University; he scored in the 99th percentile of his GRE standardized tests; and, he had compelling recommendations and professional employment reviews. Clopper and Hammond anticipated that he would be accepted into Harvard's program.

54. At a February 25, 2018 meeting, a professor on the admissions committee at SEAS informed Clopper that he was a very, very strong candidate and that he had made it to the final round, but that a fellow faculty member of the Jewish faith had blackballed [rejected a possible candidate] Clopper, presumably for his prior anti-circumcision advocacy. Feeling sympathy for Clopper, this professor invited Clopper to attend his Introduction to Data Science class in Fall of 2018 and to reapply to the program the following year.

55. Despite Clopper's termination on July 12, 2018, this professor honored his promise to Clopper and allowed him to attend his Introductory to Data Science class in the Fall of 2018; an opportunity that Clopper took very seriously in anticipation of reapplying to the Fall 2019 program. Following Hammond's suicide, Clopper heeded Harvard University Police Department's orders to not return to campus. Thus, Clopper was forced to withdraw from the Introduction to Data Science class. Clopper knew that his ban from Harvard campus, combined with his

withdrawal from this introductory class, meant that he would not be admitted to the graduate program. Clopper could no longer participate in the course that he had been taking to improve his chances of being accepted into that program for the Fall of 2019, and he instead applied to law school where he is currently a student.

CLAIMS FOR RELIEF

COUNT I

Violation of United States Constitution, Amendment 1

Harvard

56. Plaintiff re-alleges each and every allegation in paragraphs 1 through 55 above as if fully set forth herein.

57. Under the First Amendment, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S.C.A. Const.Amend. 1; *Reed v. Town of Gilbert, Ariz*. 576 U.S. 155, 162 (2015).

58. Content-based laws which target speech based on its communicative content are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert, Ariz*. 576 U.S. 155, 162 (2015).

59. Regarding nudity, the Supreme Judicial Court of Massachusetts held in *Cabaret Enterprise v. Alcoholic*

Beverages Control Commission, 468 N.E.2d 612, 614-615 (1984), that nude dancing is a form of free speech. Therefore, the Commonwealth of Massachusetts has ruled that nude performances are not a compelling state interest warranting restriction or prohibition.

60. Harvard represented to Clopper a few days before his production that the terms and conditions of its entertainment license with the City of Cambridge prohibit nudity at the Sanders Theater, and that Clopper would be prohibited from exhibiting nudity during his play. This prohibition is void under the First Amendment and is an unconstitutional restriction of the right to free speech for those who lease the Sanders Theatre for their productions, including Clopper.

61. Moreover, Harvard relied on its representation to Clopper that the terms of its entertainment license with the City of Cambridge prohibit nudity, and used this reasoning as justification for interrupting Clopper's play, causing defamatory remarks to be published about him in the Harvard Crimson, terminating his employment at Harvard, and denying him entry into graduate school at Harvard.

62. In doing so, Harvard violated Clopper's First Amendment right to free speech, in addition to committing several other independent tortious acts against Clopper.

63. As a result, Clopper has suffered damages.

COUNT II

Mass. Gen. L. Ch. 12, §§ 11I

Massachusetts Civil Rights Act

All Defendants

64. Plaintiff re-alleges each and every allegation in paragraphs 1 through 63 above as if fully set forth herein.

65. The Massachusetts Civil Rights Act (MRCA), Massachusetts General Laws, Chapter 12, §§ 11H, 11I, authorizes a private plaintiff to seek compensatory damages and injunctive relief against anyone who interferes with the plaintiff's exercise of constitutional rights. The statute provides a cause of action:

> [w]henever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth.

Id. To establish a claim under the act, "a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Currier v. Nat'l Bd. of Med. Exam'rs*, 965 N.E.2d 829, 837-38 (Mass. 2012). Unlike its federal counterpart, 42 U.S.C. § 1983, the Massachusetts Civil Rights Act does not require a party to show that a government actor deprived the plaintiff of a

constitutional right. *Sena v. Commonwealth*, 629 N.E.2d 986, 993 (Mass. 1994).

66. Regarding element (1), every person in the Commonwealth including Clopper has the constitutional right of free speech, and a statutory right to free speech under The Massachusetts Civil Rights Act. Regarding nudity, the Supreme Judicial Court of Massachusetts held in *Cabaret Enterprise v. Alcoholic Beverages Control Commission*, 468 N.E.2d 612, 614-615 (1984), that nude dancing is a form of free speech.

67. Regarding elements (2) and (3), the defendants named below interfered with or attempted to interfere with Clopper's constitutional and statutory rights to free speech, privacy, and other rights by threats, intimidation, or coercion by, without limitation, the conduct described below.

a. The defendant Harvard (i) by telling Clopper shortly before he performed the Play that he could not perform nude in it; (ii) by telling Clopper one day before his Play that he could no longer put up posters advertising his Play despite positive feedback and encouragement from his boss Hammond, senior faculty member Professor Bronski, and other faculty; (iii) telling Baystate to stop the performance of the Play, if it did so; (iv) by Harvard theatre manager Maureen Lane physically and threateningly blocking him from returning to the Play to turn off the projector and to make concluding remarks; (v) by Harvard administrators publishing defamatory and intimidating remarks about Clopper in The Crimson; (vi) by Harvard encouraging Crimson reporters to publish defamatory remarks about Clopper and the

Play; (vii) by threatening to terminate Clopper for working on the Play at Harvard, even though his boss Hammond approved all such work; (viii) by not telling Clopper what he was accused of so that he could defend himself, by continuously expanding the investigation, and by not conducting the investigation expeditiously; (ix) by threatening to terminate Clopper's employment for expressing his sincerely held opinions; (x) by threatening to phase out his department before terminating him; (xi) by invading Clopper's right to privacy by stealing sensitive videos of Clopper and disseminating them to his friends and colleagues; (xii) by terminating his employment based in part on the words and nudity in the Play, even though he performed the Play as a private individual with his boss's approval; (xiii) by banning him from the campus because of his speech, thereby preventing him from going to graduate school at Harvard; and (xiv) by acquiescing to pressure from third parties to violate Clopper's rights by engaging in, without limitation, all the aforementioned conduct.

b. The Harvard Crimson interfered with Clopper's right to free speech by (i) falsely claiming that he did not have the right to say what he said during the Play; (ii) by falsely claiming that he did not have the right to express himself by dancing nude in the Play; (iii) by not allowing him to publish a rebuttal in The Crimson when he asked to do so; (iv) by not allowing him to publish a rebuttal in The Crimson when his attorney asked The Crimson to let him do so; (v) by failing to adhere to the demands in Clopper's attorney's May 13, 2018 Cease & Desist letter; (vi) by infringing on Clopper's right to privacy and his right to be free from defamation; and (vii) by acquiescing to pressure from third parties to violate Clopper's rights.

c. Clopper perceived the foregoing conduct by each of the defendants to constitute threats, intimidation, and coercion.

68. For a valid MRCA claim, Clopper need not prove that the defendants interfered with his rights by "threats, intimidation, or coercion" if the defendants acquiesced to pressure from third parties who did wish to interfere with such rights. *See Redgrave v. Boston Symphony Orchestra, Inc.*, 502 N.E.2d 1375, 1379–1380 (Mass. 1978). Furthermore, if the defendants are found liable under the MRCA for acquiescence to third-party pressure, it is not a defense for the defendants to show that its actions were motivated by additional concerns, such as threat of economic loss, for example loss of donations from special interest groups. *Id.*

69. In *Redgrave*, performance artist and plaintiff Vanessa Redgrave signed a contract with defendant Boston Symphony Orchestra ("BSO") to perform in their theatre. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988), *petition for cert. filed*, 1988 WL 1093370 (U.S. Nov. 29, 1988) (No. 88-912), pages 5–8 . Shortly after signing the contract, BSO board member Irving Rabb called BSO General Manager Thomas Morris to see if "BSO could get out of [the contract]" because Redgrave was "very anti-Israel" and believed that the Palestinian people should have a homeland of their own. *Id.* Rabb, a trustee and board member of Hebrew College, Hebrew SeniorLife, and the Temple Israel of Boston took it upon himself to speak for this Jewish community, saying to Morris "there's a great deal of anger about this in the Jewish community . . . I think you will offend a tremendous number of Jews in the

community if she performs." *Id.* Morris complied with the demands of his Jewish boss; he removed Redgrave from the performance. *Id.* Later that day, Morris wrote a memorandum to the chairman of the BSO trustees that, "The sentiments of the Jewish [sic] are without question stronger than we had anticipated." *Id.* Morris removing Redgrave from the performance was not without opposition; the BSO stage director Peter Sellars refused to proceed without Redgrave, and thus BSO cancelled the entire production. *Id.*

70. The facts in this complaint are similar to the facts in *Redgrave* which led the Massachusetts Supreme Court to hold that acquiescing to pressure from third parties satisfied the "threats, intimidation, or coercion" element of an MRCA claim. Like in *Redgrave*, Clopper is a performance artist who signed a contract to perform at a high-end theatre with the defendants. Like the plaintiff in *Redgrave*, Clopper holds views supporting the human rights of children (and Palestinians) in opposition to certain, vocal, and organized interest groups. While Clopper was expressing his sincerely held beliefs in his Play, defendants Harvard and Baystate stopped the performance after the nude dance, thus breaching the contracts he had with Harvard and Baystate regarding the performance. This breach was similar to BSO's breach in *Redgrave*, except Harvard's breach was mid-performance instead of prior to performance, and thus arguably leading to greater damages.

71. The pressure applied from outside parties to Harvard after the Play was far greater than before or during the performance, due, in-part, to the Crimson's defamatory coverage immediately following Clopper's performance. Upon information and belief, there was

substantial outside pressure from Jewish individuals and groups in Boston and beyond to retaliate against Clopper for expressing his sincerely held anti-circumcision beliefs . If Harvard acquiesced to such pressure by, without limitation, breaching Clopper's employment contract, his Sanders Theatre contract, its own policies and all the conduct complained herein, then Clopper would have a valid and actionable claim against Harvard under the MRCA. Furthermore, it is immaterial whether Harvard was motivated by additional concerns for investigating, retaliating, and terminating him, such as the "reasons" their "investigation" cited, or by the concern that Harvard may suffer "economic loss" by loss of money from Jewish donors; the mere act of acquiescing to third party pressure is sufficient to uphold an actionable MRCA claim. *See Redgrave*, 502 N.E.2d at 1379–1380.

72. If the Crimson violated Clopper's right to be free from defamation or any other of his rights from the conduct described herein, and these violations were a result of pressure exerted on them by Harvard or any other third party, Clopper has a valid and actionable MCRA claim against the Crimson even in the absence of other behavior that would satisfy the "threats, intimidation, or coercion" element. *Id.*

73. Furthermore, "threatening, intimidating, and coercive actions directed at third parties should be included in considering any conduct that forms the basis of a claim under the MRCA." *Haufler v. Zotos*, 845 N.E.2d 322, 334 (Mass. 2006) Economic pressure can rise to meet the statutory definition of "coercion" if such pressure compels individuals to forgo rights otherwise meant to be protected by the MRCA. *See Buster v. George W. Moore, Inc.,* 783 N.E.2d 399,

411 (Mass. 2003). The standard for determining whether conduct constitutes threats, intimidation or coercion is an objective, reasonable person standard. *Currier*, 965 N.E.2d at 838.

74. Hammond emailed the LRC's Title IX representative Sandy Stergiou on June 25, 2018 alleging Harvard had created a hostile workplace by forcing him to view stolen, sexually explicit materials of Clopper while Dean Doyle and HR Representative Gary Cormier oversaw the process under implicit, if not explicit, threat of discipline up to and including termination. Harvard had the responsibility to "adopt . . . grievance procedures providing for prompt and equitable resolution of . . . employee complaints alleging any action [in violation of Title IX]." 34 C.F.R. § 106.8(b). Harvard did not do so. In fact, Harvard had failed to acknowledge Hammond's Title IX complaint, and, instead, proceeded to retaliate against him as Hammond had indicated to Clopper in his September 8, 2018 email. Also, based on information and belief, Hammond had indicated to Dean Doyle multiple times in person and via email that he perceived Harvard's actions to be unfair and retaliatory for him having the temerity to complain about what he perceived to be Harvard violating his rights.

75. Harvard, and especially Dean Doyle, knew of Hammond's chronic health problems. Hammond had taken significant time off in the past for major heart surgery among other ailments. Shortly after the May 1, 2018 Play, Hammond informed Dean Doyle of masses growing in his lungs. Via Harvard's actions -- including but not limited to (i) excluding Hammond from management meetings regarding his center; (ii) compelling him to view stolen, sexually explicit video

footage of his subordinate Clopper; (iii) refusing to address or even acknowledge his Title IX complaint; (iv) requesting medical and other receipts in a fishing expedition to "catch" him in wrongdoing; and (v) sending him a "final warning" letter -- Harvard was retaliating against Hammond for trying to assert his constitutionally and statutorily protected rights that the MRCA is designed to protect. Hammond would have lost his job, his healthcare in a time of increasing need, his home (since he lived in Harvard-owned apartments), his community, and all other necessities for life had Harvard completed its retaliation by terminating Hammond. A reasonable person would construe Harvard's action as qualifying as economic coercion under the MRCA statute, and thus Harvard violated Hammond's rights meant to be protected under the MRCA statute.

76. Harvard's actions towards Hammond constitute the kind of "threatening, intimidating and coercive actions" directed at a third party which should be included when considering the conduct forming the basis of a claim under MRCA, and Clopper suffered damages as a result.

COUNT III

Breach of Contract for Sanders Theatre

Harvard

77. Plaintiff re-alleges each and every allegation in paragraphs 1 through 69 above as if fully set forth herein.

78. Harvard's contract with Clopper as licensee which both parties signed (the "Contract") and Clopper paid

for, states that the use of the space is subject to laws and policies, including but not limited to the Sanders Theatre Policy Book. This policy book states that the entertainment license from the City of Cambridge does not encompass nudity. However, Harvard recommended and reserved Harvard's Sanders Theatre for the Play for May 1, 2018 knowing that the Play would be about circumcision, a controversial topic of which some degree of nude depiction might be expected, and impliedly promised to allow a frank discussion of it. Harvard knew that given the Play's subject matter, it would likely contain nudity as Clopper had advertised it as such (Exhibit 1), and Harvard subsequently hosted these ads promoting a show likely to contain nudity on their website, benefitting from the ticket receipts without complaint. A Harvard professor and Clopper's boss approved of the contents of the Play and the advertisements, including how Clopper advertised the Play with actors wearing inflatable penis costumes. By its words, omissions, actions, and policies, Harvard, if not expressly, then impliedly promised that Clopper could discuss the controversial topic of circumcision frankly; that portions of the Play would contain nudity; and that it would not ask for, obtain, and use a copy of Clopper's creative material without his permission.

79. Harvard breached the express and implied contract between Harvard and Clopper for Sanders Theatre by: (i) telling Clopper shortly before the Play that it could not contain nudity; (ii) by telling Baystate to stop the Play, if it did so; (iii) by obtaining a digital copy of Clopper's Play and other materials without his permission; and (iv) by terminating Clopper based upon Clopper's words and actions in the Play; and (v) by banning him from campus and thereby from being

accepted into graduate school at Harvard at a deeply discounted price.

COUNT IV

Breach of Employment Agreement and Free Speech Policy

Harvard

80. Plaintiff re-alleges each and every allegation in paragraphs 1 through 79 above as if fully set forth herein.

81. Harvard also employed Clopper and thus had an express and implied employment agreement or contract with him.

82. Clopper made clear in the Play that he was performing it in his individual capacity, not as an employee at Harvard, and that the Play expressed his own views and not those of Harvard. Thus, the Play had nothing to do with Clopper's employment at Harvard.

83. Harvard Professor Bronski told Clopper he had a right to free speech, and to deliver a rousing performance in the Play, and that Harvard would not retaliate against him for the Play, and Professor Bronski approved the advertising. Clopper's manager Hammond told him that he could work on the Play at Harvard; that he had a right to free speech in the Play; Hammond approved every word and action in the Play and its advertising, so everything Clopper did was approved by his boss Hammond at Harvard. Harvard's written free speech policy promises to protect members of the community who engage in free

speech from retaliation, and to take violations of free speech policies seriously. Harvard's outgoing and incoming presidents also underscored their promise to protect free speech in speeches shortly before and after the Play. Harvard thereby expressly and impliedly promised in its employment agreement with Clopper to allow him to say what he said in the Play as a private individual and to perform nude in it.

84. Harvard breached the express and implied employment agreement between Harvard and Clopper, without limitation, by: (i) accusing Clopper of having acted improperly and threatening to fire him for having worked on the Play occasionally at Harvard; (ii) telling Clopper shortly before the Play that it could not contain nudity; (iii) Harvard's Maureen Lane preventing Clopper from returning to the stage to make his final remarks and conclude the Play; on information and belief, by telling Baystate to turn on the light and stop the Play; (iv) by obtaining and disseminating a digital copy of Clopper's Play and other materials without his permission; and (v) by falsely accusing Clopper of improprieties, in and through The Crimson, including working working on the Play during work hours; being anti-Semitic; and performing nude; (vi) by retaliating against Clopper and terminating him based upon Clopper's words and actions in the Play; and (vii) by banning him from campus and thereby from being accepted into graduate school at Harvard at a deeply discounted price.

85. As a result, Clopper suffered damages.

COUNT V

Breach of the Covenant of Good Faith and Fair Dealing

Harvard

86. Plaintiff re-alleges each and every allegation in paragraphs 1 through 78 above as if fully set forth herein.

87. There is in every contract in Massachusetts including at will employment contracts an implied covenant of good faith and fair dealing.

88. By the conduct complained of this Complaint, Harvard breached the implied covenant of good faith and fair dealing in the contracts between Harvard and Clopper for both Clopper's employment and relating to Sanders Theatre.

89. In addition, in Massachusetts, the covenant of good faith and fair dealing protects employees for asserting legally guaranteed rights, for doing what the law requires, and for refusing to do what the law forbids. Clopper had a legally protected right to perform the Play; the Play promoted compliance with the law (parents and physicians must leave their son's healthy bodies intact); and it argued against violating the law (or that circumcising healthy boys should be a violation of law).

90. By the conduct complained of this Complaint, Harvard breached the implied covenant of good faith and fair dealing in the employment contract between Harvard and Clopper, and Clopper suffered damages as a result.

COUNT VI

Promissory Estoppel

Harvard

91. Plaintiff re-alleges each and every allegation in paragraphs 1 through 90 above as if fully set forth herein.

92. Under the concept of promissory estoppel, when one party has substantially and reasonably relied upon a promise of another to his detriment, and it would be unfair not to enforce the agreement, the promisee is entitled to a remedy for breach of the agreement as justice requires. Restatement (Second) of Contracts § 90 (1981).

93. Clopper reasonably relied to his detriment upon the many express and implied promises made to him expressly and impliedly, orally and in writing – including by Professor Bronski, Hammond, Harvard's free speech policy, and the speeches of the outgoing and incoming Harvard presidents – that he could express his personal views regarding the contentious issue of circumcision and perform in the Play, nude and otherwise, and that Harvard would not retaliate against him and his employment at Harvard for doing so.

94. It would be unfair to Clopper and unjust not to enforce the express and implied promises on which Clopper reasonably relied.

95. Clopper is entitled to a remedy under the doctrine of promissory estoppel.

COUNT VII

Defamation and Libel – The Crimson; and Harvard

96. Plaintiff re-alleges each and every allegation in paragraphs 1 through 86 above as if fully set forth herein.

97. Clopper was born Jewish and is a Jewish man. He has no animus towards Jewish people. His opposition is to circumcision and to those who practice it for religious reasons.

98. Under Massachusetts law, a plaintiff alleging libel must ordinarily establish six elements: that the defendant (1) published a written statement; (2) of and concerning the plaintiff; that was both (3) false; and (4) defamatory; and that (5) the defendant was at fault amounting to at least negligence on its part; and (6) this publication caused economic loss, or is actionable without proof of economic loss.

99. Regarding elements (1) and (2), defendants The Crimson and its reporters including but not limited to: Xie, Wang, and the nameless "Crimson Editorial Board," published five (5) articles about and concerning Clopper: "Harvard Reviewing Employee's Nude, Anti-Semitic Rant in Sanders Theatre" (May 2, 2018); "Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours" (May 4, 2018); "Against 'Sex and Circumcision: An American Love Story'" (May 9, 2018); "Harvard 'Investigating' After Swastika Found at School of Public Health" [gratuitously referring and linking to a story about Clopper's performance] (May

12, 2018); and "Expanding the Diversity Conversation" (May 24, 2018).

100. Upon information, belief, and based on the May 3, 2018 voice recording of Xie, one or more Harvard senior administrators encouraged the Crimson to publish these negative articles about Clopper. Upon information and belief, The Crimson operated as an agent of Harvard and as such, responsibility for their publication can be partly ascribed to Harvard, thus any elements the Crimson satisfies, so too does Harvard satisfy. Furthermore, Harvard senior administrators, including but not limited to Harvard spokeswoman Rachel Dane, is quoted in multiple articles accusing Clopper of being anti-Semitic and having improperly brought nudity to Sanders Theatre.

101. Regarding element (3) towards the falsity of the articles, there are major falsities throughout the five articles. The falsities can be categorized, without limitation, into three major buckets that are systemic throughout all five publications: (i) that Clopper, a Jewish man, is anti-Semitic; (ii) that Clopper improperly brought nudity to Sanders Theatre; and (iii) that Clopper had engaged in a "nude, anti-Semitic rant" in Sanders Theatre.

a. Clopper is a Jewish man. He is anti-circumcision; not anti-Semitic. Clopper has many Jewish friends and Jewish allies on the anti-circumcision front. Whether Clopper was Jewish or not, he would still have the right to freely express his critical opinions of the Jewish religious ritual of circumcision. As evidenced by the standing ovation from hundreds of progressive Harvard audience

members, and a 97% "like" rating online from many thousands of YouTube viewers, the "anti-Semitic" label the Crimson has doggedly tried to brand Clopper with cannot be true, *unless* the great majority of Harvard's population and YouTube's viewer base (as evidenced by the significant sample size in the feedback from both these groups) is also "anti-Semitic." The Crimson has created this anti-Semitic narrative by taking nonrepresentative and incomplete quotes from Clopper's two-plus-hour Play. The Crimson's *prima facie* defamatory allegations of anti-Semitism against Clopper are a red herring to distract from Clopper's "very cogent--and important--presentation on circumcision," as Philip Guarino mentioned in his email complaining of Harvard's retaliation against Clopper to Dean Claudine Gay on August 27. 2018.

b. Clopper has the right to free speech and freedom of expression as protected by the US and Massachusetts constitutions, and he had Harvard's many explicit and implicit promises to protect that right.

c. Describing Clopper's play as a "nude, anti-semitic rant", as The Crimson did in its May 1, 2018 article, is a patent falsehood. There is no conceivably accurate description of the event that could categorize Clopper's Play as a "*nude* anti-Semitic rant" (emphasis added). Clopper has the entire event professionally filmed from four angles. He said no words during his brief nude dance, let alone was he "ranting." As Professor Bronski explains in a May 3, 2018 email to Clopper, "the title implies you are nude though [sic] the entire show, which is not true -- and gives the casual reader a TOTALLY inappropriate

and inflammatory description of the event." The Crimson's coverage of Clopper's Play, especially the most widely read part of their coverage – the title – is objectively false.

102. Regarding element (4), as to whether The Crimson's articles were defamatory, the articles are *prima facie* defamatory in their headlines, contents, and insinuations. "Words may be found to be defamatory if they hold the plaintiff up to contempt, hatred, scorn, or ridicule, or tend to impair his standing in the community." *See Eyal v. Helen Broadcasting Corp.*, 583 N.E.2d 228, 232 (Mass. 1991); *see also Poland v. Post Pub. Co.*, 116 N.E.2d 860, 861 (Mass. 1953). "A defendant in an action for libel is liable for what is insinuated as well as for what is explicitly stated." *Poland*, 116 N.E.2d at 861.

103. After the Crimson's articles about Clopper were published on May 2, 2018, complaints that Harvard had hired Clopper flooded into Harvard's administration by, upon information and belief, primarily Jewish alumni, donors, and individuals. Dean Kirwan had mentioned in an irritated manner to a colleague shortly after the Play that she "had been up all night taking phone calls [in connection with the Crimson's articles regarding Clopper's Play];" presumably by those triggered by the Crimson's defamatory allegations against Clopper. A Jewish student who had worked in the LRC during the time of the Play and previously had no animus towards Clopper emailed Harvard management saying she could no longer work alongside Clopper after reading the Crimson's articles. Despite the overwhelming critical comments of the Crimson's coverage on their public messaging boards, a reader would have to scroll

all the way down the page to see how people who actually attended the play perceived the Crimson's coverage to be intentionally false and misleading in an effort defame Clopper. Thus, it was the false and defamatory headlines that did the bulk of the communication to the Harvard community, which held Clopper up to contempt, hatred, and worse within the Harvard community and beyond.

104. Regarding element (5), the Crimson displayed actual malice in their actions towards Clopper. Multiple times in the May 2, 2018 "Nude, Anti-Semitic Rant" article, Xie and Wang make reference to "videos obtained by The Crimson." If the Crimson had such videos (recorded on a cellphone or other handheld device), it would have clearly shown that Clopper did not engage in a "nude, anti-Semitic rant" as Clopper's professionally filmed video footage from every angle throughout the event demonstrates. If it is true that the Crimson had such videos, and they still decided to publish such a false and defamatory headline (and other statements throughout the articles), then they would be publishing this material "with knowledge it was false," and thus satisfy the bar for actual malice, and thus element (5) for defamation.

105. Furthermore, upon information and belief, one or more Harvard senior administrators told The Crimson what to say in many of their defamatory articles, including the Crimson's May 4, 2018 article, "Employee Planned Show Containing Anti-Semitism, Nudity in Harvard Workplace During Work Hours" article. In that article, the defendants The Crimson through its two student reporters Xie and Wang, and Harvard falsely accused Clopper of wrongdoing by (a) working on the Play occasionally at work; (b) by

performing nude in it; and (c) of being anti-Semitic. Upon information and belief, Harvard caused that article to be published with intent to terminate him on those grounds. Harvard suspended Clopper's employment on May 4, 2019 and for 69 days thereafter without explanation. If such collaboration existed between Harvard and the Crimson to defame Clopper on specific, pretextual grounds to use for his predetermined termination, the "actual malice" demonstrated by the defendants would exceed comparable analogs in Massachusetts case law.

106. Regarding element (6), the Crimson's false and defamatory coverage caused Clopper economic loss, and even if it did not, it is still actionable because of the type of defamation. Establishing the causal link between The Crimson's defamatory articles and Clopper's resulting economic harm need only be plausible, not even probable, at the pleading stage. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (U.S. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (U.S. 2007)). It is plausible that The Crimson's defamatory coverage of Clopper's Play caused Jewish donors and other stakeholders to exert pressure on Harvard via harsh letters, communications, and other *quid pro quo* arrangements to retaliate against Clopper, which resulted in the loss of Clopper's profession and other damages. This is an especially plausible claim considering the history of Jewish interest groups exerting pressure on a third party to break their contracts with a conscientious objector to their agenda. *See Redgrave*, 399 Mass 95, 98. The Crimson is also liable for other damages from their defamatory articles because of the type of defamation they engaged in. As the Massachusetts Supreme Court in *Ravnikar* explains:

> Four types of statements are actionable without proof of economic loss: statements that constitute libel, see *Shafir v. Steele,* 431 Mass. 365, 373, 727 N.E.2d 1140 (2000); statements that charge the plaintiff with a crime; statements that allege that the plaintiff has certain diseases; and statements that may prejudice the plaintiff's profession or business, see *Lynch v. Lyons,* 303 Mass. 116, 118–119, 20 N.E.2d 953 (1939). If the statement comes within one of these four exceptions, a plaintiff may recover noneconomic losses, including emotional injury and damage to reputation. See *Shafir v. Steele, supra;* Restatement (Second) of Torts, *supra* at § 622 comment b, § 623 comment a.

Ravnikar, 782 N.E.2d 630. The Crimson's coverage constitutes libel, as pled above, and thus no economic harm is necessary for element (6) to be met. *Id.* Also, The Crimson's comments prejudiced Clopper in his profession, especially considering many of his colleagues and bosses, including Harvard's president, are Jewish, and thus the Crimson falsely accusing Clopper of anti-Semitism prejudices his ability to work at and advance within the Harvard hierarchy. The dispositive evidence that The Crimson's defamatory coverage prejudiced Clopper in his profession is that he no longer has his profession because he was terminated, very likely because of the fallout from The Crimson's defamation. Because two of the four conditions for recovering on a defamation action without economic loss are present in the Crimson's defamation – namely libelous statements and professional prejudice – element (6) of the

defamation claim is met independent of a showing of economic loss.

107. As a result of the Crimson, Harvard, Xie, Wang, and others defaming and libeling Clopper, he thereby suffered economic, professional, reputational, emotional, and other losses. These include, without limitation, loss of his job with its wages, benefits, and prestige, and the opportunity to go to graduate school at Harvard at 10% of the usual cost and the significant economic benefits such a Harvard degree would confer on Clopper for the rest of his life.

108. In addition, Harvard defamed Clopper by: (a) accusing him in the Crimson of having done something improper by performing having performed in the nude when Harvard advertised that there would be nudity in the Play; (b) Harvard Faculty Arts and Sciences spokesperson Rachel Dane was quoted in the Crimson as saying that the Play included anti-Semitic content; (c) accusing him in the Crimson of having improperly used Harvard time and resources to work on the Play, when all such work was approved by Hammond.

COUNT VIII

Tortious Conversion – Harvard

109. Plaintiff re-alleges each and every allegation in paragraphs 1 through 108 above as if fully set forth herein.

110. Clopper wrote the Play with assistance from Hammond. The Play was Clopper's original creative material. Clopper had an automatic copyright of the entirety of the Play and legal ownership of it.

111. Upon information and belief, Harvard asked Baystate to provide Harvard with a copy of Clopper's Play.

112. Upon information and belief, Baystate made a perfect digital copy of the Play and other materials by taking a "screen capture" of the material on Clopper's laptop, without Clopper's consent. This wrongful act was inconsistent with Clopper's ownership of these materials. Harvard referred to these materials during its investigation of Clopper as the "Baystate video".

113. Harvard is liable to Clopper for tortious conversion of his property, the Play, and other materials, which led to Harvard terminating Clopper's employment.

114. Harvard is liable to Clopper for the damages caused by his termination and exclusion from Harvard's graduate school.

COUNT IX

Tortious Interference with Employment Contract

The Crimson and John Does 1-10

115. Plaintiff re-alleges each and every allegation in paragraphs 1 through 108 above as if fully set forth herein.

116. The Crimson, which claims to be independent of Harvard, interfered with Clopper's employment contract with Harvard, by making false accusations against Clopper with the improper motive of assisting

Harvard, which resulted in Clopper's termination and harm to Clopper.

117. Upon information and belief, complaints (primarily from Jewish donors and alumni, John Does 1-10) about Clopper flooded into Harvard's administration after the Crimson published the May 2, 2018 articles about him, and influenced Harvard to take action in terminating Clopper. Dean Kirwan stated that she had been up all night taking phone calls after the Crimson published their articles.

118. The Crimson and these unknown complainants, now called John Does 1-10, tortuously interfered with Clopper's contract with Harvard.

COUNT X

Violation of Mass. Gen. L., Ch. 274, Section 7

Conspiracy to Steal the Play || Conspiracy to Defame Clopper

Harvard, The Crimson, President and Fellows of Harvard College

119. Plaintiff re-alleges each and every allegation in paragraphs 1 through 118 above as if fully set forth herein.

120. Upon information and belief, Harvard and Baystate conspired to steal the contents of Clopper's Play and other materials before he performed it. Their acts constitute a conspiracy in violation of M.G.L. c. 274, sec. 7. Due to their conspiracy, Clopper suffered damages.

121. Upon information and belief Harvard, the Crimson, Xie, Wang, and other still unnamed individuals conspired to hold Clopper up to contempt, hatred, scorn, and ridicule, and to impair his standing in the Harvard community and beyond by defaming and libeling him in the Crimson by publishing intentionally false and malicious coverage of his Play and the events before and after it. Their acts constitute a conspiracy in violation of M.G.L. c. 274, sec. 7. Due to their conspiracy, Clopper suffered damages.

123. The statute provides for civil and criminal penalties.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays that this Court enter judgment in his favor:

(a) For compensatory damages in an amount to be determined at trial;

(b) For Harvard's profits on Clopper's past work pursuant to the doctrine expressed in *Gram v. Liberty Mutual*.

(b) For costs and reasonable attorneys' fees pursuant to M.G.L. c. 12 § 11I, and if the defendants mount a defense that is wholly insubstantial, frivolous, and not advanced in good faith, pursuant to M.G.C. c. 231 § 6F.

(c) And for such other and further relief as this Honorable Court shall deem just and proper.

THE PLAINTIFF DEMANDS A JURY TRIAL ON ALL COUNTS.

Respectfully submitted,
The Plaintiff, Eric Clopper,
By his Attorney,

/s/ Michael Vigorito

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