STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Addison Unit **Case No. 23-CV-01214**

HON. JAMES H. DOUGLAS,	)
Special Administrator of the	)
Estate of John Abner Mead,	)
	)
Plaintiff,	)
v.	)
	)
THE PRESIDENT AND FELLOWS	)
OF MIDDLEBURY COLLEGE,	)
	)
Defendant.	)

MIDDLEBURY COLLEGE'S MOTION TO DISMISS

Defendant President and Fellows of Middlebury College ("Middlebury" or the "College"), by and through counsel, moves to dismiss the Complaint pursuant to V.R.C.P. 12(b)(1) and (6). In support of its motion, Middlebury submits the following memorandum.

INTRODUCTION

The seventy-nine pages of Plaintiff's Complaint are devoted primarily if not wholly to a project of reputational rehabilitation. Plaintiff does not, nor could he, dispute former Vermont Governor John Abner Mead's vocal advocacy for the eugenics movement—a movement which would later serve as an inspiration for the Nazi's program of forced sterilization.[1] Plaintiff instead eulogizes Governor Mead at length, emphasizing his public service, successful business career, and acts of charity, as well

[1] *See* Steven A. Farber, *U.S. Scientists' Role in the Eugenics Movement (1907–1939): A Contemporary Biologist's Perspective*, 5 Zebrafish 243, 244 (2008).

as the prominent role of his family in the early white settlement of Vermont. Plaintiff is entitled to his perspective. There is no question that it can be a complicated enterprise to evaluate the legacy of a public figure such as Governor Mead, a man who made numerous contributions to the public good but also espoused inhumane policies that are uniformly condemned today. As an academic institution, Middlebury acknowledges that there are differing views on Mead's legacy, and it has embraced the opportunity for exploration and dialogue around Mead's role in the history of both the College and the State of Vermont. However, those questions are not before this Court.

The issue presented by this lawsuit is much simpler: when Governor Mead pledged funds for the construction of a chapel on the Middlebury campus over a century ago, did that gift impose a perpetual, legally binding obligation for the College to maintain the name "Mead Memorial Chapel" on the building? The answer is manifestly no. The law strongly disfavors conditions subsequent to gifts, and thus courts have required clear, explicit language to impose a condition that would trigger reversion of the gift upon failure. Such language is entirely absent here. The plain terms of the letter Governor Mead wrote offering his generous donation to Middlebury did not condition the gift on a grant of naming rights, and it certainly did not call for a reversion of the gift if the name should be changed more than one hundred years later.

Additionally, former Governor Douglas and Mead's Estate lack any standing to pursue the claims asserted in this lawsuit. Vermont, like most jurisdictions,

entrusts the Attorney General's Office with the task of enforcing conditions on charitable gifts—and thus, even if Mead had specifically conditioned his donation on maintaining the name "Mead Memorial Chapel" in perpetuity (which he did not), it would be the Office of the Attorney General alone that could bring suit to enforce such condition. To hold otherwise would open a pandora's box of litigation by donors and their heirs: if the law were to allow the estate of a donor to be resurrected more than a century after death to claw back donations through "enforcement" of purported gift conditions, it would unquestionably burden charitable institutions with extensive and expensive litigation over the whims of generations long past, wasting charitable (and judicial) resources.

Change is a constant in public life. As the Vermont Supreme Court has observed, a "donor . . . must recognize that most institutions are likely to change with time, that they will become sterile if they remain static, and that they must be adaptable to new public considerations . . . ." *Ball v. Hall*, 129 Vt. 200, 211, 274 A.2d 516, 522 (1971) (quoting *Trustees of Dartmouth College v. City of Quincy*, 258 N.E.2d 745, 753 (Mass. 1970)). Middlebury is no exception. While not seeking to turn its back on its past, the College must continue to adapt to the modern world and follow its core academic values of robust inquiry and inclusive discourse wherever they lead—even where it means revisiting the name of a cherished, iconic campus building in light of the actions taken by its namesake. Plaintiff and Mead's heirs may object to the decision, but the law gives them neither standing nor any enforceable right upon which to challenge the removal of the Mead name from the Chapel. The

Complaint must be dismissed on that basis.

BACKGROUND

Middlebury provides the following recitation of background facts based on the allegations of the Complaint, the documents appended thereto, and a few legislative documents subject to judicial notice. *See In re Blow*, 2013 VT 75, ¶ 8, 194 Vt. 416, 82 A.3d 554 (on a motion to dismiss pursuant to Rule 12(b)(6), courts consider the pleadings and any documents incorporated into the complaint by reference). The narrow legal issues at issue in this case arise from the circumstances of John Abner Mead's gift to Middlebury, the details of which are fully captured in the historical documents attached to the Complaint and are not disputed. The summary below goes beyond those core facts only for the purpose of offering context regarding the gift, its donor, and the claims asserted in the Complaint.

A. Governor John Abner Mead and the Eugenics Movement in Vermont

John Abner Mead ("Mead"), an 1864 graduate of Middlebury College, served from 1910 to 1912 as Vermont's fifty-third governor. Compl., ¶¶ 31-32. Trained as a physician, Mead practiced medicine in Rutland before pursuing political office, with stints as Vermont's Surgeon General and the Medical Superintendent of the Vermont House of Correction. *Id.*, ¶¶ 52-62. Mead also had an active and varied career as a businessperson, investing in real estate in Rutland and serving as an executive or director of a number of commercial enterprises, as well as making generous charitable donations. *Id.*, ¶¶ 67-74, 85-89.

Mead's public service left a complicated legacy, for Vermont and Middlebury

College. Although a supporter of women's suffrage and clean energy, *id.*, ¶ 29, Mead was also an early and influential proponent of eugenics in Vermont. In his farewell address to the General Assembly delivered on October 3, 1912, Governor Mead gave prominent place to advocacy for eugenics policies, which he described researching in considerable detail during his tenure as Governor:[2]

> The heads of our criminal institutions tell us that among the inmates there is always a considerable class that are termed "degenerates" or "defectives," by which is meant a class of individuals in whose mental or nervous construction there is something lacking. Alienists, criminalogists [sic] and physicians tell us that individuals of this unfortunate class tend to marry those cursed with similar defects, and that this class is increasing out of all proportion to the normal growth of the population, and that most of the insane, the epileptics, the imbeciles, the idiots, the sexual perverts, together with many of the confirmed inebriates, prostitutes, tramps and criminals that fill our penitentiaries, jails, asylums and poor farms are the results of these intermarriages or the natural offspring of defective parents. In the cases of these unfortunates there is little or no hope of permanent recovery, and **the great question that is now being considered by the lawmakers in many of our states is how best to restrain this defective class and how best to restrict the propagation of defective children.**

Compl., Exh. 8 at 22 (emphasis added). Asking "[w]hat can be done to protect society from these unfortunates and what to protect them from themselves," Mead posed three alternatives for Vermont's legislature to consider enacting:

1. Restrictive legislation in regard to marriages.

2. Segregation of defectives.

[2] Mead explained that he had "endeavored during the last two years to inform [him]self thoroughly" on the subject, "having corresponded with the secretaries of twenty or more . . . states to learn what was being done with reference to this unfortunate class," "obtain[ing] copies of their laws and [making] a careful study of the same . . ." Compl., Exh. 8 at 22.

3. A surgical operation known as vasectomy.

Id. With respect to the first option—restricting marriage with undesirables—Mead noted that he "heartily approve[d]," but "**it does not and obviously cannot go far enough**." *Id.* (emphasis added). This was so because, "[w]hile by preventing marriages among defectives, it restricts the propagation of defective children born in lawful wedlock, it does not restrict the propagation of children in those cases where the taint of degeneracy is coupled with that of illegitimacy." *Id.* As to the second option, Mead was less sanguine about the prospects for segregation as a solution, cautioning that establishing colonies for "defectives" would "necessarily entail a very great expense" and "conditions would have to be safeguarded with the same care as an actual penitentiary." *Id.*

This left the possibility of sterilization via vasectomy, of which Dr. and Governor Mead glowingly reported:

> This operation is simple, taking less than five minutes to perform. In the case of defectives and persons convicted of certain crimes it is strongly endorsed . . . Dr. H.C. Sharp, the physician of the Indiana reformatory, highly approves of this plan of restricting the propagation of defectives and abnormal criminals. . . . So far as any disturbance to the physical, mental or nervous system of the patient is concerned, his testimony, based upon observation, is that this operation is decidedly beneficial, rather than detrimental.

Compl., Exh. 8 at 22-23. Mead concluded by "recommend[ing] to the legislature of 1912" that it immediately adopt restrictions on marriage for various classes of undesirables, including those who had been confined for "feeble-mindedness or insanity," and further recommended that the legislature investigate "adoption of the

operation of vasectomy as a prevention for the spread of hereditary taints and diseases." *Id.* at 23.

The General Assembly promptly responded to Mead's call for action. Just over a month after Mead's speech (on November 8, 1912), the legislature took up S.79, "An act to authorize and provide for the sterilization of imbeciles, feeble-minded, and insane persons, rapists, confirmed criminals and other defectives." *See* Exh. A, Excerpt of the Journal of the Senate of the State of Vermont (Bien. Sess. 1912) at 138 (Nov. 18, 1912); Exh. B, S.79 (1912). The bill called for the formation of a board of examiners authorized to evaluate "insane, feeble-minded, epileptic, criminal, and other defective" individuals in the care or custody of the State and, upon finding that "procreation by such person would produce children with an inherited tendency to crime, insanity, feeble-mindedness, epilepsy, idiocy or imbecility," to "order . . . an operation to be performed on such person for the prevention of procreation." Exh. B. Although the General Assembly passed the bill, then-Governor Allen Fletcher ultimately vetoed it, citing constitutional concerns raised by the Attorney General. *See* Exh. C, Excerpt of the Journal of the House of the State of Vermont (Bien. Sess. 1912) at 793-96 (Feb. 4, 1913). However, the eugenics movement was just gaining steam. After another failed attempt at legislation in 1927, the movement succeeded in 1931 in procuring adoption of "An Act for Human Betterment by Voluntary Sterilization," a measure intended to "eliminate[] from the future Vermont genetic pool persons deemed mentally unfit to procreate." *See* Exh. D, 2021, J.R.H.2.

This period in Vermont's history has troubled the legislature as well as the University of Vermont.[3] In 2021, the Vermont General Assembly formally apologized for the State's role in the eugenics movement in a Joint Resolution. *Id.* The General Assembly noted, among other things, that the State's agencies and institutions had "adopted policies and procedures to carry out the intent of the vetoed [1912] legislation and the beliefs of the eugenics movement," targeting "the poor and persons with mental and physical disabilities," as well as "individuals, families, and communities whose heritage was documented as French Canadian, French-Indian, or of other mixed ethnic or racial composition and persons whose extended families' successor generations now identify as Abenaki or as members of other indigenous bands or tribes." *Id.* While these policies post-dated Governor Mead's tenure in office, Mead leveraged his experience as a physician, his research into policies adopted by other states, and his position as the governor to propose specific eugenicist policies, and he remains one of the earliest and most prominent advocates for eugenics in Vermont's history.

B. Governor Mead's Gift of a Chapel to Middlebury

On May 11, 1914, a year and a half after he left office, Mead wrote to Middlebury president John Thomas to advise of his interest in funding construction

[3] In 2018, the University of Vermont Board of Trustees voted to remove the name of former University President Guy Bailey from the Bailey-Howe Library due to President Bailey's involvement in the eugenics movement. *See https://library.uvm.edu/news/uvm_trustees_approve_removal_bailey%E2%80%99s_name_baileyhowe_library#:~:text=Bailey%2FDavid%20W.,in%20March%20of%20this%20year.*

of a chapel on Middlebury's campus.[4] Compl., ¶ 95. Mead's letter (the "Gift Letter") explained:

> In commemoration of the fiftieth anniversary of my graduation from Middlebury College, and in recognition of the gracious kindness of my heavenly Father to me throughout my life, I desire to erect a chapel to serve as a place of worship for the college, the same to be known as the "Mead Memorial Chapel." I have in mind a dignified and substantial structure, in harmony with the other buildings of the college, and expressive of the simplicity and strength of character for which the inhabitants of this valley and the State of Vermont have always been distinguished.

Id. ¶ 98, Exh. 1 at 1. Mead further stated that he "ha[d] in mind the furnishing of from $50,000 to $60,000 for the erection of such a structure," to which he would "bind [himself] and [his] estate" upon satisfaction of two contingencies. The first of these was that the "Trustees of the College secure appropriate plans for its erection which shall meet with my approval." The second was that the Trustees "appoint a Building Committee at once, consisting of President Thomas, former President Brainerd, and [himself] to make the necessary contracts for such a structure and to supervise the erection of the same." *Id.* ¶ 98, Exh. 1 at 1-2.

At a June 22, 2014 meeting, Middlebury's Trustees voted on and adopted a resolution accepting the gift. *Id.*, ¶ 106. The resolution stated in full:

> Whereas our esteemed colleague, the Honorable John Abner Mead of the Class of 1864, has signified to President Thomas his desire, in commemoration of the fiftieth anniversary of his graduation, to erect a Chapel for Middlebury College, and his readiness to furnish the sum of from fifty thousand to sixty thousand dollars for the erection of such an edifice.

[4] The construction of a chapel had been a high priority for President Thomas, who observed in a letter to the College's Trustees advising of the gift that "[w]e have all felt for many years that it was one of the most urgent needs of the college." Compl., Exh. 1 at 3.

> Resolved that the President and Fellows of Middlebury College hereby accept of this magnificent benefaction with sincere gratitude to both Dr. & Mrs. Mead and their family for their deep interest in the religious welfare of the College, so impressively manifested by this provision of a suitable place for divine worship.
>
> Resolved that the Trustees through the Committee nominated by Dr. Mead will use their best endeavors to secure the erection of a dignified and substantial structure, in harmony with the other buildings of the college, and such as will meet the approval of the donor.

Id., ¶ 106, Exh. 1 at 10. The Trustees likewise voted to form a building committee to oversee the project, consisting of Mead, President Thomas, former President Brainerd, and Trustee John Weeks. *Id.*, ¶ 106.

On June 23, 1914, the College held a groundbreaking ceremony in connection with its commencement exercises. *Id.*, ¶ 114. Construction of the Chapel proceeded over the following two years, with Mead's active involvement in approving designs and exercising oversight of the budget. *Id.*, ¶ 122. In addition to the costs of construction, Mead paid for and donated a pipe organ, pilasters, and pews. *Id.* He also pledged $7,000 to acquire eleven bells for the Chapel's tower, stating in a June 21, 1915 letter that, "[i]f acceptable to the members of the Board of Trustees, Mrs. Mead and I would be pleased to add a chime of bells to our gift of the Mead Memorial Chapel." *Id.*, ¶ 124, Exh. 3 at 34. Construction was completed in 1916 and was memorialized in a dedication ceremony held on June 18, 1916. *Id.*, ¶¶ 127, 131. The total cost of construction to Mead was $75,373.34. *Id.*, ¶ 127.[5]

[5] In the ensuing years, the College made a number of significant changes to the Chapel. In 1938, the College added balconies to the interior, increasing the seating capacity to 715. Compl., ¶ 130. A

The Chapel has served as a "centerpiece and aesthetic keystone" for Middlebury in the years since its completion, becoming an important component of the "College's identity and brand." *Id.*, ¶ 148. Middlebury has described it as a "place where the College community comes together on occasions of significance," offering a "community gathering place for convocations, lectures, concerts, baccalaureates, and countless other events." *Id.*, ¶ 140, Exh. 6 at 7, 10, 20. Although initially conceived as an avowedly Christian (and Protestant) place of worship, the Chapel now welcomes students of all faiths and backgrounds, and it serves as a venue for secular as well as religious events.[6] *Id.*, Exh. 6 at 4-5, 20.

C. Middlebury's Removal of the Mead Name from the Chapel

In summer 2021, following the Vermont General Assembly's formal apology for the State's role in the eugenics movement, the Middlebury Board of Trustees' Prudential Committee decided on behalf of the Board to remove Mead's name from the Chapel. *See* Exh. D, 2021, J.R.H.2; Compl., ¶ 152, Exh. 7 at 5-10. The sign identifying the Chapel as "Mead Memorial Chapel" was subsequently removed from its location above the entrance to the Chapel on the morning of September 27, 2021. *Id.*, ¶ 6.

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small ancillary chapel (the Sunderland Chapel) was also built on the right side of the building. *Id.* Additionally, the organ and bells donated by Mead have been updated: the organ was replaced with a large Gress-Miles organ in 1971, and the eleven bells donated by Mead have been succeeded by a forty-eight-bell carillon. *Id.*

[6] The College still has a chaplain who leads Sunday morning Chapel Services during special event weekends, and also employs a rabbi and a Muslim advisor as associate chaplains. Compl., ¶ 140, Exh. 6 at 4-5, 20.

As explained in a September 27, 2021 letter to the Middlebury community from the College's President and the Chair of the Board of Trustees, the decision to remove Mead's name followed a process "involving deep reflection and discussion." *Id.*, Exh. 7 at 6. The President commissioned a working group to examine Mead's role in promoting Vermont's eugenic policies and "what implications that had for us and for the iconic building named after him on campus," directing that the group "conduct its work with a generosity toward the historical context of the time, as well as rigor in historical analysis." *Id.*, Exh. 7 at 7. After inquiry and consideration of archival research, the group—which included (among many others) the College's Director and Curator of Special Collections, the President of Middlebury's Alumni Association, and a history professor—concluded that maintaining Mead's name "on an iconic building in the center of campus is not consistent with what Middlebury stands for in the 21st Century."[7] *Id.*, Exh. 7 at 7, 9-10. For that reason, the working group recommended removal. *Id*. The President forwarded the recommendation to the Board's Prudential Committee, which voted unanimously to remove Mead's name. *Id.*, Exh. 7 at 8.

Among the most vocal opponents of the decision has been former Vermont Governor and Middlebury College alumnus James Douglas, who has procured appointment as Special Administrator of the Mead Estate for purposes of

[7] This inquiry and the resulting decision were, at their core, an academic deliberation as to how Middlebury manages its facilities in support of its educational mission, and thus entitled to broad protection under the law. *See Sweezy v. State of N.H.*, 354 U.S. 234, 250 (1957).

prosecuting this action. In an opinion piece published in the New York Sun in May 2022, former Governor Douglas announced that he was boycotting his fiftieth reunion at Middlebury in protest of the removal of Mead's name, decrying the decision as an example of "cancel culture" and the "erasure of history." *Id.*, Exh. 7 at 17-20. However, as the September 2021 letter from the President and Board Chair emphasized, the removal of Mead's name from the Chapel was "not about erasing history, but just the opposite—engaging with it so we can learn from it." *Id.*, Exh. 7 at 9. In line with this, the working group called for appointment of an educational task force to "develop recommendations for how we can acknowledge and educate about Middlebury's decision to first honor a member of this community, and then remove that honor." *Id.*

In March 2023, former Governor Douglas, in his role as Special Administrator of the Mead Estate, brought the present suit challenging Middlebury's removal of Mead's name. The Complaint advances six causes of action: three claims for breach of a purported contractual obligation to preserve the name "Mead Memorial Chapel" in perpetuity (seeking specific performance, damages, and restitution, respectively); a claim for breach of the covenant of good faith and fair dealing; a claim for breach of a conditional gift; and, finally, a claim for unjust enrichment. As discussed below, all six claims fail as a matter of law and must be dismissed.

STANDARD

Dismissal for failure to state a claim upon which relief can be granted "is

appropriate when 'it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.'" *In re Blow*, 2013 VT 75, ¶ 8, 194 Vt. 416, 82 A.3d 554 (quoting *Richards v. Town of Norwich*, 169 Vt. 44, 48, 726 A.2d 81, 85 (1999)). In reviewing and ruling on a motion under Rule 12(b)(6), the Court must "assume the truth of all factual allegations in the complaint and accept 'all reasonable inferences that may be derived from [the] plaintiff's pleadings.'" *Id.*, ¶8 (quoting *Richards*, 169 Vt. at 48–49, 726 A.2d at 85). Beyond the allegations of the pleadings, the Court may also look to documents appended to, referred to in, or relied upon by the Complaint, as well as laws, statutes, and other matters of public record. *Kaplan v. Morgan Stanley & Co., Inc.,* 2009 VT 78, ¶ 10 n.4, 186 Vt. 605, 987 A.2d 258; V.R.C.P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

Rule 12(b)(1) mandates dismissal of a complaint where the plaintiff lacks standing to pursue the claims at issue, as standing is a jurisdictional requirement. *See Severson v. City of Burlington*, 2019 VT 41, ¶ 9, 210 Vt. 365, 215 A.32 102. The plaintiff "must allege facts sufficient to confer standing on the face of the complaint." *Id.* (quoting *Parker v. Town of Milton*, 169 Vt. 74, 76, 726 A.2d 477, 479 (1998)). In ruling on a motion to dismiss for lack of standing, courts "accept 'all uncontroverted factual allegations . . . as true' and construe those facts 'in the light most favorable to the nonmoving party.'" *Id.* (quoting *In re Guardianship of C.H.*, 2018 VT 76, ¶ 6, 208 Vt. 55, 194 A.3d 1174).

ARGUMENT

A. Mead Did Not Condition His Gift on a Requirement that Middlebury Maintain His Name in Perpetuity on Its Chapel.

The central claim of this lawsuit—and the foundation upon which rests each of Plaintiff's causes of action—is the proposition that Mead's gift to Middlebury imposed an affirmative, enforceable condition obligating the College to maintain the name "Mead Memorial Chapel" in perpetuity. That is simply incorrect. The Gift Letter's passing reference to the name "Mead Memorial Chapel" is ambiguous at best, falling far short of what the law would require to recognize a binding condition enforceable over a century later: the Letter includes no language expressly conditioning the gift on a grant of naming rights, no language specifying that the Chapel bear Mead's name indefinitely, and no language requiring reversion of the gift in the event that this supposed "condition" is violated. The absence of any explicit, clearly articulated condition is fatal to Plaintiff's suit and requires dismissal of the Complaint.

Vermont law generally recognizes two species of gift. The first of these is an absolute gift, by which the donor "must deliver the property, and part with all present and future dominion over it." *Williamson v. Johnson*, 62 Vt. 378, 20 A. 279, 280 (1890). Where such a gift is "made perfect by a delivery and acceptance," it "is irrevocable by the donor." *Id*. The second is a conditional gift—which is what

Plaintiff contends is present here.[8]

There is no question that "gift transfers with conditions attached are valid," and that, "[i]n limited instances, a donor may limit a gift to a particular purpose and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it." 38 Am. Jur. 2d Gifts § 68. Consistent with this, Vermont's courts have recognized that a "gift may be conditioned upon the donee's performance of specified obligations or the happening of a certain event." *Ball v. Hall*, 129 Vt. 200, 206, 274 A.2d 516, 520 (1970); *see also Univ. of Vt. v. Wilbur's Estate*, 105 Vt. 147, 163 A. 572, 575 (1933) (noting that a "gift, absolute in form, may be made subject to be defeated upon the happening of a subsequent event"). Where a condition attaches to a gift, the failure of the condition will either prevent title from vesting in the donee (in the case of a condition precedent) or will trigger a reversion of the donated property (in the case of a condition subsequent). *See In re Fogel's Will*, 156 N.Y.S.2d 739, 742 (N.Y. Sur. Ct. 1956) (explaining that "[a] condition is precedent when the performance thereof must of necessity precede the vesting of the gift" and "[i]t is subsequent when the failure or non-performance works a forfeiture of an estate already vested").

Plaintiff's characterization of Mead's donation to Middlebury as a conditional gift is accurate to a certain point, for a fair reading of the Gift Letter

[8] Plaintiff purports to frame his claims alternatively in contract and under the law of gifts. However, as discussed in Section B, *infra*, there is no authority in Vermont that would allow a donor to pursue a contract claim except in the narrow circumstances in which the law will recognize a breach of a conditional gift.

unquestionably reflects an intention to impose conditions *precedent* to Mead's donation of funds. The Gift Letter provided:

> I have in mind the furnishing of from $50,000 to $60,000 for the erection of such a structure, and I hereby suggest that the Trustees of the College secure appropriate plans for its erection which shall meet with my approval, and that said Board appoint a Building Committee at once . . . to make the necessary contracts for such a structure and to supervise the erection of the same, and I will then bind myself and my estate to provide the necessary means for its erection and completion in accordance with the suggestions of this letter and with the contracts to be made by your committee.

Compl., Exh. 1 at 1-2. Thus, the Letter offered that Mead would bind himself to make the contemplated donation upon satisfaction of two conditions: the procurement of plans meeting his satisfaction and the formation of a building committee. As detailed in the Complaint, both of those conditions were ultimately satisfied and Mead proceeded with his donation (and, indeed, generously exceeded his initial pledge).

What the Gift Letter did not do, however, was impose a condition *subsequent* requiring that Middlebury maintain the name "Mead Memorial Chapel" on the building in perpetuity. Vermont's courts have repeatedly emphasized that "conditions subsequent are not favored in the law." *Pres. and Fellows of Middlebury College v. Cent. Power Corp. of Vt.*, 101 Vt. 325, 143 A. 384, 390 (1928); *Wilbur v. Univ. of Vt.,* 129 Vt. 33, 43, 270 A.2d 889, 897 (1970) (same). Indeed, courts are instructed to interpret gift instruments, whenever possible, to avoid a reading which will result in a conditional gift: "if the language of an instrument can be otherwise construed, without violating the plain intent of the maker thereof, it will

be done." *Middlebury College,* 101 Vt. 325, 143 A. at 390; *see also Wilbur*, 129 Vt. at 43-44, 270 A.2d at 897 (an instrument "will not be construed as creating a conditional estate where the intention of the donor, taken from the entire document, indicates a contrary purpose"); *Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ.,* 174 S.W.3d 98, 115 (Tenn. App. Ct. 2005) ("Because noncompliance [with the terms of a conditional gift] results in a forfeiture of the gift, the conditions must be created by express terms or by clear implication and are construed strictly.").

This is not a matter of mere legal technicalities. The law's aversion to conditional gifts rests on sound public policy concerns with the perpetuation of donor-imposed restrictions over time—concerns that are amply illustrated in the present case. As the Massachusetts Supreme Judicial Court has explained:

> The justification for allowing a charitable gift to continue indefinitely, without regard to the Rule against Perpetuities or related rules, is the public benefit from achievement of important charitable objectives. The same justification does not necessarily apply to subordinate details of such a charitable gift, particularly those which tend unduly to restrict adapting use of the gift to changing conditions. In some cases, indeed, subordinate provisions, originally may have been imposed, not to facilitate the achievement of a general charitable purpose, but for the personal gratification of the donor in respects wholly irrelevant to any effective execution of a public purpose. There is strong ground for disregarding such subordinate details if changed circumstances render them obstructive of, or inappropriate to, the accomplishment of the principal charitable purpose. . . . A donor . . . must recognize that most institutions are likely to change with time, that they will become sterile if they remain static, and that they must be adaptable to new public considerations and unpredictable economic circumstances. For this reason, the intention to make mandatory even detailed restrictions on the conduct of such institutions is not lightly to be inferred.

Trustees of Dartmouth College v. City of Quincy, 258 N.E.2d 745, 753 (Mass. 1970); *see also Ball*, 129 Vt. at 211, 274 A.2d at 522-23 (citing and quoting *Trustees of Dartmouth College*).

Applying these standards, the language of the Gift Letter cannot be read to impose any binding condition with respect to naming rights. The Letter's reference to the name "Mead Memorial Chapel" is a vague and indeterminate one, almost appended as an afterthought: "In commemoration of the fiftieth anniversary of my graduation from Middlebury College, and in recognition of the gracious kindness of my heavenly Father to me throughout my life, I desire to erect a chapel to serve as a place of worship for the college, **the same to be known as the 'Mead Memorial Chapel**.'" Compl., Exh. 1 at 2 (emphasis added). This is the only time in the Gift Letter that the name "Mead Memorial Chapel" is mentioned. The Letter does not present the right to name the Chapel as an express condition of the gift, nor does the Letter specify the length of the term for which the Chapel might bear the name "Mead."[9] Far from focusing on the veneration of the Mead family name, the Letter makes clear that the driving motivation was the opportunity to create a prominent

[9] Indeed, the language in this initial section of the letter is plainly precatory, describing generally Mead's "desire" with respect to the Chapel—and the law has long distinguished between precatory language like this and imperative language imposing a condition or command. *See, e.g.*, *Sibley v. St. Albans Sch*., 134 A.3d 789, 803 (D.C. App. Ct. 2016) (finding donor's use of the language "it is my wish" precatory and not mandatory). Notably, though the Gift Letter initially uses equally precatory language in describing the design of the building—"I have in mind a dignified and substantial structure, in harmony with the other buildings of the college, and expressive of the simplicity and strength of character for which the inhabitants of this valley and the State of Vermont have always been distinguished"—Mead proceeds in the third paragraph of the Letter to expressly require, as a condition of his gift, that he have the right to approve the plans for the Chapel. He did not do the same with respect to naming rights.

space for worship on the College's campus:

> [I]t has been my hope and prayer that I might be able and permitted to build for this college a suitable place for divine worship and that it might rise from the highest point on its campus as a symbol of the position, most prominent in every respect, which [C]hristian character and religious faith should always maintain in its work for our youth.

Id. To conclude from this limited evidence that Mead intended the perpetual use of his family name to be an absolute condition of his funding construction of a chapel, such that the failure to continue the name requires reversion of the funds, would require a monumental leap in logic. Given the law's strong preference for a reading that does not make the gift conditional, *Middlebury College,* 101 Vt. 325, 143 A. at 390, such an inference cannot be justified.

Examples of the type of definite language that *will* give rise to an enforceable condition to a gift are easily located, even a hundred years ago. One is found in the *Wilbur's Estate* case cited above, which involved a 1928 gift to the University of Vermont from James Wilbur for the construction of a museum. The gift was memorialized in a letter from UVM's President expressly stating that the donation was made "upon [certain] conditions," which included a provision that the University would be required to return the gift unless it raised an additional $200,000 by the following year for construction of a museum. *See Wilbur's Estate*, 105 Vt. 147, 163 A. at 574. The letter was countersigned by the donor with the statement "The foregoing letter correctly states this conditional gift by me, to the University of Vermont." *Id.*

Another contemporaneous example can be found in *Herron v. Stanton*, 147

N.E. 305 (Ind. Ct. App. 1920), involving a bequest to the Art Association of Indianapolis that imposed an express naming rights condition. The relevant portion of the bequest provided as follows:

> [T]his bequest is **upon the condition following**: That the art gallery and art school of said association when established and maintained, **shall each be designated and named** by such name or names as will include the name of the testator as a part thereof**, and the use of such name or names shall be perpetual, or so long as said art gallery and art school are severally maintained**. . . . If said association shall not see fit to comply with the foregoing condition, . . . I direct that my executor shall distribute the residue and remainder of my estate in this item sought to be bequeathed, to such religious and charitable societies, churches, organizations and corporations, located in the city of Indianapolis, Indiana, as he may select . . .

Id. at 306 (emphases added). The clarity of the *Herron* naming condition—and the perpetual nature thereof—stand in sharp contrast to the Mead Gift Letter's indeterminate reference to the name of the Chapel. *See also United Daughters of the Confederacy,* 174 S.W.3d at 115 (finding enforceable naming rights condition for dormitory where gift agreement expressly required school to place on building an inscription naming it "Confederate Memorial").

While the absence of language expressly conditioning Mead's gift on the grant of naming rights is, in itself, sufficient to warrant dismissal, there is an additional impediment to Plaintiff's claims: the Gift Letter does not provide that the donation would revert to Mead or his heirs in the event any purported condition of the gift was violated. Vermont's courts view the absence of a provision for forfeiture or reversion as "a strong indication that the donor did not contemplate a failure of the ultimate purpose of his gift." *Wilbur*, 129 Vt. at 44, 270 A.2d at 897; *Ball*, 129

Vt. at 209, 274 A.2d at 522 (same).

In *Wilbur*, for example, a donor made a gift in trust to the University of Vermont for the purpose of supporting Vermont students, on the condition that the General Assembly enact legislation limiting the University's maximum enrollment; the trust further specified that if the law was ever amended or rescinded, the funds would pass in trust to the Library of Congress Trust Fund Board to be used for the same purpose. The Vermont Supreme Court rejected the argument that the restriction on student enrollment constituted a condition subsequent to the gift, reasoning that donor's "desire to keep the college small is subordinate to his intention to aid its Vermont students" and, because the trust did not expressly call for reversion, there was "no indication that the donor intended the consequence of unlimited enrollment to be a failure of that purpose." *Wilbur,* 129 Vt. at 43, 270 A.2d at 896.

In the *Ball* case, in contrast, the Vermont Supreme Court found an enforceable condition subsequent where a donor made a gift to the Town of Bakersfield in support of the construction of a high school "[p]rovided the said Town will obligate itself to refund said sum with interest thereon . . . in case said income, or any part thereof shall ever be devoted to any use or purpose other than the support and maintenance of a High School in said Bakersfield." 129 Vt. at 202-03, 274 A.2d at 518. Thus, the Court held that, when the Town voted to close its high school in 1966, it became obligated to repay the gift to the donor's heirs. No comparable language of reversion appears in Mead's Gift Letter.

For all of the reasons above, the vague reference to "Mead Memorial Chapel" in Mead's Gift Letter cannot, as a matter of law, be read as having given rise to a condition enforceable by Mead's Estate more than one hundred years after the fact. The College satisfied the two explicit conditions precedent to Mead's gift—approval of the Chapel plans and formation of a building committee—and therefore the gift vested and was fully irrevocable upon delivery over a century ago. *Williamson*, 62 Vt. 378, 20 A. at 280. The Court should dismiss the Complaint on that basis.

B. Neither Contract nor the Covenant of Good Faith and Fair Dealing Provides Mead's Estate a Colorable Basis for Relief.

Alongside his claim for "Breach of Conditional Gift," Plaintiff asserts three claims in contract and one under the covenant of good faith and fair dealing (Counts I through IV). Effectively, these claims seek to accomplish an end-run around the traditionally restrictive nature of the law on conditional gifts by reframing the Gift Letter as a "contract." This gambit fails for several reasons.

First, it is well established that, because a gift is made without consideration, it generally "does not come within the legal definition of a contract." 38 Am. Jur. 2d Gifts § 2; *cf. also In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 639, 481 A.2d 1274, 1276 (1984) ("[A] person cannot be required to give a donation in exchange for some consideration since by its very definition a gift is a voluntary transfer without consideration."). While there are some outlying decisions in which courts have recognized contract claims based on violations of conditions on a

charitable gift,[10] *see, e.g.*, *Stock v. Augsburg College*, No. C1-01-1673, 2002 WL 555944 (Minn. App. Ct. Apr. 16, 2002) (recognizing contract claim based on failure to name building after donor, but finding claim time-barred), the traditional view remains "that a restricted gift is not a contract." Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 Ga. L. Rev. 1183, 1225 (2007).[11] Vermont's cases have adhered to this conventional framework, treating restrictions imposed on a gift as a question of conditional gift rather than contract. *See Ball*, 129 Vt. at 206, 274 A.2d at 520;[12] *Wilbur's Estate*, 105 Vt. 147, 163 A. at 575.

The practical significance of the doctrinal distinction between conditional gift and contract lies, in large part, in the remedies available. The remedy for breach of a conditional gift is restitution alone (i.e., reversion of the gift). *See Ball*, 129 Vt. at

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[10] A number of these appear to reflect doctrinal or semantic confusion rather than any substantive deviation from traditional understandings of gift law. For example, two of the leading cases in this area—*L.B. Research & Educ. Found. v. UCLA Found.,* 29 Cal. Rptr. 3d 710 (Cal. App. Ct. 2005) and *Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98 (Tenn. App. Ct. 2005)—correctly categorized the gifts at issue as gifts subject to conditions, and noted the remedy to be forfeiture and reversion, but mistakenly described the nature of the claim in terms of contract rather than as a matter of gift law or property. *See* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing,* 41 Ga. L. Rev. 1183, 1190 (2007) (criticizing *L.B. Research* for the "fundamental mistake[]" of treating "conditional gifts as falling under contract law, when it is actually a specie of property law").

[11] *See also* Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 Vand. L. Rev. 1093, 1149 (2005) (noting that, while "[c]onceptually, a restricted gift hovers somewhere between a gift and a contract[,] . . .. [t]raditional jurisprudence has seen it as a gift . . . and subsumed it under property law (which is also consistent with allowing restricted gifts to be governed by the law of trusts)").

[12] In *Ball*, the Court made a passing reference to the conditions of the gifts at issue as the "contract of the parties." 129 Vt. at 206, 274 A.2d at 520. However, the Court went on to make clear that it viewed the transactions as gifts "conditioned upon the donee's performance of specified obligations or the happening of a certain event," upon failure of which "the donor is entitled to restitution." *Id.*, 129 Vt. at 207, 274 A.2d at 520.

207, 274 A.2d at 520; *see also United Daughters of the Confederacy*, 174 S.W.3d at 114 ("If the recipient fails or ceases to comply with the conditions, the donor's remedy is limited to recovery of the gift."). Asserting a claim in contract makes available a broader range of remedies, including—as witnessed by the relief requested in the Complaint here—specific performance and consequential damages. Allowing disappointed donors and their heirs to pursue such relief would fundamentally alter the traditional nature of the gift transaction, which, absent an express reservation of a right of reversion, traditionally contemplates that the donor is voluntarily "part[ing] with all present and future dominion" over the gifted funds or property. *Williamson*, 62 Vt. 378, 20 A. at 280.

Second, even if Vermont were to permit enforcement of gift conditions in contract, there was no contract formed here. It is a "basic tenet of the law of contracts that . . . there must be mutual manifestations of assent or a 'meeting of the minds' on all essential particulars." *Evarts v. Forte*, 135 Vt. 306, 309, 376 A.2d 766, 768 (1977) ("[I]f an instrument that purports to be a complete contract does not contain, or erroneously contains, the substantial terms of a complete contract, it is ineffective as a legal document."). That is manifestly absent here: the Gift Letter does not contain "all essential particulars" of a contract, either as to the gift itself or, certainly, as to any promise to maintain the name "Mead Memorial Chapel" for a period of time. Mead did not bind himself to make any specific donation in the Gift Letter, stating only that he "ha[d] in mind the furnishing of from $50,000 to $60,000," to which he would bind himself and his estate once certain conditions

were met "in accordance with the suggestions of this letter and with the contracts to be made by your committee." Compl., Exh. 1 at 1-2. This is, at most, a contract to make a contract, with the amount of the donation to be fixed at a future date.

More to the point, the Gift Letter specifies no terms as to Mead's supposed naming rights—including the most essential element, the length of time for which the parties were "contracting" for the Chapel to be denoted "Mead Memorial Chapel." *Compare Herron*, 147 N.E. at 306 (providing that use of donor's name on gallery and school "shall be perpetual, or so long as said art gallery and art school are severally maintained"). Nor, for that matter, did the formal resolution by which the College's Trustees accepted the gift set forth any grant of naming rights. Compl., Exh. 1 at 10-12. Indeed, the resolution did not even mention the name "Mead Memorial Chapel," noting only that Mead had "signified . . . his desire, in commemoration of the fiftieth anniversary of his graduation, to erect a Chapel for Middlebury College." *Id.* While there are certainly other contemporaneous documents in which Trustees and College officials referred to the building as "Mead Memorial Chapel," there is no indication that either Mead or the Trustees understood it to be an essential element of the transaction. As such "[v]agueness, indefiniteness and uncertainty of expression as to any of the essential terms of an agreement . . . preclude the creation of an enforceable contract," *Evarts*, 135 Vt. at 310, 376 A.2d at 769, the documents here cannot make out a binding contract to maintain the name "Mead Memorial Chapel" in perpetuity. *See Quenneville v. Buttolph*, 2003 VT 82, ¶ 14, 175 Vt. 444, 833 A.2d 1263 (holding no contract was formed absent meeting of the minds on essential terms).

Additionally, the Gift Letter does not indicate that any consideration was paid for the College to grant Mead naming rights. *See Sutton v. Vt. Reg'l Ctr.*, 2019 VT 71A, ¶ 60, 212 Vt. 612, 238 A.3d 612 ("The essential requirements for a contract are 'a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.'" (quoting Restatement (Second) of Contracts § 17(1) (1981))). Rather, the Letter indicates that Mead's offer to bind himself to make a donation was only made in return for the right to have input on the design of the Chapel, both through approval of the plans and participation on a building committee.

Relevant on this point is *Prentis Family Foundation v. Barbara Ann Karmanos Cancer Institute*, 698 N.W.2d 900 (Mich. App. Ct. 2005), a case in which a donor sued a cancer center for failure to honor a naming provision in an endowment fund agreement. The agreement at issue provided for a donation of $1.5 million to establish a research endowment, and went on to state:

> In recognition of the significant and long-standing commitment of and leadership and support by the Prentis Foundation in the fields of cancer education, detection and research and the generous financial contributions made over many years by the Prentis Foundation in furtherance thereof; and in further recognition of and appreciation to the Prentis Foundation for the fund it is hereby creating, the University, Center and the Michigan Cancer Foundation . . . do hereby agree that Center shall be renamed and henceforth be known as the Meyer L. Prentis Comprehensive Cancer Center of Metropolitan Detroit.

Id. at 914. Reviewing this language, the court reasoned that the "terms did not indicate a bargained for exchange with respect to the naming provision," as the agreement did not use "the word 'in consideration for' or a similar term indicating that the payment of the $1.5 million was in exchange for the naming provision." *Id.*

at 915. Accordingly, the Court held that the naming provision was "legally unenforceable." *Id.* Likewise here, there is no indication that Mead's donation was intended to be in consideration for naming rights—and, unlike *Prentis*, there is not even any express commitment or requirement of Middlebury to name the building "Mead Memorial Chapel."

Third, the claim for violation of the covenant of good faith and fair dealing necessarily depends on the existence of a contractual obligation to maintain the name "Mead Memorial Chapel" in perpetuity—a contractual obligation that, as discussed above, was never formed. It is black-letter law that "[a] cause of action for breach of the covenant of good faith can arise only upon a showing that there is an underlying contractual relationship between the parties. . . . " *Monahan v. GMAC Mort. Corp.,* 2005 VT 110, ¶ 54 n. 5, 179 Vt. 167, 893 A.2d 298. The essence of the covenant is a "promise[] not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement"; in other words, it "exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Carmichael v. Adirondack Bottled Gas Corp. of Vt.*, 161 Vt. 200, 208, 635 A.2d 1211, 1216 (1993). Where there was no contract to maintain Mead's name on the Chapel, Middlebury's removal of his name could not be said to interfere with any "justified expectations" arising out of contract. Plaintiff's claim fails on that basis. *Johnson v. Smith Brothers Ins. LLC*, No. 2020-101, 2020 WL 5269927, at *5 (Vt. Sept. 4, 2020) (holding that, where plaintiffs failed to establish existence of contract, "their dependent claim of a breach of the covenant of good faith

and fair dealing also fails").

C. Absent Failure of an Enforceable Condition to Mead's Gift, There Can Be No Viable Cause of Action for Unjust Enrichment.

Plaintiff's cause of action for unjust enrichment likewise fails. Indeed, the very concept is inapposite within the law of charitable gifts, for it is well established that a "valid gift is not a source of unjust enrichment." Restatement (Third) of Restitution § 2, cmt. b. While some courts have recognized a claim for unjust enrichment upon failure of a conditional gift, Mead's gift to Middlebury was not subject to any conditions subsequent, for the reasons explained above. Accordingly, the claim must be dismissed.

"The existence of unjust enrichment, given a certain set of facts, is a question of law . . . ." *Kellogg v. Shushereba*, 2013 VT 76, ¶ 32, 194 Vt. 446, 82 A.3d 1121. A claim may lie where it is plausibly alleged that "(1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value." *Reed v. Zurn*, 2010 VT 14, ¶ 11, 187 Vt. 613, 992 A.2d 1061 (mem.) (quotation omitted). By definition, a gift will satisfy the first of these two elements, but typically not the third: there is nothing "inequitable" about a donee retaining a gift without compensating the donor for its value (except in rare circumstances involving gifts procured by fraud, coercion, or the like).[13] *See Cooper*

[13] *See, e.g.*, Restatement (Third) of Restitution §§ 11 (mistake), 13 (fraud or misrepresentation), 14 (duress).

v. Smith, 800 N.E.2d 372, 373 (Ohio App. 4th Dist. 2003) ("[B]ecause enrichment of the donee is the intended purpose of a gift, there is nothing unjust about allowing [the donee] to retain the gifts she received from [the donor] in the absence of fraud, overreaching, or some other circumstance."). Thus, a claim for unjust enrichment generally will not lie to recover a gift. *Cf. McLaren v. Gabel*, 2020 VT 8, ¶¶ 18-34, 211 Vt. 591, 229 A.3d 422 (viability of plaintiff's claim in unjust enrichment to recover from defendant money he had contributed to the purchase and renovation of a property turned entirely on whether or not that contribution constituted a "gift" to defendant).

The necessary caveat to this general rule is that, if a donor makes a gift that is subject to a true condition subsequent—i.e., the donor reserves the right to reversion of the gift in the event that the condition fails—the donor will be entitled to restitution if the condition is violated. *See Ball*, 129 Vt. at 207, 274 A.2d at 520. Under such circumstances, a donee could rightfully be said to be unjustly enriched unless and until restitution is made. *See Camp St. Mary's Assn. v. Otterbein Homes*, 889 N.E.2d 1066, 1084 (Ohio App. Ct. 2008) (suggesting that, while unjust enrichment is inapplicable to absolute gifts, a claim might lie in the event the gift is made conditional and the gift fails). However, this does nothing more than restate the remedy available upon failure of a conditional gift—and, in any event, the gift at issue here was not subject to any enforceable condition subsequent. Because there is no plausible basis for a recovery in unjust enrichment on the allegations of the Complaint, the Court should dismiss the claim.

D. Even Were There a Valid Claim for Violation of a Gift Condition, Plaintiff Would Lack Standing to Enforce Such Condition.

For all of the reasons discussed above, the Gift Letter imposed no legal obligation on Middlebury to maintain the Mead name on its Chapel. However, even if the gift were so conditioned, Mead's Estate would not be the proper plaintiff to seek enforcement. The law has long reserved solely to the Attorney General the role of policing compliance with restrictions on gifts, denying standing to donors and their heirs. The Complaint must be dismissed on that ground as well.

The most prominent decision on donor standing in Vermont is *Wilbur v. University of Vermont*, 129 Vt. 33, 270 A.2d 889 (1970). As discussed above, the case concerned a donation by James Wilbur in trust to the University of Vermont to support Vermont students, subject to a condition that the General Assembly enact certain limitations on enrollment. When the University violated that condition by increasing enrollment, Wilbur's heirs brought suit seeking to compel reversion of the gift to his residuary estate. The Court rejected those efforts on the ground, among others, that Wilbur's heirs had no standing to seek enforcement:

> The fact the trustees of a charitable trust violate its terms does not cause the trust to fail nor entitle the settlor or his successor to enforce a resulting trust. Unless it is impossible or impractical to execute the donor's purpose, the remedy for a breach of trust is by suit at the instance of the attorney general of the state to compel compliance. It creates no right in the donor's heirs to enforce a resulting trust.

Id., 129 Vt. at 44, 270 A.2d at 897 (citation omitted). While *Wilbur* concerned an express charitable trust, it is consistent with well-established common law principles governing standing for both gifts and charitable trusts. *See Carl J. Herzog Found.,*

Inc. v. Univ. of Bridgeport, 699 A.2d 995, 997–98 (Conn. 1997) (collecting cases for proposition that, "[a]t common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so"). For that reason, Mead's Estate does not have standing to pursue enforcement of any supposed condition of his gift.

The denial of standing to donors and their heirs is by no means particular to Vermont law. To the contrary, "nearly all the modern American authorities—decisions, model acts, statutes, and commentaries—deny a donor standing to enforce a restricted gift to [a] public charity absent express retention of a reversion in the donative instrument." Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society v. Donor Empowerment*, 58 Vand. L. Rev. 1093, 1145 (2005). And, indeed, courts routinely dismiss donor suits on standing grounds. *See, e.g.*, *Siebach v. Brigham Young Univ.*, 361 P.3d 130, 137 (Utah App. Ct. 2015) (affirming dismissal of claims by donors seeking to enforce terms of charitable gift, including claims for breach of contract and unjust enrichment, and noting that "the common-law donor-standing rule has been applied almost universally to prohibit the kinds of donative-intent claims the [plaintiffs] seek to prosecute").[14]

[14] *See also, e.g.*, *Courtenay C. & Lucy Patten Davis Found. v. Colo. State Univ. Res. Found.*, 320 P.3d 1115 (Wyo. 2014) (affirming dismissal of donor suit on standing grounds); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133 (Mo. App. Ct. 2009) (same); *Lindmark v. St. John's Univ.*, No. 18-cv-1577, 2019 WL 1102721 (D. Minn. Mar. 8, 2019) (dismissing donor suit on collateral estoppel grounds where court in parallel state court action had determined that "charitable gifts may be subject to conditions without becoming a contract, and . . . conditions on a charitable gift may be enforced only by the Minnesota Attorney General"). *But see Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426

There have been two significant developments in the law in Vermont in the time since *Wilbur* was decided, both brought about by the efforts of the Uniform Law Commission. Neither changes the standing analysis in this case. First, Vermont has adopted two successive statutory regimes promulgated by the Uniform Law Commission to govern the management of endowments and restricted gifts by charitable institutions: the Uniform Management of Institutional Funds Act ("UMIFA") and the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), the latter of which was enacted in 2009 and replaced UMIFA. *See* 14 V.S.A. §§ 3411-3420.

Of note here, both UMIFA and UPMIFA contain provisions allowing institutions to modify restrictions on gifted funds upon written consent from a donor. *See* 14 V.S.A. § 3416(a). Litigants in other jurisdictions have argued that this language reflects an expansion of the traditional conception of standing in the context of charitable gifts and should be taken to supersede the common law prohibition on donor enforcement suits. *See, e.g.*, *Carl J. Herzog Found.,* 699 A.2d 995 (evaluating whether UMIFA's donor consent provision reflected an intention to abrogate the common law restriction on standing). Those arguments are without merit. As courts elsewhere have noted, nothing in the text of the uniform acts "expressly provides statutory standing for donors to charitable institutions who

(N.Y. App. Div. 2001) (finding that wife of donor, in her capacity as current executor of recently deceased donor's estate, has standing to enforce terms of gift).

have not somehow reserved a property interest in the gift such as a right of reverter." *Id.*, 699 A.2d at 1000; *see also Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 138 (Mo. App. Ct. 2009) (same). Moreover, the Uniform Law Commission's prefatory notes to UPMIFA expressly affirm that, under UPMIFA's structure, "the attorney general continues to be the protector both of the donor's intent and of the public's interest in charitable funds." Uniform Prudent Management of Institutional Funds Act, Prefatory Note at 4.[15] For these reasons, arguments for recognition of donor standing under UPMIFA have failed.[16] *See, e.g.*, *Siebach*, 361 P.3d at 137 (concluding that "UPMIFA did not preempt the common-law donor standing rule"); *Hardt*, 302 S.W.3d at 138-39 (same); *Carl J. Herzog Found.,* 699 A.2d at 16 (reaching same conclusion under UMIFA).

The second development in the law since *Wilbur* was Vermont's enactment in 2009 of the Uniform Trust Code. *See* 14A V.S.A. §§ 101 et seq. Among the many updates to trust law in Vermont brought about by the adoption of the Uniform Trust Code was an expansion of standing for suits to enforce express charitable trusts. Under current law, "[t]he settlor of a charitable trust, the Attorney General, a cotrustee, or a person with a special interest in the charitable trust may maintain

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[15] The full version of UPMIFA is available at: https://www.uniformlaws.org/viewdocument/final-act-109?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3&tab=librarydocuments.

[16] To be clear, UPMIFA would not apply to Mead's gift in any event. While the Act does apply to funds created by gifts completed prior to UPMIFA's enactment, *see* 14 V.S.A. § 3418, the Act governs only "institutional funds," which by the Act's terms exclude "program-related assets" that are "primarily to accomplish a charitable purpose of the institution and not primarily for investment." *See id.*, § 3412(5) and (7). As Mead's donation was used in whole to construct the Chapel and the Chapel is, unquestionably, a "program-related asset," UPMIFA does not govern the College's management of the building.

a proceeding to enforce the trust." 14A V.S.A. § 405(c).

Here too, some litigants have argued that the adoption of the uniform act abrogated the common-law prohibition on donor standing. Not so. The Uniform Trust Code applies, by its terms, only to express trusts. *See* 14A V.S.A. § 102(a) ("This title applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust."). Thus, while the Uniform Trust Code does expand the category of individuals who can seek enforcement of an express charitable trust, it has been held not to disturb the common-law rules on standing with respect to charitable gifts generally. As the Wyoming Supreme Court explained:

> By statute, standing to enforce an express charitable trust has been expanded [by the Uniform Trust Code] beyond the common law rule of standing. The same is not true of standing to enforce a charitable gift. No Wyoming statute has expanded the common law standing to enforce a charitable gift, and we agree with the majority rule that such standing should remain limited to the attorney general.

Courtenay C. & Lucy Patten Davis Found. v. Colorado State Univ. Res. Found., 320 P.3d 1115, 1126 (Wyo. 2014) (dismissing donor suit for lack of standing); *Hardt*, 302 S.W.3d at 137-140 (rejecting argument that Uniform Trust Code standing provisions apply to charitable gifts and dismissing donor suit for lack of standing). The same result obtains under Vermont's laws.[17]

[17] Even if there were an argument that 14A V.S.A. § 405's standing provisions applied to charitable gifts, the Estate would nonetheless lack standing. As the Restatement (Third) of Trusts observes, "absent contrary provision or agreement, settlor standing is 'personal,' although exercisable by an incapacitated settlor's personal fiduciary or by a deceased settlor's personal representative during a

In sum, the common law has long limited standing to enforce restricted gifts to the Vermont Attorney General's Office, and none of the recent statutory enactments have altered that rule. As Mead's Estate lacks standing to pursue the claims set forth in the Complaint, the lawsuit must be dismissed on that basis.

CONCLUSION

This case places in the balance a principle of broader significance than disputes over "cancel culture" or, indeed, resolution of the competing views on how John Abner Mead's legacy should be evaluated and addressed. The Mead Estate's lawsuit represents an extraordinary attempt to leverage a vague reference in a charitable gift instrument to control and limit the decisions of an academic institution more than one hundred years after the gift was made. As such, it requires consideration of when—and, particularly, by what means—donors may control the destiny of organizations to which they make gifts.

Reasonable minds may differ as to whether, as a matter of public policy, donors should be entitled to exert dead-hand control over charitable institutions decades or even centuries after they have passed from the earth. But there can be no dispute that, if a gift restriction is to be given any such weight, it must be clearly delineated and unambiguously expressed as a condition of the gift. No such restriction can be found among the 363 pages of former Governor Douglas's

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reasonable period of estate administration." Restatement (Third) of Trusts § 94, cmt. g(3) (2012) (emphasis added). While the precise duration of this "reasonable period of estate administration" is not defined, it is safe to say that a claim initiated over a century after the donor's death would fall outside such period.

Complaint and attached exhibits.

The facts here demonstrate the fulfilment of the central purpose of the gift at issue. John Abner Mead had the gratification of seeing his wishes for construction of a prominent chapel on Middlebury's campus brought to fruition—and, indeed, that chapel bore his name in recognition of the gift for over a century thereafter. But, as Mead did not expressly condition his gift on the use of his name, Middlebury was not legally bound to preserve the appellation "Mead Memorial Chapel" name in perpetuity. For that reason, and because Mead's Estate has no standing to press the claims asserted here, Middlebury respectfully requests that the Court dismiss the Complaint in full.

Dated at Burlington, Vermont, this 28th day of April, 2023.

By: */s/ Justin B. Barnard*
Justin B. Barnard, Esq.

DINSE
209 Battery Street
Burlington, VT 05401
802-864-5751
jbarnard@dinse.com

Counsel for Defendant