IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY FENCHAK, *Plaintiff*, v. THE PENNSYLVANIA STATE UNIVERSITY, et al., *Defendants*.	Civil Action No. 2:25-cv-06313-KSM

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case is the third in a series of lawsuits filed by Plaintiff Barry Fenchak ("Plaintiff" or "Mr. Fenchak"), a former member of The Pennsylvania State University's ("University's" or "Penn State's") Board of Trustees ("Board"). Because Mr. Fenchak's prior litigations have not yielded his preferred outcome, he filed a state court complaint (asserting federal claims) in the Court of Common Pleas in Philadelphia predicated on the same set of facts at issue in his prior litigations. Defendants properly removed the Complaint to this Court. ECF No. 1. All nine counts of Mr. Fenchak's Complaint not only fail to state a claim, but are legally and factually frivolous.

Off the bat, Counts I–III of the Complaint prove this point. By way of background, on August 27, 2024, Mr. Fenchak filed an amended complaint in his first lawsuit ("*Fenchak I*"). Paragraph 103 of Mr. Fenchak's pleading quoted, in full, the entire text of an August 20, 2024 letter ("August 20 Letter") that had been sent to Mr. Fenchak by Messrs. Matthew Schuyler and David Kleppinger, in their respective capacities as the then Board Chair and Vice Chair. On September 17, 2024, the Board filed preliminary objections in *Fenchak I*, and attached as an exhibit to that filing a copy of the same August 20 Letter.

Mr. Fenchak now claims that the Board's attachment of the August 20 Letter as an exhibit to a court filing—after Mr. Fenchak had already pled the content of the Letter, verbatim, in the same lawsuit—constitutes Defamation Per Se (Count I), False Light/Invasion of Privacy (Count II), and Breach of the Duty of Confidentiality and Loyalty (Count III). ECF No. 1-3 (Complaint) ¶¶ 151–207.

All three counts fail for two independent reasons, neither of which present a remotely close call. First, Mr. Fenchak unambiguously consented to having that letter published on the docket when he published it on the docket himself three weeks earlier. *See infra* Argument Section I. Second, the Board's responsive pleading enjoys absolute and unqualified immunity from tort under

Pennsylvania's judicial privilege. *See infra* Argument Section I.

Count III (for breach of the duty of confidentiality and loyalty) has an additional deficiency: Individual directors do not owe fiduciary duties to each other, and the University does not owe duties to the members of its Board. *See infra* Argument Section II.

Counts IV–IX claim retaliation against Mr. Fenchak for speech that he engaged in in his capacity as a Trustee—Counts IV–VI under the First Amendment to the federal Constitution and 42 U.S.C. § 1983 and Counts VII–IX under Article I, Section 7 of the Pennsylvania Constitution. U.S. Supreme Court precedent squarely forecloses Mr. Fenchak's First Amendment-based claims. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). The Complaint is clear that Mr. Fenchak was speaking as a Trustee with respect to all of the speech in question. He was therefore "not speaking as [a] citizen[] for First Amendment purposes," and his claim is barred. *Id.*[1] The result is the same for the state constitutional claims because Pennsylvania courts look to federal law in this area, as the Centre County Court of Common Pleas recognized when rejecting Mr. Fenchak's facial challenge to the Board's Amended Bylaws. *See, e.g.*, Opinion & Order at 5–8, *Fenchak v. Pa. State Univ. Bd. of Trs.*, No. 2025-CV-0882-CI (Pa. Ct. Com. Pls. Centre Cnty. Aug. 25, 2025) ("*Fenchak II*") (attached hereto as Exhibit A); *Carr v. Dep't of Transp.*, 230 A.3d 1075, 1089–90 (Pa. 2020); *Appeal of Chalk*, 272 A.2d 457, 459–60 (Pa. 1971).

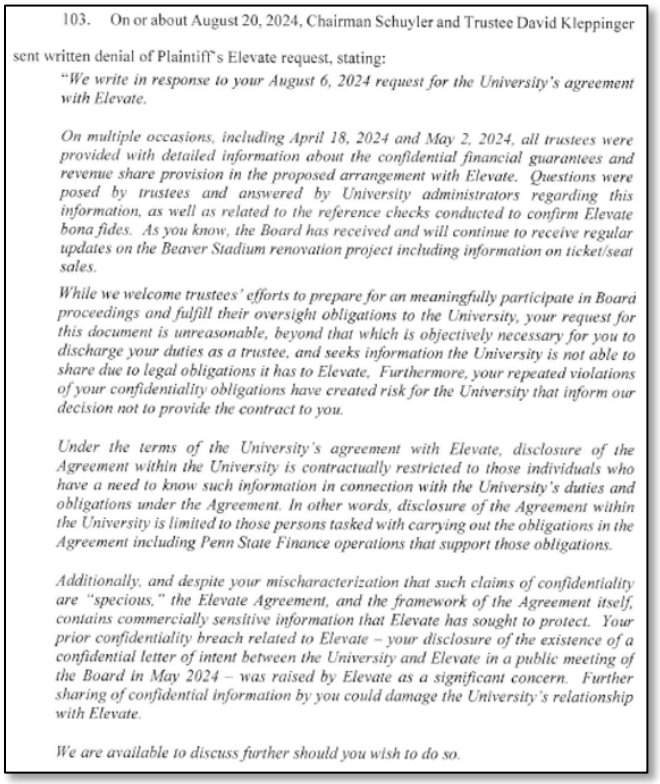
BACKGROUND

I. MR. FENCHAK'S LITIGATIONS

In *Fenchak I*, Mr. Fenchak sought (i) access to certain records after the Board refused to

[1] Although *Garcetti* applied to a state employee, the Third Circuit applies the test with equal force to uncompensated positions, such as Mr. Fenchak's former role as Trustee. *See, e.g.*, *Houston v. Township of Randolph*, 559 F. App'x 139, 142 (3d Cir. 2014) (applying *Garcetti* to affirm dismissal of First Amendment claim based on speech made pursuant to plaintiff's role as a volunteer firefighter). *See infra* Argument Section III.

provide them, and (ii) an injunction against alleged "retaliatory acts against Plaintiff" under the First Amendment. *See* Amended Complaint ¶¶ 51–62, 84–108, 123–33, 134–69, *Fenchak v. Pa. State Univ.*, No. 2024-CV-1843-CI (Pa. Ct. Com Pls. Centre Cnty. Aug. 27, 2024) ("*Fenchak I*") (attached hereto as Exhibit B).[2] In paragraph 103 of his amended complaint, filed on August 27, 2024, Mr. Fenchak reproduced, verbatim, the content of the August 20 Letter that he now claims was defamatory, Compl. ¶¶ 151–207:



103. On or about August 20, 2024, Chairman Schuyler and Trustee David Kleppinger sent written denial of Plaintiff's Elevate request, stating:

"We write in response to your August 6, 2024 request for the University's agreement with Elevate.

On multiple occasions, including April 18, 2024 and May 2, 2024, all trustees were provided with detailed information about the confidential financial guarantees and revenue share provision in the proposed arrangement with Elevate. Questions were posed by trustees and answered by University administrators regarding this information, as well as related to the reference checks conducted to confirm Elevate bona fides. As you know, the Board has received and will continue to receive regular updates on the Beaver Stadium renovation project including information on ticket/seat sales.

While we welcome trustees' efforts to prepare for an meaningfully participate in Board proceedings and fulfill their oversight obligations to the University, your request for this document is unreasonable, beyond that which is objectively necessary for you to discharge your duties as a trustee, and seeks information the University is not able to share due to legal obligations it has to Elevate. Furthermore, your repeated violations of your confidentiality obligations have created risk for the University that inform our decision not to provide the contract to you.

Under the terms of the University's agreement with Elevate, disclosure of the Agreement within the University is contractually restricted to those individuals who have a need to know such information in connection with the University's duties and obligations under the Agreement. In other words, disclosure of the Agreement within the University is limited to those persons tasked with carrying out the obligations in the Agreement including Penn State Finance operations that support those obligations.

Additionally, and despite your mischaracterization that such claims of confidentiality are "specious," the Elevate Agreement, and the framework of the Agreement itself, contains commercially sensitive information that Elevate has sought to protect. Your prior confidentiality breach related to Elevate – your disclosure of the existence of a confidential letter of intent between the University and Elevate in a public meeting of the Board in May 2024 – was raised by Elevate as a significant concern. Further sharing of confidential information by you could damage the University's relationship with Elevate.

We are available to discuss further should you wish to do so.

Exhibit B ¶ 103. As Mr. Fenchak concedes in this case, the Board subsequently provided him with the information he sought in *Fenchak I*. Compl. ¶¶ 101–02. On November 4, 2025, the defendants moved for summary judgment in *Fenchak I* on the grounds that all of the claims are moot. *See*

[2] When considering a motion to dismiss, the Court may take judicial notice of the contents of court dockets. *See Thompson v. Pennsylvania*, 2025 WL 3048965, at *1 n.2 (E.D. Pa. Oct. 31, 2025) (Marston, J.).

Defendants' Motion for Summary Judgment, *Fenchak I* (Pa. Ct. Com Pls. Centre Cnty. Nov. 4, 2025). The Motion is pending.

In the second lawsuit ("*Fenchak II*"), Mr. Fenchak sued the Board and Chair Kleppinger, bringing a facial challenge to the legality of certain of the Board's Amended Bylaws. The Centre County Court sustained the defendants' preliminary objections, dismissing the action in full after concluding the Board's Amended Bylaws do not facially violate the Pennsylvania Constitution or other state laws—a decision Mr. Fenchak did not appeal. *See* Exhibit A.

II. MR. FENCHAK'S HISTORY ON THE BOARD

Mr. Fenchak was selected to serve on the Board by vote of the Penn State Alumni for a three-year term beginning July 1, 2022. Compl. ¶¶ 24–25. As a Trustee, Mr. Fenchak stood in a "fiduciary relationship," *id.* ¶ 26, and—as alleged in his Complaint—he undertook numerous actions in "exercis[ing] his fiduciary responsibilities" to the University, *id.* ¶ 29. First, Mr. Fenchak claims that, acting in accordance with the "expectations of membership" as a Trustee, he engaged in discussions with other Trustees regarding the University's business, the manner in which the Board operated, and the manner in which the Board's Executive Committee operated. *Id.* ¶¶ 33–42. These discussions allegedly expressed Mr. Fenchak's views on what "was the best course of action to be taken to advance the interests of the University." *Id.* ¶ 40.

Second, Mr. Fenchak requested information from the University pertaining to its payment of administrative fees for Penn State's endowment in June 2022, *id.* ¶¶ 47–64, and relating to its contract with Elevate Collegiate Ticketing, LLC (the "Elevate Contract") in April and May 2024, *id.* ¶¶ 65–89. Both were allegedly relevant to Plaintiff's fiduciary duties as the Board is allegedly "responsible for the oversight and management of" the endowment, *id.* ¶ 48, and the Elevate Contract was allegedly a significant contract that implicated a pending resolution before the Board, *id.* ¶¶ 69, 85. Mr. Fenchak also alleges that filing *Fenchak I* was integral to his Board service,

stating the lawsuit was filed "consistent with fiduciary responsibilities plaintiff owed to the University." *Id.* ¶¶ 90, 100 (citing *Fenchak I*).

Mr. Fenchak alleges that, on July 19, 2024 (a few days after filing *Fenchak I*), he "engaged in conversation with three (3) adult members of Penn State's information technology team, whom [sic] provided technical support on behalf of the Board." *Id.* ¶ 92. During that conversation, the Complaint alleges that "plaintiff made a comment, in the context of a more expansive conversation, to the effect, that his wife says that he cannot wear baseball hats because it makes him look like '*a penis with a hat on*.'" *Id.* ¶ 93 (emphasis in original). According to the Complaint, "plaintiff's remark was an approximate quote from the 1992 PG-rated movie A League of Their Own, in which actor Tom Hank's character stated to a baseball umpire[,] '*You look like a penis with that little ball cap on.*'" *Id.* ¶ 94.

This led to what Mr. Fenchak described as "a sexual harassment investigation against the plaintiff upon the basis of the comment made by the plaintiff during his July 19, 2024 interaction with three (3) adult members of Penn State's information technology team at the Altoona campus." *Id.* ¶ 95. Mr. Fenchak alleges that, following the investigation, and pursuant to the Amended Bylaws, Defendants "recommended plaintiff be removed from the Board of Trustees for violating the Trustee Code of Conduct as a result of the July 19, 2024, incident and scheduled a meeting October 10, 2024, to determine whether plaintiff violated his duties as Trustee, such that he should be removed from the Board." *Id.* ¶ 97. On October 9, 2024, Mr. Fenchak obtained a preliminary injunction in the *Fenchak I* litigation, which temporarily delayed that removal vote. *See* Opinion & Order at 1, *Fenchak I* (Pa. Ct. Com Pls. Centre Cnty. May 16, 2025) (attached hereto as Exhibit

C). The preliminary injunction was dissolved on May 16, 2025, *id*. at 3, and Mr. Fenchak was removed from the Board by a vote of 30–4 on June 16, 2025.[3]

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" when taking factual allegations as true and disregarding "legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. COUNTS I–III SHOULD BE DISMISSED BECAUSE MR. FENCHAK PUBLISHED THE AUGUST 20 LETTER FIRST AND BECAUSE PENNSYLVANIA'S JUDICIAL PRIVILEGE AFFORDS DEFENDANTS ABSOLUTE IMMUNITY FROM LIABILITY.

Counts I–II of the Complaint are exclusively predicated on the filing of the August 20 Letter as an exhibit to preliminary objections filed on the Centre County Court docket on September 17, 2024, and Count III is predicated in part on the same. Compl. ¶¶ 151–89, 198. As noted above, Mr. Fenchak published the August 20 Letter first, on August 27, 2024. *See* Exhibit B ¶ 103.

Given these facts, Counts I–III present the Court with a menu of fatal defects from which to choose. To start, Mr. Fenchak plainly consented to publication of the August 20 Letter on the Centre County docket, because he published it there first.[4] And "the consent of another to

[3] *See* Public Board of Trustees Meeting June 16, 2025, PENN STATE MEDIA SPACE (June 17, 2025), https://psu.mediaspace.kaltura.com/media/Public%20Board%20of%20 Trustees %20Meeting%20June%2016%2C%202025/1_ojq79b6c (last visited Nov. 21, 2025).

[4] Adding to the frivolous nature of this third lawsuit is that Mr. Fenchak himself posted a link to his publicly filed Amended Complaint in *Fenchak I*, filed August 27, 2024, with the full text of the August 20 Letter on his personal website on or about August 30, 2024. *See* Barry Fenchak, Update August 29, 2024: Fenchak V Penn State BOT (Aug. 30, 2024),

publication of defamatory matter concerning him is a complete defense to his action for defamation." *Baker v. Lafayette Coll.*, 504 A.2d 247, 249 (Pa. Super. Ct. 1986) (quoting Restatement (Second) of Torts § 583). That alone should end the inquiry, and Counts I–III should be dismissed with prejudice.

Mr. Fenchak's first-in-time publication of the August 20 Letter also negates an element of Count II. "In order to state a claim of false-light invasion of privacy under Pennsylvania law, a plaintiff must allege '(1) publicity, (2) given to *private facts*, (3) which could be highly offensive to a reasonable person, and (4) which are not of legitimate concern to the public.'" *Schatzberg v. State Farm Mut. Auto. Ins. Co.*, 877 F. Supp. 2d 232, 245 (E.D. Pa. 2012) (emphasis added) (citation omitted). The Complaint is dead-on-arrival as to the second element; any previously "private facts" were put on the Centre County docket by Mr. Fenchak himself before defendants made their subsequent filing.

Additionally, defendants' *Fenchak I* filing is covered by Pennsylvania's judicial privilege, which provides "absolute immunity for 'communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought.'" *Bochetto v. Gibson*, 860 A.2d 67, 71 (Pa. 2004) (emphases omitted) (citation omitted). When determining whether the privilege applies, any doubt "is resolved in favor of pertinency and materiality." *Birchwood Ests. Realty, Inc. v. Hovan*, 2024 WL 5135471, at *3 (Pa. Super. Ct. Dec. 17, 2024); *see also, e.g.*, *Fritz & Bianculli, LLC v. McCabe*, 2025 WL 2608728, at *4 (E.D. Pa. Sept. 9, 2025) (applying judicial privilege to dismiss claims based on statements that had been stricken as "immaterial" under Rule 12(f) because the statements were "not entirely disconnected

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https://barryfenchak.com/update-august-29-2024-fenchak-v-penn-state-bot/ (last visited Nov. 21, 2025).

from the litigation" and had "some relationship to the proceedings").

"Pennsylvania affords this privilege so that '[a]ll persons involved in a judicial proceeding are encouraged . . . to speak frankly and argue freely without danger or concern that they may be required to defend their statements in a later defamation action,'" *Schatzberg*, 877 F. Supp. 2d at 247 (citation omitted), and therefore it applies broadly, including to "judges, lawyers, litigants and witnesses," *Panitz v. Behrend*, 632 A.2d 562, 564 (Pa. Super. 1993). Moreover, "the existence of the privilege does not depend upon the motive of the defendant in making the allegedly defamatory statement. The privilege is absolute and cannot be destroyed by abuse." *Pawlowski v. Smorto*, 588 A.2d 36, 41 (Pa. Super. 1991).

Although the privilege has "its origin in defamation actions premised on statements made during litigation," it has been extended to encompass "all tort actions based upon statements made during judicial proceedings." *Church Mut. Ins. Co. v. All. Adjustment Grp.*, 102 F. Supp. 3d 719, 730 (E.D. Pa. 2015) (applying judicial privilege and dismissing negligent misrepresentation claim); *see also Panitz*, 632 A.2d at 564 (dismissing gross negligence and misrepresentation claims that violated the privilege, holding "[t]he form of the cause of action is not relevant to application of the privilege. Regardless of the tort contained in the complaint, if the communication was made in connection with a judicial proceeding and was material and relevant to it, the privilege applies."). And it is "equally applicable where the cause of action is stated in terms of misrepresentation or a contractual requirement to exercise due care." *Panitz*, 632 A.2d at 564. It has been applied to bar claims for false light invasion of privacy, *see, e.g.*, *Schatzberg*, 877 F. Supp. 2d at 245–47 (dismissing false light invasion of privacy claim based on judicial privilege), and even medical malpractice claims brought against an expert witness, *Panitz*, 632 A.2d at 564 (citing *Clodgo by Clodgo v. Bowman*, 601 A.2d 342 (1992)).

The application of the privilege is "a question of law for the court," *Pawlowski*, 588 A.2d at 41, and here it is not a close call. There is no doubt that filing an exhibit to a motion is squarely within the regular course of judicial proceedings. *See, e.g.*, *Handy v. Del. River Surgical Suites, LLC*, 2023 WL 11884784, at *7 (E.D. Pa. Jan. 19, 2023) (dismissing claim based on judicial privilege because "[a]ttempting to admit evidence or attaching documents to pleadings is a communication with the court attempting to seek relief"), *report & recommendation adopted by*, 2023 WL 11884819 (E.D. Pa. Mar. 24, 2023). And, having published the full text of the August 20 Letter in his amended complaint, Mr. Fenchak cannot possibly argue that including a copy of the Letter as an exhibit to preliminary objections was *not* pertinent and material to the litigation. *See Fritz & Bianculli*, 2025 WL 2608728, at *4.

The September 17, 2024 filing is therefore protected by an "absolute judicial privilege,"[5] and all claims arising from it should be dismissed with prejudice.

II. COUNT III SHOULD BE DISMISSED FOR THE ADDITIONAL REASON THAT DIRECTORS DO NOT OWE FIDUCIARY DUTIES TO ONE ANOTHER, AND THE UNIVERSITY DOES NOT OWE FIDUCIARY DUTIES TO THE MEMBERS OF ITS BOARD.

In Count III, Mr. Fenchak alleges that the Defendants breached duties of confidentiality and loyalty to him by attaching the August 20 Letter as an exhibit to the *Fenchak I* preliminary objections, and by allegedly retaliating against him for exercising free speech rights. Compl. ¶ 198. This count should be dismissed first and foremost because it is predicated on his other claims, which fail as explained in Sections I and III. But it also fails because, under the Nonprofit

[5] Mr. Fenchak pleads in conclusory fashion that "defendants abused any conditionally privileged occasion attached to the correspondence." Compl. ¶ 160. That threadbare legal conclusion is of no moment because it is not supported by any factual allegations and is therefore not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 664. In any event, where the privilege applies, it "is absolute and cannot be destroyed by abuse." *Pawlowski*, 588 A.2d at 41.

Corporations Law, the duties of nonprofit directors run to the University, not to their fellow trustees. Specifically, 15 Pa. Cons. Stat. § 5717 provides that directors of nonprofit corporations owe duties "*solely to the nonprofit corporation* and not to any member or creditor or any other person or group." (emphasis added). And the claim against the University is absurd—as a Trustee, Mr. Fenchak owed duties to Penn State, not vice versa.

III. COUNTS IV TO IX SHOULD BE DISMISSED BECAUSE PLAINTIFF ALLEGES NO PROTECTED SPEECH.

Counts IV–IX fail because Mr. Fenchak does not plausibly allege that he engaged in any protected speech (let alone that he was retaliated against for it).[6] *See Kimbrough v. Bucks County*, 763 F. Supp. 3d 700, 708 (E.D. Pa. 2025) (Marston, J.); *Carr*, 230 A.3d at 1089. The claims fail as a matter of law under *Garcetti*,[7] because they are expressly based on "speech that owes its existence" to Mr. Fenchak's alleged duties as a Trustee, 547 U.S. at 421, and any supposed restrictions on that speech therefore "do[] not infringe any liberties [Mr. Fenchak] might have enjoyed as a private citizen," *id*. at 421–22. Instead, it "simply reflects the exercise of [Board] control over what the [Board] itself has commissioned or created." *Id.* at 422 (citation omitted). Therefore, public servants have "no First Amendment cause of action based on [their] employer's reaction to [such] speech." *Id.* at 418. This commonsense rule recognizes the self-evident truth that "[w]hen a citizen enters government service," he "by necessity must accept certain limitations

[6] As noted in *supra* Section II, Count III fails for this reason, to the extent it is predicated on his free speech claims.

[7] Counts VII–IX, based on the Pennsylvania Constitution, should be dismissed for this same basis because Pennsylvania courts routinely look to federal law when analyzing state institutions' rights to manage those in public service. *See, e.g.*, *Fenchak II*, 2025 WL 1643951, at *8 (Pa. Ct. Com. Pls. Centre Cnty. Apr. 14, 2025); Exhibit A at 5–6; *Carr*, 230 A.3d at 151; *Appeal of Chalk*, 272 A.2d at 459–60.

on his . . . freedom."[8] *Id*. Though *Garcetti* involved a state employee, the Third Circuit has applied it equally to uncompensated volunteer positions, such as Mr. Fenchak's prior role as a Trustee. *See, e.g.*, *Houston*, 559 F. App'x at 142 (affirming dismissal of First Amendment retaliation claim brought by volunteer firefighter because speech was "pursuant to his official duties" and therefore received "no First Amendment protection").

"The controlling factor" is whether the speech alleged was "made pursuant to [Mr. Fenchak's] duties," as a Trustee, *Garcetti*, 547 U.S. at 421, and here there is no doubt that is the case. The Complaint prefaces its description of the speech at issue with the following: "Consistent with *expectations of membership*, from time to time, *as a Board of Trustee member*, plaintiff spoke openly, freely, and candidly about what he believed to serve the greater good of the University and its student body." Compl. ¶ 33 (emphases added). The speech at issue dealt with "University business," "the manner in which the Board of Trustees operated," "the manner in which the Board of Trustees' Executive Committee operated," and "the best course of action to be taken to advance the interests of the University," *id.* ¶¶ 34–41, and when describing it, the Complaint repeatedly emphasizes that such discussions were "[c]onsistent with expectations of membership" and performed "as a Board of Trustees member," *id*.

As for the information requests, the Complaint alleges that the information related to the endowment and the Elevate Contract was necessary to Plaintiff's discharge of his fiduciary duties. *Id*. ¶ 52. Specifically, Mr. Fenchak alleges that he requested information on the endowment because he "reasonably believed [the information to be] necessary to: (1) familiarize himself with

[8] In dismissing Mr. Fenchak's facial challenge to certain Amended Bylaws, the Centre County Court held that, "[i]n accepting the position [on the Board of Trustees], [Fenchak] accepted certain restrictions on his speech that are to be expected of a fiduciary of an institution. These restrictions are not unreasonably or uncommon, and they serve to facilitate the efficient operation of a large and complex University such as PSU." *See Fenchak II*, 2025 WL 1643951, at *8.

important affairs of the University; (2) intelligently render decisions necessary to manage the University; and (3) otherwise faithfully discharge his duty as trustee to protect the interests of the University." *Id.* At all times when requesting this information, including when filing *Fenchak I*, Mr. Fenchak alleges he acted "[c]onsistent with the fiduciary responsibilities plaintiff owed to the University." *Id.* ¶¶ 55, 62, 90. So too for the Elevate Contract. The Complaint again emphasizes that Mr. Fenchak requested information "[c]onsistent with the fiduciary responsibilities plaintiff owed to the University." *Id.* ¶ 69, 100. Indeed, Mr. Fenchak allegedly requested the Elevate Contract during the May 21, 2024 Board meeting not just for himself but also for "other members of the Board of Trustees." *Id.* ¶ 89. Mr. Fenchak's speech thus fell within the realm of "daily professional activities" that Trustees engage in *because* they are Trustees. *Garcetti*, 547 U.S. at 422. Put another way, Mr. Fenchak's speech "owes its existence" to his alleged duties as a Trustee, rather than to any private interest. *Id.* at 421. Because he did not speak "as a citizen," his speech was not protected, and Counts IV–IX should be dismissed with prejudice.

CONCLUSION

For the reasons stated above, the Court should dismiss the Complaint in its entirety with prejudice.

Dated: November 21, 2025

Respectfully submitted,

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CERTIFICATE OF CONFERRAL

I HEREBY CERTIFY that on November 12, 2025, counsel for the parties met and conferred via telephone regarding the pleading deficiencies identified in the foregoing Memorandum of Law in Support of Defendants' Motion to Dismiss. The parties were unable to reach a resolution that would eliminate the need for this Motion.

Dated: November 21, 2025

/s/ Andrew R. Stanton
Andrew R. Stanton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 21, 2025, I electronically filed a true and correct copy of the foregoing Memorandum of Law in Support of Defendants' Motion to Dismiss and all supporting materials using the Court's CM/ECF system, which will generate a Notice of Electronic Filing that effects service on all counsel of record, L. Civ. R. 5.1.2(7)(a), and that I have caused copies of the same to be served on Plaintiff's counsel via email and by first-class mail, postage prepaid and addressed as follows:

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Dated: November 21, 2025

/s/ Andrew R. Stanton
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