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 FOR SUMMARY JUDGMENT AND RENEWED MOTION TO DISMISS FOR LACK OF STANDING

Defendant The President and Fellows of Middlebury College ("Middlebury" or the "College"), by and through counsel, moves for summary judgment pursuant to V.R.C.P. 56, and renews its motion to dismiss for lack of standing pursuant to V.R.C.P. 12(b)(1). In support, Middlebury submits this Memorandum of Law and an accompanying Statement of Undisputed Material Facts.

MEMORANDUM

The facts material to resolution of this action date back more than a century and are not contested. It is undisputed that when John Abner Mead generously offered to build a chapel for Middlebury College in 1914, Mead suggested that he envisioned the building being known as "Mead Memorial Chapel." However, it is also undisputed that Mead—an experienced businessman—did not ever explicitly impose or negotiate for a perpetual requirement that the building be so named as a condition

of his gift. That is both critical and dispositive.

Former Governor Mead certainly knew how to impose explicit conditions to ensure his wishes were carried out when he wanted to do so. In making a gift of real estate to establish a community center in Rutland around the same time, for example, Mead spelled out detailed conditions:

> This conveyance is made upon the *express condition* that the property herein described and conveyed shall be maintained as a general center for wholesome recreation and social opportunity, and that all of said buildings now on said property and those that may be built thereon shall be protected to a reasonable extent by fire insurance, and that all of said buildings shall be kept in good condition and repair, and should they be partially or wholly destroyed by fire, they shall be rebuilt at least so far as the insurance will permit and used only for the purposes above specified . . . . It is also a condition that the grounds and the buildings shall be kept open during such hours as the Board of Managers may dictate, and there shall always be a suitable person in charge of the same and whose duty it shall be to keep the buildings and the grounds in proper condition for the purposes which are specified in this deed. . . . *And in case of the failure to perform any of said conditions, then and in that case, this deed shall be null and void and the property herein conveyed shall revert to the said John A. Mead, [and] his heirs and assigns* . . . .

Exh. FF (emphasis added). No comparable language of condition appears in any of the documentation of Mead's gift to Middlebury. Rather, Mead was clear that he saw his donation of the Chapel as a gift "where no return can be expected," Exh. V, motivated by his desire to assist Middlebury by providing a place of worship for the community.

Reduced to its essence, then, the question at the center of this case is relatively straightforward: will the law imply into a charitable gift a binding, perpetual condition, enforceable by a donor's estate over a century after his death, absent

explicit, plain language on the face of the gift instrument imposing such a condition? The answer is no. To hold otherwise would upend well-settled law and expose schools, hospitals, and other charitable organizations to burdensome litigation seeking to enforce the inchoate preferences of donors who have long passed from this world.

For several reasons, Plaintiff's effort to have the Court to read into Mead's gift a condition that would obligate Middlebury to refer to the Chapel as "Mead Memorial Chapel" in perpetuity—and require the College to pay millions of dollars in restitution for a violation of this supposed condition when it renamed the Chapel in 2021—lacks any basis in the law. The primary theory advanced by Plaintiff, which would treat Mead's gift as a private contract, runs contrary to the law governing charitable gifts. The common law traditionally has viewed restrictions on gifts as a matter of charitable trust or conditional gift, both of which are aspects of property law, not contract. Even if contract law were to apply, Mead's failure to actually bargain for express perpetual naming rights would defeat Plaintiff's claims. The law disfavors perpetual terms and requires that they be clearly stated, and it is beyond dispute that Mead did not secure any explicit agreement to naming rights in perpetuity.

While Plaintiff's suit would perhaps more properly be viewed as an attempt to enforce a condition on a gift rather than a contract action, it fails there as well: the facts do not support a conditional gift claim. The law will recognize and enforce a conditional gift only where there is express language of condition together with a right of reverter, as conditional gifts (like perpetual terms in contracts) are strongly

disfavored. The language of Mead's 1916 gift of a community center in Rutland, quoted above, offers a paradigmatic example of a valid, enforceable conditional gift. His 1914 gift to Middlebury, on the other hand, contains none of the requisites that could make out a conditional gift—and, indeed, there is no indication that Mead envisioned or intended that his gift of the Chapel to Middlebury might fail and be subject to forfeiture at some point in the future based on violation of a condition. As there is no colorable claim that Mead's gift gave rise to an enforceable legal obligation to maintain the Mead name on the Chapel in perpetuity, Middlebury is entitled to judgment on all of Plaintiff's claims.

In the background of this lawsuit there lurks another issue, one of much greater significance to donation-supported institutions and organizations in Vermont: whether and under what circumstances a donor (or a donor's estate) may bring suit to enforce asserted restrictions on a charitable donation. The common law precluded donor standing to enforce charitable gift restrictions, on the rationale that a donor has given up any legal interest in property transferred to the donee institution. As charitable gifts are intended to benefit the common good, the Attorney General alone was responsible for enforcing the public's interest in compliance with the terms of charitable gifts. While the Court declined to dismiss this suit on standing grounds at the outset, Middlebury urges the Court to revisit the issue. Courts in most jurisdictions continue to conclude that donors and their estates lack legal standing to pursue enforcement of gift restrictions, and there is no reason to believe that Vermont would diverge from the common law on this point. As standing presents a question

of the Court's subject matter jurisdiction, the Court should dismiss the suit prior to trial.

BACKGROUND

A. John Abner Mead and the Special Administrator

John Abner Mead, an 1864 graduate of Middlebury College, served from 1910 to 1912 as Vermont's fifty-third governor. Statement of Undisputed Material Facts ("SUMF"), ¶ 1. Trained as a physician, Mead practiced medicine in Rutland for a period before pursuing political office, and later had a career as a businessperson and a real estate investor. *Id.*, ¶¶ 2-3. Mead also served on Middlebury's Board of Trustees. *Id.*, ¶ 4.

Mead died on January 12, 1920, and his estate was administered and closed as of 1923. *Id.*, ¶ 5. A century later, in May 2022, John L. Hinsman, a distant heir of Mead, filed a petition in the Probate Division of the Vermont Superior Court seeking to reopen Mead's estate for the purpose of investigating and presenting potential claims against Middlebury College for an alleged breach of the terms of Mead's gift of the Chapel. *Id.*, ¶ 7. The Probate Division, noting that it was not "passing judgment on the validity of any claims," granted the petition and appointed James Douglas as Special Administrator of Mead's estate in an order dated June 17, 2022. *Id.*, ¶ 8.

B. Mead's Gift to Middlebury

On May 11, 1914, former Governor Mead wrote to Middlebury President John Thomas and stated his intention to make a substantial gift to the College. 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., ¶¶ 9-10. 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." *Id.*, ¶ 11. 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.*

On May 15, 1914, President Thomas wrote to the College Trustees, enclosing the Gift Letter and noting with "the keenest pleasure" that it "assures the erection of an appropriate and beautiful chapel for Middlebury College." *Id.*, ¶ 14. President Thomas asked the Trustees to reply "immediately as to whether you will authorize the acceptance of Governor Mead's proposition and the appointment of the Building Committee which he suggests." *Id.* The letter did not ask the Trustees to authorize any agreement to use the name "Mead Memorial Chapel," nor, indeed, did the letter contain any reference to the name at all. *Id.*, ¶¶ 15-16. President Thomas received

numerous responses from the College's Trustees accepting the gift and authorizing the appointment of a building committee. *Id.*, ¶ 17.

At a June 22, 1914 meeting, Middlebury's Trustees voted on and adopted a resolution formally accepting the gift. *Id.*, ¶ 20. The resolution, which was followed by a recitation of Mead's Gift Letter, 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.
>
> 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. 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.*, ¶ 21.

On June 23, 1914, the College held a groundbreaking ceremony in connection with its commencement exercises (although the actual construction of the Chapel did not begin in earnest until 1915). *Id.*, ¶ 23. As the project proceeded, Mead was directly involved in many of the communications and discussions regarding the design and construction of the Chapel. *Id.*, ¶ 22. By December 1914, the College

secured plans for the Chapel and a contractor, and the Trustees formally voted at a December 18, 1914 meeting to "proceed with construction of the Chapel, with the understanding that $60,000 would be contributed by Dr. Mead; the balance estimated at about $1,000 to be contributed by the College." *Id.*, ¶ 25.

Mead wrote to the Trustees on January 13, 1915, confirming his agreement to contribute $60,000, stating:

> In consideration of the contract of the Committee for the Erection of the Mead Memorial Chapel at Middlebury College with Thomas W. Rogers of Brandon, Vt., whereby the same is to be erected in accordance with plans and specifications of Allen & Collens, architects, at a cost of $51,945, I agree to furnish funds for the discharge of this contract and for the expenses connected with the erection of this chapel, to the amount of $60,000, as may be required during the construction and in accordance with the terms of the above contract, binding myself, my heirs and my assigns as above specified. It is agreed on the part of said Trustees that they are to complete said chapel, making it complete in every way, as to grounds, furnishings, etc. for the purposes of a college chapel, as voted at the meeting of the Trustees of said College held in New York City Dec. 18, 1914, and as defined in correspondence between the President of Middlebury College and myself.

Id., ¶ 26. Mead subsequently agreed to increase his gift toward the Chapel by $1,031, which the Trustees voted to accept in April 1915. *Id.*, ¶ 27. 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.*, ¶ 28. The Board of Trustees accepted this additional gift in a June 23, 1915 meeting. *Id.*

Construction of the Chapel was completed in 1916[1] and was memorialized in a dedication ceremony held on June 18, 1916. *Id.*, ¶ 29. The Chapel has served as an important role in the life of the College since that time. 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.*, ¶ 32. 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.[2] *Id.*, ¶ 33.

C. Middlebury's Renaming of the Chapel and the Ensuing Lawsuit

In summer 2021, the Middlebury Board of Trustees' Prudential Committee decided on behalf of the Board to discontinue the use of the name "Mead Memorial Chapel." SUMF, ¶ 34. The impetus for the change, which related to Mead's advocacy of eugenics policies, is not relevant or material to the present Motion. The sign identifying the Chapel as "Mead Memorial Chapel" was removed from its location above the entrance to the Chapel in September 2021, *id.*, ¶ 35, and the Chapel is now known as "Middlebury Chapel." *Id.*, ¶ 36.

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[1] In the years since, 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. SUMF, ¶ 31. A 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.*

[2] 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. SUMF, ¶ 33.

In March 2023, former Governor Douglas, in his role as Special Administrator of the Mead Estate, brought the present suit challenging Middlebury's renaming of the Chapel. 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. Through this Motion, Middlebury seeks summary judgment on all six counts.

STANDARDS

A moving party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The court will "consider the record evidence in the light most favorable to the nonmoving party." *Stone v. Town of Irasburg*, 2014 VT 43, ¶ 25, 196 Vt. 356, 98 A.3d 769. Accordingly, "the nonmoving party receives the benefit of all reasonable doubts and inferences." *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356, 848 A.2d 310. If "the record shows that there is no genuine issue of material fact[,]" then the moving party "is entitled to judgment as a matter of law." *Bacon v. Lascelles*, 165 Vt. 214, 218, 678 A.2d 902, 905 (1996) (citation omitted). Where the nonmoving party bears the burden of proof on the underlying claim, the moving party may show there is no "genuine issue of material fact . . . by showing the nonexistence of evidence to support the nonmoving party's case." *Brown v. State*, 2013 VT 112, ¶ 12, 195 Vt. 342, 88 A.3d 402 (citing

Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986)).

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). A motion to dismiss for lack of standing can be made at any point during the pendency of an action. *See* V.R.C.P. 12(h)(3).

ARGUMENT

I. The Undisputed Material Facts Entitle Middlebury to Judgment on All Counts of the Complaint.

Each of the six counts in this lawsuit rests on a common proposition: the assertion that, in making his gift to Middlebury, former Governor Mead imposed a legally binding obligation for the College to maintain the name "Mead Memorial Chapel" in perpetuity. As that proposition is not borne out by the facts, all six fail. The law requires clarity and specificity in imposing obligations of a lengthy or unlimited duration, including perpetual contract terms and conditions subsequent to a gift. The documents evidencing Mead's gift proposal and the College's acceptance

of the gift, the entirety of which are before the Court, fail to offer any evidence of an agreement about naming rights that could meet the law's requirements. For that reason and the others set forth below, the Court should grant Middlebury's Motion and enter judgment on all claims.

A. Mead Did Not Enter into a Contract with Middlebury for Perpetual Naming Rights to the Chapel.

Plaintiff's lead claim[3] posits that Middlebury breached a contract with former Governor Mead to name the chapel he gifted to the College "Mead Memorial Chapel" in perpetuity. The claim fails on two independent grounds. First, Mead's donation was not a matter of contract, but rather a charitable gift subject to the well-developed body of law governing restricted and conditional gifts. Second, even if one were to view Mead's gift through the lens of contract law, there is no evidence that Mead bargained for perpetual naming rights as a condition of his gift to Middlebury. The law disfavors perpetual contractual obligations and will only recognize a perpetual obligation where it is clear on the face of the contract—yet the documentation here does not establish any bargained-for naming rights, let alone support the claim that Middlebury was obligated to maintain the name "Mead Memorial Chapel" in perpetuity. Middlebury is entitled to judgment on those bases.

1. Mead's gift is not governed by the law of contract.

Plaintiff's contract claim raises two interrelated threshold questions: (a) was

[3] In the Complaint, Plaintiff styles his contract claim as three separate counts (Counts I through III), seeking, respectively, specific performance, damages, and restitution. *See* Compl. ¶¶ 179-190. Those counts all rest on the same contract theory and are subject to judgment on the same basis.

former Governor Mead's donation of the Chapel to Middlebury a charitable gift to the College or a bargained-for exchange, and (b) assuming the former, what law governs gifts in Vermont? As discussed below, the undisputed facts establish that Mead's donation of the Chapel was a charitable gift. As such, it is subject to the body of law governing charitable gifts in Vermont, which can include the law of conditional gift, trust law, and UPMIFA—but not contract law. Plaintiff's claim thus must fail.

a. Mead's donation of the Chapel was a gift.

The law defines a "gift" as a voluntary transfer of property to a donee "without consideration and with donative intent." Restatement (Third) of Property (Wills & Don. Trans.) § 6.1; *see 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."). Gifts may be either absolute—where the donor "part[s] with all present and future dominion over it," *Williamson v. Johnson*, 62 Vt. 378, 20 A. 279, 280 (1890)—or they may be made subject to conditions or restrictions. *See* 38 Am. Jur. 2d Gifts § 68 (explaining that "[g]ift transfers with conditions attached are valid."). Thus, the fact that a donor might impose obligations on a donee in connection with a gift is not dispositive of whether the transaction is a gift. As the Restatement of Contracts explains:

> [A] gift is not ordinarily treated as a bargain, and a promise to make a gift is not made a bargain by the promise of the prospective donee to accept the gift, or by his acceptance of part of it. This may be true even though the terms of gift impose a burden on the donee as well as the donor.

Restatement (Second) of Contracts § 71 cmt. c (1981). The distinction between a gift subject to conditions and a bargained-for exchange depends "on the motives manifested by the parties." *Id.; see also* Restatement (Third) of Property (Wills & Don. Trans.) § 6.1 cmt. b (2003) ("[D]onative intent is the essence of a gift.").

Admittedly, the distinction between gift and bargained-for exchange is not always crystal clear. There are situations in which the circumstances of a donation to a school or other charitable institution might fairly lead the donation to be characterized as a bargained-for exchange. In *Lupton v. Leander Clark College*, 187 N.W. 496 (Iowa 1922), for example, a college seeking to establish a permanent endowment made a public solicitation offering "that the college would be given the name of any one who would donate $50,000 to said fund." *Id.* at 497. A wealthy local resident submitted a proposal to the college's board of trustees accepting the offer, subject to a number of detailed terms and conditions. These conditions included, among others, that the trustees make provision to change the college's name to "Leander Clark College" by proper amendment of its articles of incorporation upon receiving his payment of the $50,000; that the college raise an additional $100,000 by a certain date; and that the funds be protected and maintained as an endowment for the college "forever" and the interest used "only for payment of president and teachers" with "no part of it . . . diverted to any other use or purpose." *Id.* at 497-99. The donor's proposal directed the board to call a meeting as soon as practicable and "by proper action made of record, fully accept said donation of $50,000.00, with all the terms and conditions on which it is offered as herein expressed, and *solemnly*

pledge the college to the strictest compliance with such conditions forever." *Id.* at 499 (emphasis in original). The college's trustees duly accepted the offer with all terms and conditions, and succeeded in raising an additional $100,000 by the specified deadline. *Id.* at 501.

In 1919, nine years after the donor's death, Leander Clark College, unable to sustain itself as an independent institution, made plans to merge with and transfer its endowment to Coe College. *Id.* at 498. The executors of the donor's estate brought suit for breach of contract, seeking the reversion of the donated funds for violation of what they characterized as a contractual obligation to maintain the funds in perpetuity to support an educational institution under the name "Leander Clark." The trial court dismissed the suit on a demurrer by the college, and, on appeal, the Iowa Supreme Court split over the nature of the transaction. The dissenting justice agreed with the donor's estate that the transaction was properly viewed as contractual, and he would have reversed and allowed the claim to proceed. *Id.* at 501-04. The majority, however, affirmed dismissal, treating the donation as establishing a perpetual charitable trust rather than as a forming a contractual exchange. The court reasoned that "the provision of Leander Clark that the college should bear his name" was not the "dominant motive or purpose" of the gift but rather a "mere incident to a broader and more generous purpose, that of assisting to found and perpetuate a fund . . . to be used for the better education of young men and women . . ." *Id.* at 499-501.

This case presents no such close question: the undisputed facts from a century

ago conclusively establish that Mead's donation to Middlebury was a charitable gift. As noted above, the defining characteristic of a gift is donative intent. The Court need not engage in any speculation as to what motivated Mead's donation, for Mead himself expressly laid out his motives in a letter to the editor of the Middlebury Kaleidoscope in late 1914:

> It will be my pleasure . . . to express to the members of the Junior Class, to the Faculty, the Alumnae and Alumni of our beloved college, my high appreciation for the many kind words spoken and for the innumerable letters received commending *this gift* to our Alma Mater. I have realized for many years that the only enduring source of happiness springs not from selfish acts, but is only attained *by doing for others where no return is expected*, and the greater is the pleasure when you so govern your acts, that mankind may rise to a higher leve[l]—that other lives may be happier and more useful because you have lived and have seen and realized an opportunity. *It was this thought that inspired my desire to assist the students of Middlebury [C]ollege* in having a place of worship where they could all assemble in one auditorium for this inspiration, that the duties of each day might begin with a religious thought, which we all realize is the foundation of all true knowledge.

Exh. V (emphasis added); *see also* Exh. AA (letter from Mead offering to "add a chime of bells to **our gift** of the Mead Memorial Chapel"). Mead viewed and described the donation as a gift with no expectation of return, inspired by a desire to assist Middlebury and its students. The College's officers and trustees likewise understood and repeatedly referred to the donation of the Chapel as a "gift" or "benefaction"[4] and

[4] *See, e.g.,* Exh. M (letter from Trustee John Weeks congratulating Mead on his "splendid gift to Middlebury College"); Exh. N (letter from Trustee James Barton to Mead remarking on his "magnificent gift to Middlebury College"); Exh. O (letter from Treasurer John Fletcher to President Thomas referring to Mead's "splendid gift"); Exh. F (letter from Trustee J.B. McCullough assenting to gift and "congratulat[ing] heartily both the College and Governor Mead upon this gift of the Governor and its acceptance by the College"); Exh. K (letter from Trustee A. Barton Hepburn concurring in "accepting this gift"); Exh. P (dedication speech by Trustee and former President Ezra Brainerd accepting Mead's "gift of this beautiful sanctuary" and assuring him that his "generous gift" would be

reported Mead's donation among the College's charitable gifts[5]—and there is no evidence that Mead ever took exception to that characterization.

The subject matter of the transaction, helping build a place of worship for an educational institution, was also fundamentally charitable in nature. In offering the donation, Mead—a pious man whose tombstone memorializes him as a "Christian and a Philanthropist," SUMF, ¶ 6—emphasized the centrality of his Christian faith to his motivations, writing that it "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." Exh. D at 1. Mead also spoke on multiple occasions of a "sacred duty" to make the Chapel "an instrument of great good to those of this generation and to those of the distant future." SUMF, ¶ 30.

Nor is there any language in the Gift Letter or other correspondence that would suggest a negotiated exchange of naming rights as consideration for Mead's monetary contributions. *Id.*, ¶ 12. This is particularly notable in light of the fact that Mead was an experienced businessman who demonstrated an attention to detail and a keen understanding of contracts in his correspondence regarding the Chapel construction.

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used to "promote the growth of earnest [C]hristian character in the students of Middlebury College"); Exh. Q (Trustee resolution "accept[ing] this magnificent benefaction").

[5] *See* Exh. R at 11 (Middlebury Treasurer's Report for the year ending May 31, 1915); Exh. S at 7 (Middlebury Treasurer's Report for the year ending May 31, 1916); Exh. T at 7 (1916 Middlebury President's Report).

For example, in a July 6, 1914 letter to President Thomas addressing a contract proposed by the architect for the Chapel, Mead wrote:

> I have noted Mr. Collens' letter and the blank form of contract which he has submitted and it simply reminds me of the form of contract which the Government is very apt to insist upon being used if you were to sell anything to any of their departments. It is what we in business life call "a jug-handle" to the very limit—all on one side. . . . I have had a great deal of experience with contracts of this nature and I simply wish to state that if [you] sign the contract drawn after these lines, you are tied hand and foot. If you will read it over very carefully, you will see that there is not a hole for you to escape through, while they have got every condition protecting themselves. . . . I feel that we should be very very careful with these people or anybody else in the making of contracts. I have been bit once and I feel that is sufficient for me. I am strongly impressed that we should not tie ourselves to Mr. Collens until we have in black and white exactly how our plans are to be governed.

SUMF, ¶ 22. This punctiliousness was not limited to Mead's business affairs. As discussed above, Mead's donation of land for a community center in Rutland contained detailed conditions, the failure of which would trigger reversion of the gift. *See* SUMF, ¶ 40. The absence of any comparable language of condition or exchange in the Gift Letter (and other correspondence concerning the Chapel) reflects the fact that the donation was understood and intended as an absolute gift—not as a contract.

b. As a gift, Mead's donation is not governed by the law of contract.

What follows from the characterization of Governor Mead's donation as a charitable gift is the fact that any restrictions on that gift[6] would not be enforceable

[6] To be clear, while this discussion of the principles governing restricted gifts assumes the presence of an express, valid condition or restriction, Middlebury does not agree that Mead's gift was in fact restricted or subject to conditions, as discussed further below.

by his estate in contract. While this may seem self-evident, there has been some amount of jurisprudential confusion over the body of law governing restricted charitable gifts. As discussed below, there are good reasons why Vermont law has not viewed and should not view gifts as a form of contract, as to do so would be inconsistent with the legal framework governing charitable gifts in this state.

As one commentator has noted, there are theoretically "four ways to analyze a restricted gift—three under property law (charitable trust, conditional gift, restricted gift to corporate charity), and then contract law." Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 Ga. L. Rev. 1183, 1190-91 (2007). While there are occasional outlying cases,[7] the prevailing view has been "that a restricted gift is not a contract." *Id.* at 1225; *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)"); John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U. Cal. Davis L. Rev. 375, 405 (2005) (noting that "the parties'

[7] The leading case for application of contract principles to a restricted gift (cited by Plaintiff in opposing Middlebury's Motion to Dismiss) is *Stock v. Augsburg College*, No. C1-01-1673, 2002 WL 555944 (Minn. App. Ct. Apr. 16, 2002), an unpublished intermediate appeals court case that affirmed dismissal of the plaintiff donor's contract claim on statute of limitations grounds. Although the court suggested in dicta that the donor would have had a contract claim if the complaint had been timely filed, it appears likely that the court was actually analyzing the issue as a question of conditional gift.

relationship with regard to the contribution and enforcement of [a gift's] terms is typically addressed under property-based principles" rather than contract); 38 Am. Jur. 2d Gifts § 2 (because a gift is voluntary and without consideration, it lies outside "the legal definition of a contract").

This traditional treatment of restricted gifts as a species of property law—whether conditional gift or charitable trust—accords with Vermont's approach to gifts. Thus, for example, gifts made to a charitable or educational institution without any specific restrictions are deemed under Vermont law to be held in trust for use consistent with the charitable purposes of the institution. *See Cramton v. Cramton's Estate,* 88 Vt. 435, 92 A. 814, 815 (1915) (citing 2 Perry, Trusts (3d Ed.) § 733). Likewise, where Vermont courts have recognized a right by donors to sue over restrictions placed on gifts, they have done so only upon finding an express, conditional gift. *See Ball v. Hall*, 129 Vt. 200, 206, 274 A.2d 516, 520 (1970) (recognizing that a "gift may be conditioned upon the donee's performance of specified obligations or the happening of a certain event" and finding that failure of express condition required reversion to plaintiffs).[8] To the best knowledge of the undersigned, no Vermont court has ever allowed a donor to pursue an action for breach of contract for violation of a gift restriction.

Declining the application of contract law to charitable gifts makes sense for

[8] While the Vermont Supreme Court in *Ball* referred to the terms of one of the gifts at issue as the "contract of the parties," *id.*, it is clear from the text of the discussion that the Court viewed the cause of action as breach of a conditional gift, only recognizing a remedy of restitution (consistent with the law of conditional gifts). *See Williamson v. Johnson,* 62 Vt. 378, 20 A. 279, 281 (1890) (upon failure of condition to gift, cause of action for recovery of gift arises).

several reasons. First, to apply contract law to gifts would be inconsistent with Vermont's statutory regime for management and oversight of charitable funds. Under the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), a charitable institution may modify or release a restriction on a charitable gift by petitioning the Probate Division (after notification of the Attorney General), consistent with the trust doctrine of *cy pres*; UPMIFA even allows, in the case of small gift funds in existence for more than twenty years, for institutions to unilaterally modify restrictions without judicial approval (although they are still required to provide notice to the Attorney General). *See* 14 V.S.A. § 3416(b)-(d). The requirement of notification of the Attorney General is consistent with the principle that "in all types of modification 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. There is no requirement, however, that the donor be made a party to a modification proceeding or consulted in the case of unilateral modification. *See* 14 V.S.A. § 3416(b)-(d). If gift restrictions were independently enforceable in contract, a statutory scheme that allowed courts and charitable institutions to modify or eliminate restrictions without involving the donor would make no sense and very likely would run afoul of the Contracts Clause of the United States Constitution.

Second—and relatedly—because restrictions on charitable gifts often persist long after the donor's death, it is important that the law afford a mechanism for charitable institutions to seek relief from obligations that become impracticable or

outmoded due to changes in society or in the nature and operations of the donee institution. As the Massachusetts Supreme Judicial Court has observed, in many cases restrictions on a charitable gift "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" and "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." *Trs. of Dartmouth Coll. v. City of Quincy*, 258 N.E.2d 745, 753 (Mass. 1970). Such relief is available through the doctrine of *cy pres* and UPMIFA where gifts are treated under property law, whereas application of contract law would leave charitable institutions with no clear avenue for relief from outdated or burdensome restrictions.

Third, the donor's remedy (if any) for the violation of a gift restriction has traditionally been limited to restitution—i.e., reversion of the gift. *See Ball*, 129 Vt. at 207, 274 A.2d at 520; *see also Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ.,* 174 S.W.3d 98, 114 (Tenn. App. Ct. 2005) ("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 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.

For all of these reasons, allowing a contract claim to proceed for violation of an alleged condition on a charitable gift would be inconsistent with Vermont's legal framework for charitable gifts. The Court should grant judgment to Middlebury on that basis.

2. <u>The undisputed facts do not make out a contract to grant Mead naming rights in perpetuity.</u>

Even if Plaintiff were entitled to pursue a remedy in contract for the alleged violation of the terms of former Governor Mead's gift, Middlebury would nonetheless be entitled to judgment on the claim. This is so for two reasons.

First, the undisputed facts do not and cannot support the contention that an enforceable contract as to naming of the Chapel was formed by the parties. 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." SUMF, ¶ 11.

The Gift Letter was, at most, a contract to make a contract, and a "mere agreement to agree at some future time is not enforceable." *Miller v. Flegenheimer*, 2016 VT 125, ¶ 12, 203 Vt. 620, 161 A.3d 524 (quoting *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996)); *see also Sinex v. Wurster*, No. 2010-407, 2011 WL 4977680, at *1 (Vt. June 1, 2011) (affirming ruling that there was no legally enforceable contract absent "agreement on the most essential term of the arrangement—the financial obligations of each party"). And indeed, it was only later—in his letter of January 13, 1915—that Mead actually agreed to bind himself and his heirs to a specific donation of $60,000 toward construction of the Chapel. SUMF, ¶ 26. That January 1915 letter reflects that the only obligation Mead expected the College Trustees to undertake was "to complete said chapel, making it complete in every way, as to grounds, furnishings, etc. for the purposes of a college chapel." *Id*.

Second, even if one were to treat Mead's Gift Letter as a contract, it cannot be construed as giving rise to an enforceable contractual obligation to maintain the Mead name on the Chapel in perpetuity. The law strongly disfavors perpetual terms, and thus courts broadly have refused to recognize and enforce a perpetual condition absent clear and unambiguous language in the contract expressing the parties' intent that the obligation run in perpetuity. *See* 17B C.J.S. Contracts § 608 ("[A] construction conferring a right in perpetuity will be avoided unless compelled by the

unequivocal language of the contract" and a "contract which purports to run in perpetuity must be adamantly clear that that is the parties' intent, in order to be enforceable.").[9] There are indeed cases in which donors have specified or negotiated for perpetual naming rights. In *Herron v. Stanton*, 147 N.E. 305, 306 (Ind. Ct. App. 1920), for example, a donor left a bequest for the purpose of establishing an art gallery and art school, requiring that the gallery and school be named in his honor and that "the use of such name or names shall be perpetual, or so long as said art gallery and art school are severally maintained." Here, neither the Gift Letter nor any of the correspondence with Mead clearly establishes *any* naming condition, and they certainly do not include clear language agreeing to maintain the "Mead" name on the Chapel in perpetuity. SUMF, ¶ 12. As the law disfavors implying such a term, Plaintiff's claim lacks a basis to proceed. Middlebury is entitled to judgment on that ground as well.

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[9] *See also, e.g.*, *Glacial Plains Coop. v. Chippewa Valley Ethanol Co., LLLP*, 912 N.W.2d 233, 236 (Minn. 2018) (collecting cases and stating that "[i]n general, contracts of perpetual duration are disfavored as a matter of public policy; thus, while we will enforce a contract that unambiguously expresses an intent to be of perpetual duration, we construe ambiguous language regarding duration against perpetual duration"); *Roberts Tech. Grp., Inc. v. Curwood, Inc.*, No. 14-5677, 2015 WL 5584498, at *5 (E.D. Pa. 2015) (law disfavors contracts with perpetual duration without "clear and unequivocal terms" as it would be unreasonable for parties to intend for contracts to last "forever" absent such terms); *Open Lake Sporting Club v. Lauderdale Haywood Angling Club*, 511 S.W.3d 494, 501-02 (Tenn. Ct. App. 2015) ("Under the law, perpetual obligations are disfavored" and "will not be construed to exist unless the parties plainly express their intent to establish them."); *Bell v. Leven*, 90 P.3d 1286, 1288 (Nev. 2004) ("[A]s a matter of public policy, courts should avoid construing contracts to impose a perpetual obligation."); *Jespersen v. Minnesota Min. & Mfg. Co.*, 700 N.E.2d 1014, 1017 (Ill. 1998) ("[P]erpetual contracts are disfavored."); *City of Billings v. Pub. Serv. Comm'n of Mont.*, 631 P.2d 1295, 1306 (Mont. 1981) ("Where a contract is not expressly made perpetual by its terms, construction of such contract as perpetual is disfavored."); *Borough of W. Caldwell v. Borough of Caldwell*, 138 A.2d 402, 412-13 (N.J. 1958) ("Perpetual contractual performance is not favored in the law[,] and a construction affirming a right in perpetuity is to be avoided unless given in clear and peremptory terms.").

B. Plaintiff's Good Faith and Fair Dealing Claim Fails in the Absence of a Contract.

Plaintiff's 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. *See 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. Plaintiff's Claim for Breach of a Conditional Gift Fails Because Mead's Gift Was Not Subject to Any Conditions Subsequent.

Unlike the contract and implied covenant claims, Plaintiff's claim for breach of

a conditional gift falls within an established jurisprudential framework: Vermont and other jurisdictions have long recognized and allowed a cause of action for breach of a conditional gift, the remedy for which is reversion of the gift. Plaintiff's claim nonetheless fails. While donors and their estates may pursue claims for breach of a conditional gift under appropriate circumstances, the law looks with disfavor on conditional gifts and requires clear language establishing both the condition and the right of reversion. No such language is found in the Gift Letter or correspondence between Mead and the College's officers and trustees. As Mead's gift is not subject to any enforceable conditions subsequent, Middlebury is entitled to judgment.

It is well established that "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*, 129 Vt. at 206, 274 A.2d at 520; *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").

As courts in Vermont and other jurisdictions have emphasized, "conditions subsequent are not favored in the law." *Pres. & Fellows of Middlebury Coll. v. Cent. Power Corp. of Vt.*, 101 Vt. 325, 143 A. 384, 390 (1928); *see also Wilbur v. Univ. of Vt.,* 129 Vt. 33, 43, 270 A.2d 889, 897 (1970) (same).[10] 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* 38A C.J.S. Gifts § 39 ("Because noncompliance with the conditions 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."); *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").[11]

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[10] *See also, e.g.*, *Anna H. Cardone Rev. Tr. v. Cardone*, 8 A.3d 1, 8 (N.H. 2010) (observing that "we have traditionally viewed conditions subsequent with disfavor" and "[t]he passage of time has failed to increase the social value of conditions subsequent"); *Gray v. Harriet Lane Home for Invalid Children*, 64 A.2d 102, 108 (Md. 1949) (noting that "[c]onditions subsequent or not favored in the law" and "this Court has gone to great lengths in refusing to imply a condition subsequent which would result in a forfeiture").

[11] *See also, e.g.*, 14 C.J.S. Charities § 33 ("The intention of the donor to create a condition subsequent must clearly be expressed, and, if it is doubtful whether a clause in a deed is a condition subsequent, courts will always lean against construing it as such."); *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."); *Wesley Home, Inc. v. Mercantile-Safe Deposit & Tr. Co.,* 289 A.2d 337, 343 (Md. 1972) ("[T]o make estates contingent, there must be

To find an enforceable condition subsequent, courts have traditionally required not only clear language expressing the intended condition, but also explicit language calling for reverter or gift-over to another individual or institution in the event the condition is violated. In *Queen City Park Ass'n v. Gale*, 110 Vt. 110, 3 A.2d 529, 531 (1938)—a case involving a conveyance of real property—the Vermont Supreme Court held that the use of the language "'upon the following conditions and restrictions' in the instrument is not conclusive" as to the existence of a condition subsequent. In that case, notwithstanding clear language of condition, the Court declined to recognize a condition subsequent where there were "no words reserving to the grantor a right to reenter or to declare a forfeiture upon breach of the so-called conditions and restrictions, nor . . . any intent manifested to cause the estate to be defeated by reason of any act or omission on the part of the grantee." *Id.* Likewise, in the context of charitable gifts, Vermont's courts have viewed 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).[12]

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plain expression to that effect, or such intent must be so plainly inferable from the terms used as to leave no room for construction."); *First Nat. Bank of Chicago v. King Edward's Hosp. Fund for London*, 117 N.E.2d 656, 669-70 (Ill. Ct. App. 1954) ("Since conditions subsequent, especially as applied to charities, are not favored by the law, the intention to create such a condition must clearly appear from the instrument, and in case of reasonable doubt the vested estate will not be divested.").

[12] *Accord Wesley Home.*, 289 A.2d at 343 ("Even in those cases where, unlike the present case, there are apparent conditions or contingencies attached to a gift, we have held that in the absence of a clear reservation of a reversion, what might otherwise be construed as a condition will be regarded merely as the testator's expression of confidence that the property will be used for the intended purpose, insofar as may be reasonable and practicable."); *St. Mary's Med. Ctr., Inc. v. McCarthy*, 829 N.E.2d 1068, 1076 (Ind. Ct. App. 2005) ("[G]iven the disfavor of conditions subsequent and the absence of clear

Applying these standards, the documents memorializing former Governor Mead's donation to Middlebury cannot be read to impose any binding condition subsequent with respect to naming rights. First, there is no clear language of condition. The Gift Letter's reference to the name "Mead Memorial Chapel" is a vague and indeterminate one: "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*.'" SUMF, ¶ 10 (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."[13]

This stands in sharp contrast to the directness and specificity with which

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reverter language or the required length of any . . . Memorial created by [decedent's] estate, the most that can be said of her devise . . . was that she . . . expressed confidence . . . that [the donee] would 'use the property so far as may be reasonable and practicable to effect the purpose of the grant.'" (citation omitted)); *Application of Bd. of Ed. of Utica City Sch. Dist.,* 184 N.Y.S.2d 735, 741-42 (N.Y. Sup. Ct. 1959) ("It is well settled that . . . [a] charitable gift, once vested, will not revert to the heirs of the testators or grantors even in the event of nonuser or misuser of the fund or property unless the instrument itself expressly provides for reverter or gift over.").

[13] 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.

Mead imposed conditions on other gifts and bequests. In his 1916 gift of real estate to establish a community center in Rutland, Mead set forth a series of "express condition[s]" requiring, among other things, that the property be used as a "center for wholesome recreation," that the buildings be kept in good condition and insurance maintained, and that there be a "suitable person in charge" of the building and its maintenance. *Id.*, ¶ 40. The instrument specified that "in case of failure of perform any of said conditions, . . . this deed shall be null and void and the property herein conveyed shall revert to the said John A. Mead, his heirs and assigns." *Id.* Likewise, in his will, Mead made a bequest of $50,000 "to be used wholly for the maintenance and support of the Mead Community House" on the "conditions . . . that said officials shall furnish an equal amount annually for the same purpose, and should said officials fail in this endeavor, this bequest of $50,000 shall revert to my heirs, as the title to the real estate does." *Id.*, ¶ 41.[14] *Compare also Herron*, 147 N.E. at 306 (addressing express naming rights condition requiring "perpetual" use of donor's name and calling for gift-over to other charitable entities in the event the donee "shall not see fit to comply with the . . . condition").

To the extent that the Gift Letter can be read to have stated any conditions on Mead's proposed gift, the only such conditions were conditions *precedent* to the making of the gift. Specifically, the Letter provided that Mead would "bind

[14] Mead's will also made a bequest of $50,000 in bonds to his grandson J.A.M. Hinsman on several enumerated "conditions," including that he attend "some well disciplined military school, and thereafter some technical school," and provided that "if at the age of twenty-five years he has wholly abstained from the use of all kinds of Tobacco and Liquor, and having lived an honorable and [C]hristian life, he shall be given the possession of said bonds." SUMF, ¶ 42.

[him]self and [his] estate" to provide the means for erection of the Chapel only upon satisfaction of two contingencies: the procurement of plans meeting his satisfaction and the formation of a building committee consisting of Mead, the College's president, and former College president Ezra Brainerd.[15] The Gift Letter does not make the gift contingent on satisfaction of any other conditions, whether precedent or subsequent.

Second, the Gift Letter does not contain any provision for the reversion or gift-over of Mead's donation in the event that any supposed condition to the gift were violated. SUMF, ¶ 13; *compare Ball,* 129 Vt. at 202-03, 274 A.2d at 518 (finding enforceable condition subsequent to gift where the instrument expressly "[p]rovided the [donee] *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" intended purpose of the gift (emphasis added)). Again, Mead himself included express, unambiguous language of reversion in his gift and bequest for the Community House in Rutland. SUMF, ¶¶ 40-41. In the absence of any comparable language in his gift to Middlebury, there is no basis to imply a condition subsequent.

Third, it is apparent from the Gift Letter and other statements from former

[15] Notably, when President Thomas wrote to the College's Trustees and asked them to authorize acceptance of the gift, he also expressly directed the Trustees to indicate their authorization of the "appointment of the building Committee which [Mead] suggests," which might suggest that he saw the formation of the Committee as a condition of the gift. SUMF, ¶ 14. President Thomas's letter made no mention of any naming rights condition, nor did it even refer to the name "Mead Memorial Chapel." *Id.*, ¶¶ 15-16.

Governor Mead that the primary motivation for his gift was the opportunity to create a prominent space for worship on the College's campus—not the veneration of the Mead family name. The Gift Letter emphasized Mead's "hope and prayer" that he would "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," in light of his view that "[C]hristian character and religious faith" should maintain a "prominent" position in the College's educational work. Exh. D. And, as previously noted, Mead described the gift in a letter in late 1914 (with no mention of the Chapel's naming) as having been "inspired" by his "desire to assist the students of Middlebury college in having a place of worship where they could all assemble in one auditorium." SUMF, ¶ 24. There is no indication that Mead ever envisioned conditioning his gift such that the failure to maintain the Mead name would work a forfeiture of a donation that was, from every indication, born of a genuine and heartfelt desire to contribute to the spiritual life of the College community.

The Vermont Supreme Court's decision in the *Wilbur* case is instructive on this point. *See* 129 Vt. 33, 270 A.2d 889. The case arose from a gift in trust to the University of Vermont for the purpose of supporting Vermont students, made on the condition that the General Assembly enact legislation limiting the University's maximum enrollment. The trust further specified that if this condition was ever violated, the funds would pass in trust to the Library of Congress Trust Fund Board to be used for the same purpose. Several decades after the donor's death, the University exceeded the specified cap on enrollment, and the donor's heirs brought

suit seeking reversion of the gift for violation of the donor's conditions. The Vermont Supreme Court rejected the argument that the donor's intended restriction on student enrollment constituted a condition subsequent to the gift, reasoning that the 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. Other courts have been similarly reluctant to find an enforceable condition triggering forfeiture of a gift where the asserted condition is subordinate to the donor's primary charitable intent.[16]

In sum, "although charitable gifts should be encouraged so far as possible, charities . . . should not be bound to one particular use of bequeathed property for multiple generations unless they are on clear notice that such is a requirement of the bequest." *St. Mary's Med. Ctr., Inc. v. McCarthy*, 829 N.E.2d 1068, 1076-77 (Ind. Ct. App. 2005) (declining to find gift used to construct memorial chapel was subject to condition subsequent absent "clear reverter language or the required length" for maintaining the memorial). There is no such clear notice to be found

[16] *See, e.g.*, *City of Quincy v. Atty. Gen.*, 35 N.E. 1066, 1068 (Mass. 1894) ("[I]t is plain . . . that the great thing in the testator's mind—his dominant intent—was to establish the female institute, and the general intent gathered from all the words must prevail over any small detail which interferes with it, unless clearly he makes exact compliance essential."); *Gray*, 64 A.2d at 103 (construing will provisions not to impose conditions subsequent where donor's overarching intent was "to promote the interest and well-being" of the donee institution and donor failed to include "a forfeiture clause or 'gift over' in the event the [donee] did not strictly comply with the will" or to "specifically [direct] that the stated purposes were mandatory").

here. The single, indeterminate reference to "Mead Memorial Chapel" in the Gift Letter cannot reasonably be read to suggest that Mead intended the perpetual use of his family name to be an absolute condition of his funding construction of a chapel for Middlebury, such that the failure to continue the name would require reversion of the gift. There is no question that Mead *could have* imposed an express naming condition and provided for reversion of his gift in the event Middlebury deviated from his wishes, as he did with his gift of the Community House. But he did not do so, and that is dispositive of the claim. Absent any enforceable condition, Middlebury is entitled to judgment.

D. The Claim for Unjust Enrichment Fails Because Plaintiff Cannot Establish the Failure of an Enforceable Condition to Mead's Gift.

It is well established that, as a general proposition, 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, as explained above. Accordingly, Plaintiff's unjust enrichment claim fails as a matter of law.

"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; *see also DJ Painting, Inc. v. Baraw Enterprises, Inc.*, 172 Vt. 239, 243, 776 A.2d 413, 418 (2001) (affirming summary judgment on unjust enrichment on finding that circumstances did not warrant equitable relief). 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 the two elements unjust enrichment, but typically not the third: a gift unquestionably involves a conferral and acceptance of a benefit, but there is nothing "inequitable" about the donee retaining the gift without compensating the donor for its value (except in rare circumstances involving gifts procured by fraud, coercion, or the like).[17] *See Cooper v. Smith*, 800 N.E.2d 372, 373 (Ohio Ct. App. 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. *See, e.g.*, *In re Estate of Hill,* 492 N.W.2d 288, 295 n.2 (N.D. 1992) ("A finding of a gift necessarily defeats a finding of unjust enrichment, absent circumstances of fraud, undue influence, and the like, for equity generally cannot force the repayment of a gift"); *Berenergy Corp. v. Zab, Inc.*, 94 P.3d 1232, 1238 (Colo. Ct. App. 2004) (same), *aff'd,* 136 P.3d 252 (Colo. 2006); *Buchignani v. White*, No. 2019-CA-001248-MR, 2020 WL 3027248, at *4 (Ky. Ct.

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

App. June 5, 2020) (holding that "unjust enrichment claim fail[ed] due to the transaction being a completed gift," and noting that "where a gift is given without fraud, mistake, duress, or undue influence present, there is no inequity to allow recovery"); *cf. also 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 proposition does nothing more than restate the remedy available upon failure of a conditional gift.

The gift at issue here was not subject to any enforceable condition subsequent. Accordingly, because the undisputed facts do not establish any colorable basis for a recovery in unjust enrichment, Middlebury requests that the Court grant it judgment on the claim.

II. The Court Should Dismiss the Case for Lack of Subject Matter Jurisdiction Because Plaintiff Lacks Standing to Pursue Enforcement of Gift Restrictions Under Well-Established Common Law Principles.

Middlebury also respectfully renews its motion to dismiss this case for lack of subject matter jurisdiction pursuant to V.R.C.P. 12(b)(1), on the ground that former Governor Mead's estate lacks standing to pursue enforcement of any supposed restrictions on his gift more than a century after it was completed. Middlebury is mindful of the fact that the Court previously declined to grant dismissal when standing was raised alongside the College's Rule's 12(b)(6) motion. However, the issue of donor standing is a central one—significant for purposes of this narrow case, and even more so for the large number of schools, hospitals, and other nonprofit organizations in Vermont that rely on charitable donations—and Middlebury submits that it merits further consideration.

A. The Court Should Exercise Its Discretion to Revisit the Issue of Subject Matter Jurisdiction.

In its August 4, 2023 Ruling on Middlebury's Motion to Dismiss, the Court addressed and declined to grant the College's Rule 12(b)(1) motion, viewing the issue as a question of a real-party-in-interest defect rather than a question of subject matter jurisdiction. *See* Aug. 4, 2023 Order at 2-3. Notwithstanding the fact that the Court has already made a preliminary ruling on standing, it can and should revisit the issue for a couple of reasons.

First, as explained below, the question of donor standing properly goes to the Court's subject matter jurisdiction. *See, e.g.*, *Carl J. Herzog Found., Inc. v. Univ. of*

Bridgeport, 699 A.2d 995 (Conn. 1997) (affirming dismissal of donor suit for lack of subject matter jurisdiction). The existence of subject matter jurisdiction may be raised and considered at any time during the pendency of a proceeding, as courts have an ongoing "obligation to ensure" that they act only in cases where they have jurisdiction. *Mullinnex v. Menard*, 2020 VT 33, ¶ 11, 212 Vt. 432, 236 A.3d 171; *see also* V.R.C.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). For this reason, courts will generally entertain a renewed motion to dismiss for lack of subject matter jurisdiction after denial of an initial motion at the pleadings stage, particularly—as here—after relevant discovery has taken place. *See, e.g.*, *Reed v. U.S.*, No. 3:18-CV-201, 2020 WL 13888385, at *3 (E.D. Tenn. Sept. 8, 2020) (agreeing that second motion to dismiss on subject matter jurisdiction grounds was "a Renewed Motion to Dismiss rather than a Motion to Reconsider," as "Defendant may bring motions regarding the Court's subject matter jurisdiction at any time"); *Pestube Sys., Inc. v. HomeTeam Pest Def., LLC,* No. CV 05-2832-PHX-MHM, 2008 WL 11448028, at *2 (D. Ariz. Mar. 31, 2008) ("[A] renewed motion for lack of subject matter jurisdiction at a different stage in the ligation does not constitute a motion for reconsideration."); *Baker & Taylor, Inc. v. AlphaCraze.com Corp.,* No. 3:07-CV-1851 CFD, 2011 WL 4891028, at *1 n.2 (D. Conn. Oct. 13, 2011) (same).

Second, the Court has broad discretion to revisit a prior interlocutory ruling under Rule 54(b). *See Myers v. LaCasse*, 2003 VT 86A, ¶ 11, 176 Vt. 29, 838 A.2d 50. While Vermont's courts may "generally to refuse to reopen what has been decided"

pursuant to the law-of-the-case doctrine, that is simply "a rule of practice from which the court may depart in a proper case." *Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶¶ 30-31, 208 Vt. 578, 201 A.3d 326 (quotation marks and citation omitted). This would be a proper case, given the significance of the issue and the fact that "questions of subject matter jurisdiction are generally exempt from law of the case principles." *Walsh v. McGee*, 918 F. Supp. 107, 112-13 (S.D.N.Y. 1996).

In the time since the Court's initial ruling, discovery has developed the factual record on issues relevant to standing—specifically, the fact that Plaintiff has made no effort to engage with the Attorney General regarding the complaints raised in this lawsuit. Middlebury also submits that the Court's initial ruling misconstrued the thrust of the College's standing argument in addressing it as a real-party-in-interest defect, and that affording standing to a donor's estate (absent retention of a reversionary interest) is an error of law. Revisiting the issue of subject matter jurisdiction is therefore justified.

B. Under the Common Law, Donors and Their Estates Lack Standing to Enforce Charitable Gifts Absent Retention of a Reversionary Interest.

The Court's August 4, 2023 Order correctly noted that the only Vermont case cited by Middlebury on the question of donor standing—*Wilbur,* 129 Vt. 33, 270 A.2d 889—arose in the context of a charitable trust. However, *Wilbur*'s holding that a donor and his heirs lack the right to sue for breach of the terms of a charitable trust in the absence of an express "provision for forfeiture or reverter" is consistent with a well-developed body of common law governing standing in suits over charitable trusts

and gifts. *Id.*, 129 Vt. at 44, 270 A.2d at 897. It has long been established under the common law, as *Wilbur* noted, that the sole remedy for claims for violation of the terms of a charitable gift is "suit at the instance of the attorney general of the state to compel compliance." *Id.* While there may not be a wealth of case law on the subject in Vermont, *Wilbur* reflects accord with this traditional common-law limitation.

The attorney general's primacy in regulation and enforcement of matters related to charities has a lengthy history. As the United States Supreme Court recognized in *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 195-97 (1844), the courts' equitable jurisdiction over charities, and the attorney general's *parens patriae* authority to initiate enforcement actions, predates the Statue of Elizabeth in England and has long been a fixture of the common law. *See also MacKenzie v. Trustees of Presbytery of Jersey City,* 61 A. 1027, 1040 (N.J. 1905) (noting that "[o]ur legal ancestors appear for a time to have felt a difficulty as to who was the proper person to bring a suit" in cases involving property donated to charity but "[a]t length . . . it came to be established that the Attorney General, as representing the crown, was the proper person"). As the common law developed in the United States, most jurisdictions have adhered to the principle that it is a state's attorney general, and not a donor or the donor's heirs, who has the right and standing to pursue claims to enforce restrictions on a charitable gift. *See, e.g.*, *id.* (donor's heirs had no standing to enforce restrictions); *Herzog Found.*, 699 A.2d at 998-99 (noting that "a donor who attaches conditions to his gift has a right to have his intention enforced" but the "donor's right . . . is enforceable only at the instance of the attorney general," and collecting cases

for that proposition (citations omitted)).

At least two justifications have been offered for the common law's limitation on standing to enforce charitable gift restrictions. The first derives from the nature of a charitable gift: in completing a gift, a donor surrenders dominion over the donated property and devotes it to an institution or purpose serving the public good. *See* 38 Am. Jur. 2d Gifts § 67 (unless subject to an express condition, a gift becomes "irrevocable once transferred to and accepted by the donee."). Thus, absent retention of a reversionary interest, the law has traditionally held that donors and their heirs do not have a legal interest in a completed gift that could confer standing. *See, e.g.*, *Smith v. Thompson*, 266 Ill. App. 165, 169 (Ill. Ct. App. 1932) ("Where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him have any standing in a court of equity as to its disposition and control." (citation omitted)); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 641 (1819) (donors "have parted with the property bestowed upon [the donee], and their representatives have no interest in that property"); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 Ga. L. Rev. 1183, 1197 (2007) (noting that standing limitation "derives from a view of the transaction as a property interest—and donated property is simply no longer the settlor's").[18] And, because the class of beneficiaries of a charitable gift

[18] This is consistent with how the concept of a charitable gift is treated under the tax law, which generally requires a surrender of control to qualify for the tax benefits of making a gift. *See, e.g.*, *Macklem v. U.S.*, 757 F. Supp. 6, 8 (D. Conn. 1991) (noting that "[b]y definition, a 'completed gift' is a donation that is placed beyond the dominion and control of the donor" and finding that donor's exercise of "dominion and control over the [gift] funds . . . precludes a finding that there was a charitable gift").

or trust who might have an interest in the enforcement of the terms or restrictions on a gift is often indeterminate and shifting, the common law has designated the attorney general as the appropriate official to represent the public's interests.[19]

The second rationale on the limitation on standing has been to shield charitable institutions and trusts from vexatious litigation. *See, e.g.*, *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019, 1025-26 (Ariz. Ct. App. 2004) (noting standing limitation's roots in concern with "vexatious litigation that would result from recognition of a cause of action by any and all of a large number of individuals who might benefit incidentally" from a charitable trust or gift); *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 756 (N.Y. 1985) (noting that "[n]ormally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney-General in order to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter"). While this concern is most often raised in response to the prospect of opening up standing to a large class of public beneficiaries of a charitable gift or trust, it has force as well in contemplating the consequences of extending standing to distant heirs seeking to enforce claimed gift restrictions generations after the donor has died.

The paucity of case law in Vermont on donor standing should not give the Court pause in applying the established common law rule. The Vermont Supreme Court's

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[19] *See, e.g.*, *In re Nevil's Est.*, 199 A.2d 419, 422 (Pa. 1964) (as the "beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue," the state assumes the role of oversight, and "[t]he responsibility for public supervision traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers" (citation omitted)).

statement of the law in *Wilbur* on the enforcement rights of a donor and his heirs for gifts made in trust is fully consistent with the common law as it has developed in other jurisdictions—and, moreover, Vermont's courts routinely rely on case law from other states when determining the existence or extent of common law rules. *See Avery v. Avery*, 2018 VT 59, ¶ 13, 207 Vt. 570, 192 A.3d 1250 (noting reliance on Restatement and "other states' case law" where there is no Vermont law addressing an issue); *M. Ward & Co. v. Morrison*, 25 Vt. 593, 601 (1853) ("The presumption is, that upon a common law question, the common law of a sister State is the same as our own . . . ").

There is an extensive and well-developed body of common law on the question here: as a Utah court has observed, "the common-law donor-standing rule has been applied almost universally to prohibit the kinds of donative-intent claims" raised in this case. *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); *see also* Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society v. Donor Empowerment*, 58 Vand. L. Rev. 1093, 1145 (2005) ("[N]early 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.").[20] This common law standing

[20] *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

limitation has been applied to claims by donors and their heirs across a variety of causes of actions, not just those framed as actions for breach of a conditional gift.[21] *See, e.g., Siebach.*, 361 P.3d at 135-37 (affirming dismissal of claims for breach of contract, unjust enrichment, and revocation of gift on standing grounds); *Courtenay C. & Lucy Patten Davis Found. v. Colo. State Univ. Res. Found.*, 320 P.3d 1115 (Wyo. 2014) (affirming dismissal of donor claims for breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing on standing grounds).

There is one prominent case in which a court has departed from the common law's limitation on donor standing, *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001), but that case has no application here. *Smithers* concerned a $10 million gift by R. Brinkley Smithers to St. Luke's–Roosevelt Hospital Center for establishment of a treatment center for alcoholism. After Mr. Smithers' death in 1994, his widow became concerned with the Hospital's management of the donated funds and pressed for disclosure of financial statements. The Hospital ultimately was forced to disclose that it had been misappropriating funds from Mr. Smithers' endowment and using them for other purposes. Upon being notified by Mrs. Smithers, the New York Attorney General investigated and entered into an

becoming a contract, and . . . conditions on a charitable gift may be enforced only by the Minnesota Attorney General").

[21] The Court's August 4, 2023 Ruling noted that Middlebury raised standing "only to the extent this case falls under gift law as opposed to contract law." It is true that, if what were at issue were a purely private contract and not a gift, the common law limitations on standing would not apply. However, as demonstrated in the cases noted above, the fact that a donor or his heirs may seek to enforce gift restrictions in contract does not take the case out of the sweep of the common-law donor standing rule.

assurance of discontinuance with the Hospital. Mrs. Smithers, unsatisfied with the terms of the Hospital's resolution with the Attorney General, obtained appointment as Special Administrator of her husband's estate for purposes of enforcing the terms of his gift and thereafter brought suit.

After the trial court dismissed Mrs. Smithers' claims for lack of standing, the intermediate appeals court reversed in a 3-1 decision. Instrumental to the decision was the court's conclusion (based on a 1900 opinion from the New York Court of Appeals) that there was "longstanding recognition under New York law of standing for a donor such as Smithers." *Id.* at 435. The court acknowledged the existence of contrary precedent in other jurisdictions reflecting the traditional bar on donor standing, but distinguished those authorities as "not addressing the situation in which the donor was still living or his estate still existed." *Id.* The court also emphasized the fact that Mrs. Smithers had involved the Attorney General's Office, which had been less than zealous in its enforcement of the gift's terms. *Id.*

Here, unlike *Smithers*, there is no history of Vermont courts recognizing donor standing outside of cases involving express conditional gifts. Nor is Governor Mead's estate "still existing," as was the case in *Smithers*; rather, it was reopened more than a century after his death for the purpose of pursuing the present claims.[22] Even in New York, it is unlikely that courts would recognize standing for the estate of a donor

[22] The New York Appellate Division's emphasis on the fact that the donor's estate was "still existing" at the time of suit is congruent with the law governing express charitable trusts, which recognizes that a settlor's estate may have standing "during a reasonable period of estate administration." Restatement (Third) of Trusts § 94, cmt. g(3) (2012).

to sue for enforcement of gift restrictions so very long after the estate had been closed. Moreover, discovery has confirmed that the Plaintiff here made no effort to seek enforcement of the supposed restrictions on Mead's gift through the Vermont Attorney General, in contrast with *Smithers*. SUMF, ¶ 38.

Regardless, *Smithers* does not indicate any larger change in the common law on donor standing outside of New York. *See, e.g., Siebach,* 361 P.3d at 135 and n.4 (citing *Smithers* for proposition that "[a]t least one American jurisdiction has expanded the common-law rule to permit donor standing in some circumstances," but finding that the plaintiff donors lacked standing to enforce charitable gift restrictions and noting that the parties did "not argue that *Smithers* altered the general common-law rule that donors to charitable institutions lack standing to enforce their donative intent"); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 139-140 (Mo. App. Ct. 2009) (rejecting argument for expansion of common law standing on the basis of *Smithers*); Restatement of the Law, Nonprofit Organizations § 6.03 cmt. b(1) (2017) (noting that "[l]ater courts have tended to limit *Smithers* to its facts," on the grounds "that the violation of the restriction took place while the original donor was still living and involved in the affairs of the charity, that the plaintiff was granted standing only as the executrix of the donor's estate, rather than personally, and that the donor was only recently deceased at the time of the action").

In sum, given Vermont's recognition of the common-law donor standing limitation in connection with charitable gifts given in trust, *see Wilbur*, 129 Vt. at 44, 270 A.2d at 897, it is very likely that the Vermont Supreme Court would follow the

mainstream of cases applying the donor standing rule to charitable gifts generally. Those cases would require dismissal of the suit here.

C. The Bar on Donor Standing Presents a Question of Subject Matter Jurisdiction Requiring Dismissal.

As discussed above, the doctrinal basis for the common law's bar to donor standing rests on the fact that, once a gift is completed, the donor no longer retains a legal interest in the gifted property. As such, neither a donor nor a donor's estate can claim an injury in fact sufficient to support standing, depriving the Court of subject matter jurisdiction to hear donor claims. Dismissal under V.R.C.P. 12(b)(1) is therefore appropriate.

It is well established that "Vermont courts' subject matter jurisdiction is limited to 'actual cases or controversies.'" *Ferry v. City of Montpelier*, 2023 VT 4, ¶ 11, 296 A.3d 749 (citation omitted). As standing "is one of several prerequisites to satisfy the case-or-controversy requirement," it presents "a jurisdictional question" for the courts. *Id.*, ¶¶ 10-11 (citations omitted). To establish standing, a plaintiff must demonstrate: (1) injury in fact; (2) causation; and (3) redressability. *Id.* ¶ 12; *see also Parker*, 169 Vt. at 78, 726 A.2d at 480 ("Stated another way, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct, which is likely to be redressed by the requested relief.").

Plaintiff's standing turns, as many questions of standing do, on the presence of an injury in fact. An injury in fact is "defined as the 'invasion of a legally protected interest.'" *Hinesburg Sand & Gravel Co., Inc. v. State*, 166 Vt. 337, 341, 693 A.2d

1045, 1048 (1997) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)). "Determining whether plaintiff has suffered an invasion of a legally protected interest requires inquiry into the substance of plaintiff's claim," *id.*, and thus, although "[s]tanding is a substantive issue separate from the merits of a plaintiff's case," the two "are 'closely related.'" *Ferry*, 2023 VT 4, ¶ 13 (citation omitted).

Plaintiff's claims cannot make out an injury in fact. As discussed above, except in cases where a reversionary interest is retained, a gift transaction involves the surrender of all dominion over the gifted property.[23] While heirs (or even perhaps, as here, a donor's distant relatives acting through his estate) might have some personal desires relating to a gift given by a previous generation, the law does not grant them a *legal right* under the common law to pursue any claim for enforcement. For that reason, Plaintiff cannot be said to have suffered an "invasion of a legally protected interest," and the Court lacks subject matter jurisdiction to hear Plaintiff's claims. *See Hinesburg*, 166 Vt. at 341, 693 A.2d at 1048; *U.S. Bank Nat'l Ass'n v. Kimball*, 2011 VT 81, ¶ 12, 190 Vt. 210, 27 A.3d 1087 ("[A] party who is not injured has no standing to bring suit."); *Russell v. Yale Univ.*, 737 A.2d 941 (Conn. Ct. App. 1999) (affirming dismissal of suit by donors and donor's heir for lack of subject matter jurisdiction, relying on common law standing rule); *cf. Bolster v. Attorney General*, 28

[23] Indeed, modern tax law requires that a donor give up control in order to gain the attendant tax benefits. *See, e.g.*, *Fakiris v. Commr. of Internal Revenue,* 113 T.C.M. (CCH) 1555 (Tax Ct. 2017) (to qualify as a charitable gift, the "donor must completely relinquish 'dominion and control' over the contributed property; the donor may not retain any right to direct the disposition or manner of enjoyment of the subject of the gift").

N.E.2d 475, 476 (Mass. 1940) (potential beneficiary of gift had no standing because beneficiary lacked any "interest different in kind from that of the public generally, which is represented exclusively by the Attorney General" and thus "could not, legally speaking, be aggrieved").[24]

D. Affording Standing to a Donor's Estate More Than a Century After His Death Would Be Inconsistent with Recent Developments in Vermont Law Governing Charitable Gifts.

There have been significant changes to the body of law governing charitable trusts and institutions in Vermont over recent decades, foremost among them the enactment of the Uniform Prudent Management of Institutional Funds Act and the Uniform Trust Code. While introducing some liberalization of standing limitations in cases involving charitable trusts, none of these developments, if they applied to the gift at issue, would permit suit by a donor's estate under the circumstances here.

UPMIFA, enacted by Vermont in 2009, was promulgated by the Uniform Law Commission to govern the management of endowments and restricted gifts by

[24] The Court's August 4, 2023 Ruling noted that the Vermont Attorney General "has not attempted to intervene in this action or otherwise assert any *exclusive* authority to bring suit." (emphasis in original). While the absence of any attempt by the Attorney General to intervene might be relevant were donor standing a question of real party in interest—which is how the Court originally viewed the matter—it is not pertinent to the determination of the Court's subject matter jurisdiction. The fact that the Attorney General has not pursued action to vindicate the public's interests does not confer standing on private parties where it otherwise would be lacking. In *Hazen v. Perkins*, 92 Vt. 414, 105 A. 249 (1918), for example, the Vermont Supreme Court held that, although the defendant had "affect[ed] the common rights of all persons and produce[d] a common injury" by raising and lowering water levels on a public lake, such that "a remedy may be had in behalf of the state," private plaintiffs could not maintain a suit absent some "special and substantial injury, distinct and apart from the general injury to the public." *Id.*, 105 A. at 251. The fact that the Attorney General was absent from the suit *Hazen* was not considered.

charitable institutions. *See* 14 V.S.A. §§ 3411-3420. While UPMIFA would not apply to former Governor Mead's gift—the Act governs only "institutional funds," the definition of which excludes "program-related assets" like the Chapel, *see id.* § 3412(5)—it is significant in that it provides an explicit legal framework addressing what is likely the largest category of restricted gifts: gifts of funds subject to specific, donor-imposed restrictions on expenditure or management (e.g., a restricted gift for the support a specific department within a college).

In drafting UPMIFA, the Uniform Law Commission initially included a provision that would have granted a donor of a restricted gift (or their estate) the right to bring an action to "enforce the restriction on the gift," which right would terminate thirty years after the donation was completed. *See* Brody, 41 Ga. L. Rev. at 1216-17 (reproducing text of donor enforcement provision from 2002 draft of UPMIFA). However, the final version of the Act omitted the donor enforcement provision, and the notes 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.[25] Consistent with this, UPMIFA requires that an institution notify the Attorney General—but not the donor or their estate—when seeking court approval to modify an express restriction on a gift. *See* 14 V.S.A. §

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

3416(b), (c). Several courts have had occasion to examine whether UPMIFA and its predecessor (UMIFA) impacted the common law principle that donors lack standing to enforce gift restrictions, and they have uniformly concluded that the Acts left the common law's donor standing rule intact. *See Hardt*, 302 S.W.3d at 138 (holding that UPMIFA did not displace donor standing rule); *Siebach,* 361 P.3d at 137 (same); *Herzog*, 699 A.2d 995 (holding that UMIFA did not affect donor standing rule).

The other significant development in Vermont's law governing charitable gifts came with the adoption of the Uniform Trust Code in 2009, which expanded standing for suits to enforce express charitable trusts. Under the Uniform Trust Code, the parties authorized to enforce a charitable trust now include "[t]he settlor of a charitable trust, the Attorney General, a cotrustee, or a person with a special interest in the charitable trust." 14A V.S.A. § 405(c). As with UPMIFA, the terms of the Uniform Trust Code do not apply to former Governor Mead's gift, as the UTC only governs "express trusts, charitable or noncharitable." *Id.* § 102(a). Courts in other jurisdictions have rejected the notion that adoption of the UTC abrogated the common-law prohibition on donor standing for gifts not made in trust. *See Courtenay C. & Lucy Patten Davis Found.*, 320 P.3d at 1126; *Hardt*, 302 S.W.3d at 137-40.

That said, even if the gift at issue here were held in an express charitable trust, former Governor Mead's estate would lack standing. While § 405(c) extends standing to the "settlor of a charitable trust," as the Restatement (Third) of Trusts

notes, "absent contrary provision or agreement, settlor standing is 'personal,' although exercisable by . . . a deceased settlor's personal representative *during a reasonable period of estate administration*." Restatement (Third) of Trusts § 94, cmt. g(3) (2012) (emphasis added); *cf. Pet. of U.S., on behalf of Smithsonian Instn.*, No. CV 13-MC-1454 (KBJ), 2019 WL 3451394, at *12 (D.D.C. July 31, 2019) (settlor's estate and heirs have no right of enforcement absent reversionary interest). There is nothing in Vermont's statutes to suggest that settlor standing survives the settlor's death—and, if it did, the Restatement suggests it could only survive during a reasonable period of estate administration. By any stretch of the imagination, the reasonable period for administration of former Governor Mead's estate expired long before this action was filed, over a century after his death.[26]

In sum, neither the most recent enactments pertaining to charitable gifts in Vermont nor the common law, as developed in Vermont and its sister jurisdictions, would recognize standing for former Governor Mead's estate to pursue enforcement of supposed restrictions on his gift more than a century after the gift was completed. The Court accordingly should dismiss this case for lack of subject matter jurisdiction.

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[26] While § 405(c) also provides for standing by a person with a "special interest," that category pertains to fiduciaries (trustees) and beneficiaries who can establish a sufficiently concrete right to receive trust benefits, *see* Bogert's The Law of Trusts and Trustees §§ 413, 414, not to the settlor or the settlor's heirs. *See, e.g.*, Restatement (Second) of Trust § 391 (distinguishing between persons with a "special interest in enforcement of the charitable trust," who had standing to seek enforcement, and "the settlor or his heirs," who lacked standing); *but see Herzog*, 699 A.2d at 999 n.5 (noting that "the settlor of the trust may bring himself and his heirs within the 'special interest' exception to the general rule" by "expressly reserving a property interest such as a right of reverter").

CONCLUSION

The law approaches the creation and enforcement of restricted gifts with caution, and rightly so. Charitable gifts reflect an inherent deal between a community and a donor: a community receives the benefit of funds devoted to a public purpose that otherwise might have gone to purely private ends, and in turn the donor benefits by special rules that allow a gift to be made with no identified beneficiary and for a period that may extend into perpetuity, allowing the donor's wishes to be carried out long after death. *See* Susan N. Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 Alb. L. Rev. 565, 591-94 (2018) (noting that donors also garner tax benefits and public prestige through donations). This tradeoff incentivizes great acts of public charity—but it also carries with it the risk that a donor's idiosyncratic restrictions may shackle and burden the gift recipient over time. The law has traditionally guarded against these burdens by demanding clarity from a donor who seeks to restrict a gift, and by entrusting enforcement not to the donor or their heirs, but to a public officer charged with pursuing the public good.

If there ever were a case that would invite consideration of changes to these basic tenets of charitable gift law, this would not be it. The facts here are extreme, and recognizing an enforcement right on such facts would profoundly unsettle the law. Plaintiff does not simply seek to open the door for donors to enforce restrictions on gifts during their lifetimes; he effectively asks the Court to recognize standing for a donor's estate in perpetuity. If Plaintiff can step into former Governor Mead's shoes to enforce a supposed gift restriction over a century after the administration of his

estate was completed, who is to say that a motivated third party cannot revive a donor's estate two or even three centuries postmortem to do the same? And to find an enforceable, perpetual gift condition on the basis of the documentation here would entirely vitiate the law's requirement of clarity in imposing conditions, thereby encouraging litigation over even the vaguest expressions of a donor's desires.

The Court should decline to work so radical a change in the law governing charitable gifts. To allow Plaintiff's claims to proceed any further would expose the schools and countless other nonprofits in Vermont that rely on charitable donations to great uncertainty and potentially expensive and distracting lawsuits like this one—a result directly at odds with the constitutional directive that schools and charitable organizations are to be "encouraged and protected." *See* Vt. Const. Ch. II, § 68; *see also Burr's Ex'rs v. Smith*, 7 Vt. 241, 280 (1835) ("It has always been the practice in this state, and may be considered as their settled policy, to encourage voluntary associations for public, pious and charitable purposes."). For all of the reasons set forth above, the undisputed facts confirm that former Governor Mead, in making his generous gift to the College, did not impose any legally binding obligation to maintain the Mead name on the Chapel in perpetuity. Middlebury is entitled to judgment on that basis, and independently on the ground that Mead's estate lacks standing to pursue the claims asserted here.

Dated at Burlington, Vermont, this 29th day of April, 2024.

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