IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATSY LEVANG, CHERYL TUCK-SMITH, SUSAN JENNINGS, MARGO KNORR, KAREN POPE, and ANN WITT,	)	Case No. 2:24-cv-00316-MHW-KAJ
Plaintiffs,	)	Judge Michael H. Watson
v.	)	
KAPPA KAPPA GAMMA FRATERNITY, MARY PAT ROONEY, MARIA BROWN, NANCY CAMPBELL, BARB GOETTELMAN, LIZ WONG, KYLE DONNELLY, and BETH BLACK,	)	Magistrate Judge Kimberly A. Jolson
Defendants.	)	**PLAINTIFFS' MOTION TO CERTIFY STATE LAW QUESTIONS TO THE OHIO SUPREME COURT**

Plaintiffs respectfully move this Court for an order certifying two questions of state law to the Ohio Supreme Court: (1) Can the board of an Ohio nonprofit corporation effectively amend its governing documents other than through vote of the membership where the governing documents expressly require one? (2) Does the Ohio Constitution's guarantee of the right to "speak freely" provide speech protections broader than those provided by the First Amendment? Specifically does Art. I of the Ohio Constitution protect dissenting members of an Ohio nonprofit from retaliatory termination from membership? These questions of Ohio law may be determinative of the case, and the course that Ohio courts would take on these questions is not "reasonably clear." Accordingly, certification of these questions to the Ohio Supreme Court will serve the interests of judicial economy. A brief in support of this motion is attached.

Respectfully submitted,

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO CERTIFY STATE LAW QUESTIONS TO THE OHIO SUPREME COURT

I. INTRODUCTION

This case does not ask the Court to define who is a "woman" or police a private organization's definition of that common and ordinary term. When it comes to its membership and its governing documents, Kappa Kappa Gamma ("Kappa") can set its own membership criteria and define those criteria as it sees fit.

Instead, this case addresses whether, and to what extent, the directors of an organization, constrained by its Articles of Incorporation, Bylaws, and Standing Rules ("Governing Documents") to present amendments to the full body, may make decisions that disavow more than a century of tradition and alter the organization's membership criteria. These are questions of Ohio law. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987)("[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law."); *Hasan v. CleveTrust Realty Inv'rs*, 548 F.Supp. 1146, 1148 (N.D.Ohio 1982), *vacated on other grounds*, 729 F.2d 372 (6th Cir.1984)("Questions of corporate governance are to be decided under the law of the state of incorporation."). And, as set forth below, they are questions of Ohio law on which there is no Ohio Supreme Court precedent.

This case also raises a separate but related question of state law regarding whether Sec. 11 Art. 1 of Ohio's constitution enshrines the right to speak freely and protects dissenting members from being removed from an Ohio nonprofit for voicing their disagreement with the organization's leadership. The U.S. Supreme Court has recognized that state constitutional protections are often broader than their federal counterparts. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). To be sure, the Ohio Supreme Court has yet to adopt this more expansive view of the Ohio Constitution's free speech protections. *See Eastwood Mall, Inc. v. Slanco,* 68 Ohio St. 3d

221, 223 (1994). But the majority's thirty-year old analysis in *Eastwood Mall* is at best perfunctory, limited to the facts of that case, and focused on balancing the right to speak freely with the property right of a shopping center owner to exclude picketers. *Id*. at 222-23. There is no competing property right here, where members of a not-for-profit corporation seek to voice their opinions regarding the organization's policies, enforce its bylaws as they have been understood for over a century, and advocate for new leadership within the organization. More significantly, though, Justice Wright wrote a lengthy and analytical dissent in *Eastwood Mall* comparing Section 11, Article 1's text to the text of the First Amendment and concluding that in choosing different language to frame Ohio's free speech protections, the drafters of Ohio's Constitution, who would have been well-acquainted with the First Amendment, intended a different and broader result. *Id.* at 225-229 (Wright, J. dissenting).

II. FACTUAL BACKGROUND

The derivative claims in this case involve the members of a not-for-profit corporation challenging actions of the corporation's leadership. Plaintiffs bring this case on behalf of Kappa against Fraternity Council for intentional malfeasance in office to the detriment of the organization.

The Plaintiffs seek to hold Kappa's directors, individuals comprising the Fraternity Council, accountable for their intentional violation of the corporation's governing documents. Specifically, Plaintiffs have alleged that the Fraternity's leadership—in pursuit of its own political and social agenda—violated the corporation's bylaws by unilaterally adding a new category of members (biological males), and that this alteration to the organization's core mission and purpose must be presented for approval to the membership. The Plaintiffs further allege that the organization's leadership intentionally hid this significant change from the membership while

continuing to raise funds on the representation that the organization was and remains a *single-sex*[1] organization. And Plaintiffs allege that Fraternity Council punished any criticism of its goal to remake the organization by swiftly terminating dissenters through unsupported charges, which it continues to do.

From its founding in 1870, Kappa operated as a single-sex, women-only organization. (ECF 1, Complaint, ¶¶20,65.) That is, until 2021. (*Id.*) Throughout its history, and still today, Kappa represented that it was committed to supporting and promoting women and to defending its right "to exist as a single-sex organization." (*Id.* at ¶¶22, 23, 32, 33, 39-48.) In spite of that commitment, and notwithstanding the clear and plain language in Kappa's Governing Documents limiting membership to "women," Fraternity Council has taken the position that membership includes "women *and* individuals who identify as women." (*Id.* at ¶¶50, 52, 56.) (Emphasis added.) This case arises from a series of actions taken by Fraternity Council without proper notice to, or authorization of, the membership which effected fundamental changes that undermined the mission and purpose of the more than 150-year-old fraternity[2] and cast out any who might dissent.

Plaintiffs Susan Jennings, Margo Knorr, Karen Pope and Ann Witt ("the Derivative Plaintiffs"), are alumnae members seeking damages and equitable relief, derivatively on behalf of Kappa, based on Fraternity Council's (i) violations of the Governing Documents, (ii) actions taken in excess of its authority, (iii) efforts to conceal and misrepresent critical information regarding efforts to change the Governing Documents without notice and a vote by the membership, (iv) civil conspiracy to commit a fraud on the members, (v) disregard of their fiduciary duties and (vi) retaliation against members who challenged their misconduct. Plaintiffs Patsy Levang and Cheryl Tuck-Smith challenge their dismissals on the grounds that Fraternity Council's decision to expel

[1] *See* ECF 1, Complaint at ¶77. For consistency, terms defined in the Complaint will have the same meaning here.
[2] Kappa was formed in 1870, before the term sorority referred to a women's society. (ECF 1, Complaint at ¶20.)

them breached a contract for a lifetime membership and retaliated against them in violation of their rights to speak freely in challenging the Fraternity Council's improper conduct, as well as damages for the harm their expulsions have caused to their reputations.

Beginning with a position statement on Membership Selection, which Kappa alleges to have been prepared in 2015[3], Fraternity Council described Kappa as a "single-gender organization" and expanded membership criteria to include "women ***and*** individuals who identify as women." (ECF 1, ¶50 and 1-6, Kappa Position Statements.) The "position statement" was never presented to the membership for review, debate, approval or vote. (*Id.* at ¶54.) Fraternity Council made similar representations in the Guide, issued in 2018, and again in the FAQs issued in 2022. (*Id.* at ¶¶52,53,54,56,57.) At no time did Fraternity Council disclose to the membership that, by issuing these documents, it was altering the fundamental meaning of Kappa's Governing Documents. (*Id.* Yet, while Fraternity Council worked to violate Kappa's membership criteria and take Kappa away from its mission and purpose, it continued to promote itself to new and existing members as an organization that supports and unites women and continued to receive the protections of Title IX. (*Id.* at ¶¶50, 163, 164.) It also permitted the Kappa Foundation to solicit donations with continued emphasis on supporting women and "sisterhood." (*Id.* at ¶¶107,165 and ECF 1-23, 1-24, 1-25, Exhibits 23, 24, and 25.) Since the Governing Documents were never modified or amended to reflect the new category of members, and Fraternity Council never provided its "interpretation" of the term "woman" for a vote, the members were left to believe that the various online statements did not upend membership criteria. (*Id.* at ¶59.) Members were entirely unaware that the Fraternity Council intended to amend the Governing Documents without bringing the matter for a vote by the membership. (*Id.* at ¶60.)

[3] Whether this statement was actually issued in 2015 is questionable. *See* Appellants' Reply Brief, *Westenbroek v. Kappa Kappa Gamma,* Case No. 23-8065, Document: 010110989560, p.13 (10th Cir. Jan. 24, 2024).

Then, on March 27, 2023, a group of collegiate members filed suit in the Wyoming District Court under the caption, *Westenbroek v. Kappa Kappa Gamma*, Case No. 2:23-CV-00051-ABJ (D. Wy.) (hereafter "the Wyoming Lawsuit"), challenging the admission of a biological male student, who identified as a woman, to Kappa's Gamma Omicron Chapter. (ECF 1, ¶¶77-84.) Ms. Levang and Ms. Tuck-Smith learned of the lawsuit and the admission of the Student[4] to the Wyoming Chapter and openly supported the collegiate members' effort to uphold single-sex nature of the fraternity set forth in the Governing Documents. (*Id.* at ¶7, 85.) For that, they were expelled from Kappa on October 27, 2023. (*Id.* at ¶7.)

III. LAW AND ARGUMENT

A. Standard For Certification To State Supreme Court

The Supreme Court of Ohio Rule of Practice 9.01 provides that it "may answer a question of law certified to it by a court of the United States" when "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." S.Ct.Prac.R. 9.01(A). Certification is critical to preserving the dual sovereignty inherent in federalism. From the state's perspective, if "a federal court applies different legal rules than the state court would have, the state's sovereignty is diminished." *Scott v. Bank One Trust Co*., 62 Ohio St.3d 39, 43 (1991). As one judge put it, the unhappy result would be that "the federal court has made state law." *Id*.

The Sixth Circuit agrees: "Submitting uncertain questions of state law to the state's highest court by way of certification acknowledges that court's status as the final arbiter on matters of state law and avoids the potential for 'friction-generating error' which exists whenever a federal court construes a state law in the absence of any direction from the state courts." *Planned Parenthood*

[4] *See Id.* ¶77, male member initiated and admitted to the University of Wyoming Chapter.

of Cincinnati Region v. Strickland, 531 F.3d 406, 410 (6th Cir. 2008), certified question answered *sub nom. Cordray v. Planned Parenthood Cincinnati Region,* 2009-Ohio-2972. Moreover, as a practical matter, "[c]ertification 'avoids the hazards of attempting to forecast' how a state court might rule, and 'saves time, energy, and resources and helps build a cooperative judicial federalism.'" *Arbino v. Johnson & Johnson*, 2006 U.S. Dist. LEXIS 41009 at *2 (N.D. Ohio June 20, 2006) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997)). Whether to certify a question to a state court "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

B. Can a Voluntary Association and its Directors Rely on the Noninterference Rule When its Directors Re-write its Bylaws Through Interpretation?

1. The Question is One of State Law and May Be Determinative of the Action

The Plaintiffs, current and former alumnae members of Kappa, do not come to this Court asking it to declare who is a woman. While Kappa's woman-only requirement, enshrined in its Governing Documents, creates an interesting factual underpinning, the legal questions that will determine this action are perhaps prosaic but vitally important to voluntary associations dealing with a changing society, new understandings, and changing mores. Simply, this case focuses on corporate governance and the rights of members of a voluntary nonprofit corporation to dissent from the views of the organization's leadership on issues of public concern and of significant importance to the membership, without retaliation. These are questions of state law. *See CTS Corp.*, 481 U.S. at 89; *Hasan*, 548 F.Supp. at1148 (N.D.Ohio 1982), *vacated on other grounds*, 729 F.2d 372 (6th Cir.1984); R.C. 1702.11 (A)(2)(Statutorily allowing qualifications for admission, voluntary withdrawal, censure, termination of members may be included in organization's regulations).

The derivative claims in this case address, among other things, Fraternity Council's attempt to change the Fraternity's long-standing membership requirements by unilaterally and surreptitiously adding "individuals who identify as women" to the sorority's "woman"-only membership criteria. (ECF 1, Complt. at ¶ 53; ECF 1-8, Ex. 7, Guide, ECF 1-9; Ex. 8, FAQs.) This change—made without a vote of the membership—transformed what for over 150 years had been a "single-sex organization" into a "single-gender organization." Rather than acknowledge the substantive change to its membership criteria, Fraternity Council casts its actions as merely "interpreting" Kappa's existing bylaws. Defendants have thus raised Ohio's "noninterference rule" as their primary argument in support of their motion to dismiss. Ohio's noninterference rule is the commonsense doctrine that courts "will not interfere with the quasi-judicial decisions of voluntary associations unless such decisions are alleged and shown to be the result of fraud, arbitrariness, or collusion." *Lough v. Varsity Bowl, Inc*., 16 Ohio St.2d 153, 154 (1968). But, the Ohio Supreme Court has clarified that court intervention is appropriate when "'officers are acting in excess of their powers, or collusion or fraud is claimed to exist on the part of the officers or a majority of the members.'" *Ohio High School Athletic Assn. v. Ruehlman*, 2019-Ohio-2845, ¶ 34, (O'Connor, C.J., dissenting); *State ex rel. Ohio High School Athletic Ass'n v. Judges of Court of Common Pleas of Stark Cnty.*, 173 Ohio St. 239, 247 (1962)(*abrogated on other grounds*).

Defendants essentially argue that Fraternity Council, can "interpret" the Governing Documents in any manner it chooses, and thus, no actual amendment to the bylaws or vote of the membership is necessary to re-define the word "woman" to mean "women ***and*** individuals who identify as women" and that , this "interpretive" act cannot be challenged. (ECF 1, Complt. at ¶ 50 and ECF 1-6, Kappa Position Statements; ECF 23, Motion to Dismiss, pp.6,13-14)[5]. But Plaintiffs

[5] Page references refer to ECF pages numbers.

aren't challenging an interpretation. Instead, Plaintiffs allege that Fraternity Council, in bad faith, created an entirely new membership category, thus engaging in ultra vires actions in violation of Kappa's bylaws (ECF 1, Complt at ¶¶ 65-73, 77-81, 141-150, 153-54); breaching its fiduciary duty to individual members and the organization as a whole (*Id.* at ¶¶ 114-138); engaging in arbitrary conduct by repeatedly violating its own rules regarding objective membership criteria such as academic performance for members and leadership experience for District Directors in order to advance their own ideological agenda (*Id*. at ¶¶ 65-81); colluding to conceal these violations from Kappa's membership and to oust dissenters from the organizations (*Id.* at ¶¶ 158-163, 175-180); misusing Kappa Foundation Funds (*Id*. at ¶¶ 104-112), retaliating in bad faith against members who challenged their actions (*Id*. at ¶¶ 86-100); and committing fraud against the organization (*Id*. at ¶¶ 157-173). The Complaint thus alleges—in significant detail—acts in excess of the directors' power, fraud, arbitrariness and collusion. Plainly, the scope of Ohio's noninterference rule and its exceptions may be determinative of some or all of the issues in this action. Equally plain is that these are questions of Ohio law. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987); *Hasan v. CleveTrust Realty Inv'rs*, 548 F.Supp. 1146, 1148 (N.D.Ohio 1982), *vacated on other grounds*, 729 F.2d 372 (6th Cir.1984).

2. <u>There is No Controlling Authority from the Ohio Supreme Court on the Corporate Governance Questions.</u>

a. The Ohio Supreme Court has Never Addressed the Scope of or Pleading Requirements for the Noninterference Rule Exceptions.

The contours of Ohio's noninterference doctrine need additional definition. In Ohio, it's true that courts are generally unwilling to review certain types of decisions from voluntary organizations. But courts will step in where leaders act outside their authority. *See Redden v. Alpha Kappa Alpha Sorority, Inc.*, No. 1:09CV705, 2010 WL 107015 at *5 (N.D. Ohio Jan. 6, 2010)(citing *Powell v. Ashtabula Yacht Club*, No. 953, 1978 WL 216074 (11th Dist. Ct. App.

1978). All this lends itself to tremendous line-drawing. Are certain types of decisions, like individual, quasi-judicial decisions, different from decisions that go to the core of an organization? How can a court both give an organization breathing room but also recognize activity in excess of corporate authority?

Unfortunately, Ohio law interpreting the noninterference doctrine is sparse. A diligent electronic search reveals only three cases decided by the Ohio Supreme Court applying the noninterference rule.[6] Despite being decided over 50 years ago, *Lough v. Varsity Bowl, Inc.*, has been mentioned only twice in subsequent Ohio Supreme Court decisions, most recently in a 2019 case where the Court did not examine what constituted "fraud, arbitrariness or collusion" in the context of a voluntary organization, but merely clarified that the doctrine was a substantive rule of law and not a jurisdictional bar to the court hearing the case. *See Ohio High School Athletic Assn. v. Ruehlman*, 2019-Ohio-2845. ("The cases relied upon by OHSAA announced not a rule of subject-matter jurisdiction but, rather, a substantive legal rule of noninterference with the decisions of voluntary organizations absent special circumstances or a permissive statute.").[7] Those three Ohio Supreme Court decisions did nothing, however, to examine or define the contours of the ultra vires, fraud, and collusion exceptions alleged here, because the parties in those cases never raised them.

For example, in *State ex rel. Ohio High School Athletic Ass'n v. Judges of Court of Common Pleas of Stark County*, 173 Ohio St. 239 (1962)(abrogated on other grounds by

[6] *State ex rel. Ohio High School Athletic Ass'n v. Judges of Court of Common Pleas of Stark Cnty.*, 173 Ohio St. 239, 247 (1962)(*abrogated on other grounds*); *Lough v. Varsity Bowl, Inc*., 16 Ohio St.2d 153 (1968); *Ohio High School Athletic Assn. v. Ruehlman*, 2019-Ohio-2845 (in dissent).

[7] Another recent case, *Ostanek v. Ostanek*, 2021-Ohio-2319, cited *Ruehlman* to reaffirm that Ohio courts have subject matter jurisdiction over disputes within voluntary associations and that cases like *Judges of Stark County* and *Lough* "are best understood as using the term 'jurisdiction' in the loose sense of a court's legal authority to grant the relief sought by the plaintiff based upon the conduct alleged…"

Ruehlman), the Court recited the rule that it will not "interfere with the management of a society unless the officers are *acting in excess of their powers*, or collusion of fraud is claimed to exist on the part of the officers or a majority of the members," but did not address those exceptions because the "respondents [did] not allege any mistake, fraud or collusion." *State ex rel. Ohio High School Athletic Ass'n v. Judges of Court of Common Pleas of Stark Cnty.*, 173 Ohio St. 239, 247 (1962)(*emphasis added*). Similarly, *Lough* involved members of a bowling league who won a tournament but were later disqualified and thus ineligible for the prize money. *Lough*, 16 Ohio St.2d at 153. The trial court dismissed the case for lack of jurisdiction based on the noninterference rule. The Ohio Supreme Court affirmed, citing the rule that absent "arbitrariness, fraud, or collusion," the courts will not disturb the decision of a voluntary association that "where the duly adopted laws of a voluntary association provide for the final settlement of disputes among its members . . . ." *Id*. at 155. But the *Lough* Court did not analyze or discuss those exceptions because the appellees did "not properly allege[] any of the criteria for judicial review." *Id*. at 156.

And *Ruehlman*, like the cases before it, did not actually apply the noninterference rule or more importantly, its exceptions. Rather, it discussed whether it was a rule of substantive law or a bar to subject matter jurisdiction. In *Ruehlman*, the Ohio High School Athletic Association ("OHSAA") sought a writ of prohibition against a common pleas court judge, arguing that the Hamilton County Common Pleas Court lacked jurisdiction to hear a dispute regarding whether an OHSAA rule regarding competitive balance and the divisions in which high school basketball teams would compete. *Ruehlman*, 157 Ohio St. 3d at 296-97. The *Ruehlman* court, without examining the merits of the dispute, denied the writ of prohibition and affirmed that "a court of common pleas has jurisdiction over any case in which the matter in controversy exceeds the

jurisdictional limit unless some statute takes that jurisdiction away, thus abrogating *Stark County Judges*. *Id.* at 298 (*citing State ex rel Ohio Co. v. Maschari*, 51 Ohio St. 3d 18, 20 (1990)).

Chief Justice O'Connor dissented and would have granted the writ of prohibition on the ground that OHSAA had shown the requisite "exercise of judicial power, the lack of authority for the exercise of that power, and the lack of an adequate remedy in the ordinary course of law." *Id.* at 302 (O'Connor, C.J., dissenting). Justice O'Connor further opined that the majority misread *Stark Cty Judges*, and that absent a party pleading one of the exceptions, the noninterference rule deprived a court of subject matter jurisdiction. Regardless, Justice O'Connor's dissent still recognized that Ohio courts will intervene "when the association's 'officers are acting in excess of their powers, or collusion or fraud is claimed to exist on the part of the officers or a majority of the members.'" *Id.* at 307 (quoting *Stark Cty. Judges* at 247). In other words, the *Ruehlman* court did not address the merits of the noninterference rule or its exceptions, but the scope of a trial court's jurisdiction and what test to apply in considering a writ of prohibition. *Id*. at 296. Simply put, the Ohio Supreme Court has never issued a decision even touching on what facts a party must plead to avail herself of the oft-recited ultra vires, fraud, and collusion exceptions in response to a motion to dismiss based on the noninterference rule. There is no controlling Ohio Supreme Court precedent and certification is appropriate.

b. Appellate Courts That Have Addressed the Noninterference Rule Have Not Articulated a Consistent Test or Standard of Review.

In the few cases where the courts of appeals have addressed the noninterference rule, the courts have been inconsistent in applying the rule and unclear regarding the standard of review. Some courts apply a de novo review to the determination of whether corporate acts conform with the organization's bylaws. For example, in *Buchanan v. Shack*, the Second District Court of

Appeals recited the rule and its exceptions, but also qualified that the organization's decision must be consistent with own rules:

> In the absence of mistake, fraud or management activity in excess of its corporate powers, a decision by such association ***in accord with its own charter and rules*** made by the governing body must be accepted by courts of law.

Buchanan v. Shack, 1995 WL 386938, *2 (2nd Dist. June 28, 1995)(*emphasis added*). Similarly, the Seventh District Court of Appeals has noted that where a voluntary organization "is governed by a constitution and by-laws, [it] cannot visit punishment upon a member for any acts or conduct which were not violative of the constitution and by-laws at the time that such acts were committed." *Armstrong v. Duffy*, 90 Ohio App. 233, 244–45, (7th Dist. 1951). The Fourth District, in the context of a due process complaint over member expulsion, treated the organization's compliance with its own constitution and bylaws as a necessary component of due process:

> A member of a private association may not be expelled without due process. This right is derived not from the constitution but rather from a theory of "Natural Justice." Due process in this respect is comprised of three basic elements: (1) absence of bad faith, (2) compliance with the constitution and bylaws of the association, and (3) natural justice."

Browning v. Fraternal Order of Eagles, Ironton Aerie No. 895, 1986 WL 9644, *1 (4th Dist. Aug. 22, 1986)(internal citations omitted).

Thus, before giving deference to the ruling group's interpretation of constitution or bylaw, these decisions require a due process analysis which has embedded within it (1) a factual determination regarding the absence of bad faith, (2) a legal review and construction of the associations' constitution and bylaws, and (3) a substantive due process inquiry into the fundamental fairness of the action or proceeding. This approach is consistent with the idea that a voluntary organizations' governing documents are contracts between the members. *BCI v. DeRycke*, 2003-Ohio-6321, ¶ 10 (9th Dist.); *Mace v. Carpenters & Joiners of America*, 1933 WL

2348, *14 (July 12, 1933) ("When one joins a voluntary organization such as the United Brotherhood, he agrees to be governed by its Constitution and rules as in the nature of a contract"). This means that courts review associations' governing documents de novo. *See BCI at* ¶ 10 ("[B]ecause the Code is a contract between BCI and its shareholders, "the interpretation and construction of [it] is a matter of law, reserved to the court.")

When conducting that de novo review, the courts' "primary role is to give effect to the intent of the parties," and they "presume that the intent of the parties to a contract is within the language used in the written instrument." *Id.* at 88. If the court is able to determine the parties' intent from the plain language of the agreement, "there is no need to interpret the contract." *Id.* A court will not go beyond the agreement itself to interpret the intent of the parties unless the language used is unclear and ambiguous" *Blosser v. Enderlin*, 113 Ohio St. 121, paragraph two of the syllabus (1925); *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St. 3d 635, 638 (1992). And in determining whether a contract's terms are ambiguous, courts will give "common words appearing in a written instrument . . . their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Shifrin* at 638. A noninterference doctrine which requires courts to defer, *ab initio*, to an interpretation of governing documents adopted by the organization's leadership conflicts with the de novo review requirement.

Notwithstanding the holdings applying this de novo standard of review to the interpretation governing documents, Ohio courts also recognize that the relationship between a voluntary association's leadership and its members is not merely contractual, but *fiduciary* in nature:

> The relation of the member to the association is partly shaped by the terms of the constitution and by-laws as they exist when he joins or as they are afterwards altered in accordance with provisions for their amendment, but these writings do not constitute a contract in the ordinary sense, and should not finally or rigidly determine the rights of the

> member and the powers of the association. *** Such relations are much more than contracts…

Meadowood, Inc. v. Armstrong, 68 Ohio App.3d 439, 444–45 (8th Dist. 1990) (quoting *Solomon v. Edgewater Yacht Club*, 35 Ohio Misc.2d 1, 2 (M.C. 1987) quoting Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv.L.Rev. 993, 1007–1008 (1930). In other words, "[a]n executive board stands in a fiduciary relationship to an organization's rank-and-file members"—a relationship "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Tucker v. Natl. Assn. of Postal Supervisors, Cleveland Branch 46*, 2003-Ohio-2994, ¶ 19 (internal citations omitted.) When the association's leadership "exceeds its powers, disregards its own rules, or does not observe its fiduciary duties, equity may enjoin it . . . ." *Jennings v. Jennings*, 56 Ohio Law Abs. 25 (7th Dist. 1949).

The Ohio Supreme Court has never squared the apparent de novo contractual review requirement in cases like *Buchanan*, *Armstrong*, and *Browning*, *supra*, and the fiduciary duty cases like *Solomon* and *Tucker* with one another, much less with other cases that seem to counsel total deference to an associations' directors, officers or other officials interpretation of its constitution or bylaws. *See Wellendorf v. Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union No. 377*, 1988 WL 59811, *7 (7th Dist. 1988) (quoting *Finlay v. Duffy*, 43 O.O. 451, 453 (7th Dist. 1950)("[C]ourts will not assume to act in place of those authorized to interpret the constitution and bylaws of a voluntary association unless those upon whom the duty is placed acted in an unreasonable and arbitrary manner.") Because there is no controlling Ohio Supreme Court authority on the question of how much—if any—deference to give a voluntary association's officers in interpreting the organization's documents, certification is appropriate.

c. Ohio Courts Have Never Addressed Whether An Organization's Directors Can Effect Changes to an Organization's Mission and Purpose Through The "Reinterpretation" of a Single Term in the Governing Documents.

Most importantly, however, none of the decisions in which a court recognized a voluntary association's ability to govern its internal affairs dealt with the type of substantial question of corporate governance presented here: Can corporate officers work a fundamental change in an organization's purpose and membership through its purported "reinterpretation" of a single word rather than through a change to the bylaws or other governing documents? No. Even if this case boiled down to an interpretation of an ordinary term, Ohio appellate court cases applying the noninterference rule did not consider novel interpretations of an ordinary term that would fundamentally upend the organization at the foundational level. And no Ohio appellate court has addressed this question in the context of a derivative challenge like the one presented here. The issues on which courts have deferred have been less consequential.

In *Kresse v. N. Coast Charter Boat Assn.*, 2006-Ohio-6871 (11th Dist.), the issue was the interpretation of the rules of the 2004 North Coast Charter Boat Association Walleye-Steelhead Tournament and suspected cheating on the part of the winning contestants. The Eleventh District Court of Appeals wisely held that it would not weigh in on NCCBA's procedures (which included polygraph examinations of the suspected fishermen) and interpretation of tournament rules to determine the legitimate winner of the fishing tournament. Similarly, in *Stibora v. Greater Cleveland Bowling Assn*., 63 Ohio App. 3d 107 (8th Dist. 1989)— another bowling case—the plaintiffs complained to their association's leadership that certain bowling lanes had not had the appropriate amount of dressing (the oil used to reduce friction on bowling lanes) applied to them. When the governing board of the local association decided against them, the member plaintiffs quit their bowling teams in protest. A third-party alleged this violated the rules of the American Bowling Congress ("ABC"), to which the Greater Cleveland Bowling Association ("GCBA")

adhered. The GCBA held a hearing and determined that the plaintiffs had violated the ABC's rules by quitting their teams, and suspended them from the GCBA for a year, with automatic reinstatement following that term. The trial court held, and the court of appeals affirmed, that the plaintiffs' bare and conclusory allegations did not meet *Lough*'s pleading requirements. *Id*. at 113.

Fraternity Council's revision to its bylaws and the defenestration of its critics is different in kind than the processes employed to police rogue fishermen or bowlers disputing the proper amount of lane dressing. Fraternity's council's claimed right to "interpret" what "woman" means strikes at the very heart of Kappa's purpose as a single-sex organization that relies on the protections of Title IX. To the extent that Kappa would dispute its characterization as a single-sex organization or argue that the term "woman" is ambiguous consider: Of Kappa's more than 210,000 living members; only two – to the best of Plaintiffs' knowledge are biological males. (ECF #23, Kappa Mot. to Dismiss, at 1). This is, of course, a very recent development in Kappa's 150-year history.

The word "woman" is undefined in Kappa's Governing Documents because no definition was ever needed. A word is not rendered ambiguous simply because it is not defined within the contract. *State ex rel. Petro v. R.J. Reynolds Tobacco, Co*., 2004-Ohio-7102, ¶ 22. Undefined words in corporate constitutions and bylaws, like those in contracts and statutes, are given their plain and ordinary meaning. *Id.*, *Shifrin,* 64 Ohio St.3d at 638; *see also Solomon, 35* Ohio Misc. 2d at 2 ("The relation of the member to the association is partly shaped by the terms of the constitution and by-laws as they exist when he joins . . ."). With a few exceptions, the biologically female members of the fraternity and the countless Kappas that went before them understood "woman" to mean what it ordinarily means—"an adult female person." S*ee* DICTIONARY.COM, *https://www.dictionary.com/browse/woman* (last visited Jan. 13, 2024), and MERRIAM-WEBSTER,

https://www.merriam-webster.com/dictionary/woman (last visited Jan. 13, 2024) (both defining "woman" as an "an adult female person."). "Reinterpreting" woman to include biological men—interpreting the term to include its opposite—impermissibly re-writes the organization's by-laws and constitution without a vote of the membership. The Ohio Supreme Court has never ruled on whether such authority lies within the governing board's power of interpretation or when "interpretation" becomes wholesale revision. Certification is therefore appropriate.

C. Does the Ohio Constitution's Guarantee that "Every Citizen May Freely Speak" Protect Members of Voluntary Association from Retaliation from the Association's Leadership?

1. The Question May Be Determinative of the Action

In addition to raising the scope of the noninterference rule's exceptions, this case presents the question of whether members of a voluntary association have a right to dissent regarding the business of the association without retaliation by the association's leadership. Section 11, Article I of the Ohio Constitution guarantees that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." Although the Ohio Supreme Court has not yet applied this positive protection to private entities, other state courts with similar or identical provisions have. *Compare Eastwood Mall, Inc. v. Slanco,* 1994-Ohio-433, and *Commonwealth v. Tate*, 495 Pa. 158, 432 A.3d 1382 (Pennsylvania 1982)(Applying similar Pennsylvania free speech guarantee to private college); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)(affirming the California Supreme Court's reading of the California constitution's nearly identically worded free speech provision to allow leafletting at shopping center). In this case, the Plaintiffs allege that they were expelled from Kappa based on their speech opposing Fraternity Council's to expand

Kappa membership to biological males. The scope of Ohio's speech protections may thus be dispositive of the action.

2. There is No Controlling Ohio Supreme Court Authority Regarding Sec. 11, Art. 1's Application to Speech within Voluntary Associations.

In contrast to the First Amendment, Ohio's constitutional free speech protections, drafted a quarter century later, recognized an affirmative right to speak freely. *Eastwood Mall,* 68 Ohio St.3d at 225 (Wright, J. dissenting). And although the *Eastwood Mall* majority chose to interpret Art 11, Sec. 1 to be coextensive with the First Amendment, it limited its holding "to the facts of [that] case," which dealt with property owner's competing right to exclude speakers. *Id*. at 222-223. In his *Eastwood Mall* dissent, Justice Wright recognized that the words used by the Framers of Ohio's constitution are distinctly different than those used by the Framers of the First Amendment. *See Ferner v. Toledo-Lucas Cty. Convention & Visitors Bur., Inc.*, 80 Ohio App.3d 842, 847–48, (6th Dist. 1992) (noting that Section 11, Article I, "differs from the United States Constitution in that while both include the prohibition against laws abridging speech, the Ohio Constitution additionally includes an affirmative grant of the right of free speech."). In analyzing a constitutional provision, the analysis must always start with the provision's plain text. Beyond the common sense inherent in that approach, textualism as a method of constitutional interpretation has steadily gained ground over the last few decades.[8] Further, in the 30 years since Eastwood Mall was decided, judges and scholars have given a renewed vitality to the study of state constitutions as a source of rights beyond those guaranteed in 1789. *See, e.g.* Jeffrey Sutton, *Fifty-One Imperfect Solutions: States and the Making of American Constitutional Law*, (2008).

Further, the *Eastwood Mall* majority did not foreclose a more expansive reading. *See*

[8] As Justice Kagan famously observed, "we are all textualists now." Elena Kagan, Remarks at 2015 Scalia Lecture, "A Dialogue with Justice Elena Kagan on the Reading of Statutes," *https://www.youtube.com/watch?v=dpEtszFT0Tg* (last visited 04/21/2024).

Eastwood Mall, 68 Ohio St.3d at 226 ("The question whether Section 11, Article I provides protections which are broader than those provided under the First Amendment to the United States Constitution is not as settled as would appear from the majority opinion. The opinions from this court cited by the majority are limited to the facts of those cases and are distinguishable from the present case.")(Wright, J., dissenting). Further, in *Crossen v. Duffy*, 90 Ohio App. 252, 270–71 (7th Dist. 1951), the court of appeals held that union members could state a claim against union officials who had retaliated against them based on their criticism of union leadership. The court reasoned that "in view of the provisions of the Constitution of the United States and of the state of Ohio, guaranteeing free speech, that we should construe this [section 11] as intending to deprive members of the union of the right of free and fair criticism, ..." *Id.* at 270-71. The *Crossen* decision is particularly applicable here, where members of an organization who are seeking to use the organizations' processes to bring about internal change and have been targeted and retaliated against by that organization's current leadership. Kappa is wrestling with a societal issue that has only recently risen to prominence. Kappa, like the union in *Crossen*, is the type of intermediary voluntary institution that Alexis De Tocqueville saw as particularly American and necessary to the preservation of American democracy. But as the *Crossen* court recognized, strong organizations and the salutary effects they provide, can exist only when members are free to question their leadership.

The *Eastwood Mall* majority did not expressly overrule *Crossen* but limited its holding to the facts of the case. Further, the Ohio Supreme Court need not overrule *Eastwood Mall* to recognize that Plaintiffs' Ohio constitutional speech rights here. *Compare Tate* and *W. Penn. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 27, 515 A.2d 1331, 1333 (1986)(Prohibiting leafletting at a shopping mall while protecting peaceful protest on

a private college campus). Nevertheless, the Ohio Supreme Court has recognized that "our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established." *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 44 (2003). As this case demonstrates, expressing the idea that a woman means only a biological woman has become cause for dismissal in some circles. *Eastwood Mall* does not address the issues present here, and certification is therefore appropriate.

IV. CONCLUSION

For all of the foregoing reasons, this Court should issue an Order certifying these questions of State law to the Ohio Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Plaintiffs' Motion to Certify State Law Questions to the Ohio Supreme Court* was filed electronically with the Court this 22nd day of July 2024. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by U.S. Mail. Parties may access this filing through the Court's system.

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O*ne of the Attorneys for Plaintiffs*