IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GAMMA MU CHAPTER OF KAPPA ALPHA THETA FRATERNITY, *et al.* *Plaintiffs*,	*	
v.	*	No. 8:24-cv-00992-DLB
JAMES BOND, *et al.* *Defendants*.	*	

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Respectfully submitted,

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Defendants University of Maryland, College Park (the "University"), James Bond, James McShay, Patricia Perillo, and Darryll Pines (the "University employees") (collectively, "Defendants"), submit this memorandum of law in support of their Motion to Dismiss.

INTRODUCTION

Plaintiff Gamma Mu Chapter of Kappa Alpha Theta Fraternity ("Gamma Mu") is a member of the University's Panhellenic Association ("PHA"). Plaintiffs Jane Does 1-6 are students at the University and members of Gamma Mu.

On March 13, 2024, members of the University's Interfraternity Council ("IFC") commenced a related action in this Court (Case No. 8:24-cv-00753-DLB, referred to herein as the "IFC Action")[1] and filed a Motion for Temporary Restraining Order and Preliminary Injunction (IFC Action, ECF No. 2), in which they sought a court order requiring the University to lift its

[1] Because this case involves the same issues and claims as the IFC Action, Defendants intend to file a motion to consolidate this case with the IFC action. Counsel for Plaintiffs has indicated that Plaintiffs will not oppose such a motion.

March 1 and March 6, 2024, orders imposing a temporary restriction (or pause) on new member recruitment activities and social events involving alcohol in all IFC and PHA chapters. On March 15, 2024, the University lifted the orders and Gamma Mu was free to resume its normal recruiting and social activities. Consequently, on March 15, 2024, the IFC plaintiffs withdrew their Motion for Temporary Restraining Order and Preliminary Injunction, recognizing that "Defendants rescinded their system-wide restrictions imposed on all [IFC] and [PHA] organizations at the University . . . ." which rendered Plaintiffs' Motion "moot." ECF No. 16.

Despite the University lifting the March 1 and 6 orders, Plaintiffs now ask the Court to issue a declaratory judgment that Defendants violated Plaintiffs' constitutional rights by issuing the temporary restrictions and order prospective injunctive relief prohibiting the University from imposing similar restrictions in the future. ECF No. 1. However, where, as is the case here, there is no live case or controversy and the Plaintiffs have already been afforded the relief sought (*i.e.*, the recission of the March 1 and 6 orders), the case is moot and should be dismissed for lack of jurisdiction. Likewise, because there is no ongoing violation of federal law, Plaintiffs' request for a declaratory judgment and prospective injunctive relief should be denied. Additionally, Plaintiffs' claims against the University and the University employees in their official capacities are barred by Eleventh Amendment and state sovereign immunity, and Plaintiffs' claims against the University employees in their individual capacities are barred by the doctrine of qualified immunity.

For these reasons, as well as those discussed below, the Court should dismiss Plaintiffs' complaint.

STATEMENT OF FACTS

Relevant Policies Applicable to Council Chapters and their Members

The University recognizes eligible fraternities and sororities, also known as chapters, as student organizations. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 2.[2] The University's chapters are governed by four councils: the IFC, the PHA, the Multicultural Greek Council, and the National Pan-Hellenic Council. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 2. The vast majority of University students who are members of Greek organizations are members of chapters governed by the IFC and the PHA. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 2. These chapters generally engage in recruitment activities for a period of six to eight weeks beginning in or around February of each year. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 2.

[2]As discussed below, Defendants move to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that this case is moot, thereby depriving the Court of subject matter jurisdiction. Additionally, the Court lacks subject matter of jurisdiction over Plaintiffs' claims to the extent they are barred by Defendants' Eleventh Amendment and state sovereign immunity. In deciding a Rule 12(b)(1) motion, "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citation omitted). Defendants also move to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6). Although the Court does not generally consider extrinsic evidence in connection with a Rule 12(b)(6) motion, it "may consider, without converting the motion to dismiss into one for summary judgment . . . documents attached to a motion to dismiss if the document is integral to the complaint and there is no dispute about the document's authenticity." *Faulkenberry v. U.S. Dep't of Def.*, 670 F. Supp. 3d 234, 249 (D. Md. 2023) (citations and internal quotation marks omitted). Here, Plaintiffs' complaint references some of the exhibits to Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction in the IFC Action (IFC Action, ECF No. 12). *See* Compl. at ¶¶ 20-23; 28-29. Accordingly, such exhibits are integral to Plaintiffs' complaint and their authenticity is not disputed. Moreover, to the extent that an exhibit to Defendants' Opposition is not deemed integral to the complaint, the Court can take judicial notice of such records. *See Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015) ("[A] court may properly take judicial notice of 'matters of public record' and other information that, under Federal Rule of Evidence 201, constitute 'adjudicative facts.'") (citations and footnote omitted).

University students and student organizations, including chapters, are subject to the University's Code of Student Conduct (the "Code of Conduct"). Compl. at ¶¶ 20-23; IFC Action, ECF No. 12-2. The Code of Conduct strictly forbids, among other things, students and student organizations from engaging in hazing, defined by the University's Policy and Procedures on Hazing. IFC Action, ECF No. 12-2 at 5; IFC Action, ECF No. 12-3. The Code of Conduct also prohibits the unauthorized use or possession of any controlled substance or illegal drug, providing alcohol or alcoholic beverages to underage persons, and the illegal consumption or possession of alcohol. IFC Action, ECF No. 12-2 at 5-6. Additionally, the Code of Conduct prohibits the failure to comply with a directive of University officials. IFC Action, ECF No. 12-2 at 7.

The Code of Conduct contains the process for the University's review of student conduct, including that of student organizations. That process commences when the Office of Student Conduct ("OSC") receives and reviews a referral[3] alleging a violation of the Code of Conduct. IFC Action, ECF No. 12-2 at 9. OSC determines what steps to take in response to the referral, if any, including whether to impose interim measures. IFC Action, ECF No. 12-2 at 9-10. The Code of Conduct authorizes OSC to impose, as an interim measure, a cease and desist notice to student organizations, including chapters, "whose continued operation poses a threat to the health and safety of the University community." IFC Action, ECF No. 12-2 at 10. The Code of Conduct further states:

> Directives to Cease and Desist may be effective immediately without prior notice to the Student Group or Student Organization if there is evidence that the continued presence and operation of the Student Group or Student Organization poses a substantial threat to the health and safety of their members or others in the community (e.g., hazing allegation).

[3] A "referral" is defined as a report, complaint, or allegation of prohibited conduct against a student, student group, or student organization. IFC Action, ECF No. 12-2 at 3.

IFC Action, ECF No. 12-2 at 10. The Code of Conduct also allows OSC to institute no contact orders in response to a referral. IFC Action, ECF No. 12-2 at 10. "No Contact Directives are effective immediately without prior notice to Students whenever there is evidence that the continued interaction of the Student with other particular members of the University community poses a substantial threat to themselves or others, or to the stability and continuation of normal University operations including but not limited to individuals' educational or work environments." IFC Action, ECF No. 12-2 at 4.

The Code of Conduct further provides that OSC can conduct preliminary interviews in response to a referral. There is no requirement that any written notice of complaints be provided to a party prior to a preliminary interview; rather, the allegations can be discussed during the initial meeting. IFC Action, ECF No. 12-2 at 10.

The University Received Multiple Reports Alleging Violations of the Code of Conduct by Council Chapters and Issued Limited Temporary Restrictions to Chapter Members

On or around February 22, 2024, OSC received two referrals alleging Code of Conduct violations by Fraternity 1[4], a member of the IFC. IFC Action, ECF 12-1, Bond Aff. at ¶ 5. Specifically, a resident director reported that, during residence inspections on February 20, 2024, he found multiple prohibited substances and drug paraphernalia in the fraternity house of Fraternity 1. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 5. OSC also received an anonymous report from a parent that their son was being subjected to harmful hazing by Fraternity 1, including being required by the chapter to stay outside in the cold for several hours on the evening of February 21, 2024, which necessitated a trip to the University Health Center for suspected hypothermia,

[4] Fraternity 1 is not a party to this proceeding. To protect the privacy of third-party chapters, the University will identify them as Fraternity 1, Fraternity 2, etc.

cleaning the off-campus houses of chapter members (known as "satellite houses"), and scrubbing floors until 2:30 am. Compl. at ¶ 29; IFC Action, ECF No.12-1, Bond Aff. at ¶ 5; IFC Action, ECF No. 12-4. Following OSC's receipt of these referrals, on February 27 and 28, 2024, OSC interviewed members of Fraternity 1, who provided inconsistent and apparently false statements to OSC investigators. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 6.

On the evening of February 27, 2024, OSC received an anonymous email referral alleging that multiple unidentified fraternities[5] were engaged in hazing activities with new members, including: new members being beaten with a paddle; being burned with cigarettes and torches; having to lie on nails; "[b]eing forced to consume things that are not food (an alive fish, chewing tobacco, urine)"; being spit on; and being forced to clean chapter members' residences. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 7; IFC Action, ECF No. 12-5. The anonymous reporter also alleged to have personally experienced:

> Being forced to attend a "Line Up" at which they abuse you for hours on end (5 in my experience) where they force you to wall sit, do push ups, plank, intentionally harm oneself, be naked/in underwear for the purpose of public humiliation, and be physically assaulted. At one of these events one individual passed out as they refused to provide us with water and forced us to drink straight vodka and they did nothing to help him, in fact they hit him in the face with a plastic bat and poured beer on him until he woke up.

IFC Action, ECF No. 12-5.

As a result of the serious nature of the alleged widespread conduct described in the February 27, 2024, referral, Kevin Pitt, Assistant Dean of Students, Tyler Huddleston, Assistant Director, Advising and Programming, and Dr. James McShay, Assistant Vice President, Division of Student Affairs, met with the chapter presidents on the evening of Thursday February 29, 2024,

[5] The author referred to having spoken with 20 members in at least eight different unidentified chapters. IFC Action, ECF No. 12-5.

to address the allegations described in the February 27, 2024, referral and to reinforce the University's policies prohibiting hazing and alcohol use. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 2; Compl. at ¶ 30. Mr. Pitt presented a general overview of the concerns raised in the February 27 referral, including that there were allegations of widespread physical abuse and dangerous rituals, severe mental and emotional distress, financial exploitation and forced labor, drug and alcohol abuse, and a general atmosphere of fear and intimidation. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 3. Mr. Pitt specifically mentioned that there were allegations of "line-ups" and bodily harm, including some involving human waste, and that the allegations included criminal acts that are against Maryland law[6] and University policy. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 3. During this meeting, chapter leadership was advised that the University would take action in response to further allegations of prohibited conduct, including a pause of new member activities across one or all of the councils. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 4. Mr. Pitt, Mr. Huddleston, and Dr. McShay offered chapter leadership the opportunity to ask questions and several chapter leaders posed questions about the process. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 5. The administrators also distributed index cards and offered chapter leaders the opportunity to confidentially seek support for chapters (their own or others) that may need assistance in addressing hazing activities and harmful traditions. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 5. Finally, the administrators encouraged chapter leaders to contact them via email following the meeting with questions or concerns. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 5. The chapter leaders and members at the meeting did not provide any additional substantive information that suggested that they were not engaged in the alleged misconduct, nor did they provide further

[6] Hazing is a misdemeanor offense under Maryland law, subject to imprisonment of up to six months, a fine not to exceed $500, or both. Md. Code Ann., Crim. Law § 3-607.

information to clarify which fraternities or sororities were responsible for the allegations. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 5. None of the fraternity or sorority leaders contacted Mr. Pitt in the days after the meeting, by e-mail, phone, or in person. IFC Action, ECF No. 12-6, Pitt Aff. at ¶ 6.

Several hours after meeting with the chapter presidents about inappropriate conduct, in the early morning hours of March 1, there were two separate incidents of alcohol transports[7] involving excessive alcohol consumption by new members of PHA sororities who had reportedly attended chapter events on the evening of February 29, 2024. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 9. OSC received referrals relating to these incidents on Friday March 1, 2024. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 9. Additionally, in the morning of March 1, OSC received an anonymous referral from the mother of a new member of Fraternity 2 alleging hazing by the chapter, including locking new members in the basement and breaking glass on the floor for the new members to clean up. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 10; IFC Action, ECF No. 12-7. OSC also reviewed data from the University's Health and Counseling centers and found there was a troubling uptick in visits to both centers by IFC and PHA chapter members during the month of February. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 11; IFC Action, ECF No. 12-8.

Based on the totality of information received by the University as of Friday March 1, and concerns about ongoing violations of the Code of Conduct relating to hazing and alcohol and drug use, OSC determined that immediate action was warranted to prevent harm to the University's students, particularly since it was anticipated that there would be many recruiting activities and social events by the chapters during the coming weekend. IFC Action, ECF No. 12-1, Bond Aff.

[7] An "alcohol transport" is an incident where a student is transported off campus by an emergency responder to a healthcare facility due to excessive alcohol consumption. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 8.

at ¶ 12. Consequently, OSC determined that it would place a *temporary* cease and desist order, consistent with the Code of Conduct, relating to two specific activities by chapters: (1) hosting social events where alcohol is served; and (2) conducting new or prospective member activities. Compl. Ex. D. Because the February 27 referral alleged widespread hazing across multiple unnamed chapters and because of the nature and extent of the other evidence described above, the cease and desist order was imposed on all IFC and PHA chapters so that the University could have an opportunity to thoroughly but expeditiously investigate the allegations and identify specific chapters, if any, that were allegedly involved in hazing. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 12. The intent of the no-contact restriction was to protect vulnerable freshmen or sophomores who were new or prospective members of chapters from being subjected to hazing as well as to maintain integrity in the investigation of the serious allegations in the February 27 referral. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 12.

On March 6, in response to questions regarding the applicability of the no-contact order to non-Greek-letter organization-related matters, OSC issued a clarification that the only prohibited contact with new or prospective members was contact relating to Greek-letter organization-related activities and, therefore, communications about, for example, University course-work, employment operations, or any other matter unrelated to Greek-letter organization-related activities was not prohibited. Compl. Ex. E.

The University Promptly Engaged an Outside Firm to Investigate the Allegations of Misconduct and, on March 15, 2024, Lifted the Temporary Interim Measures

Following the decision to implement interim measures on March 1, the University promptly engaged INCompliance, an outside consulting firm, to interview students to gather information about chapter activities during the preceding weeks. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 13; IFC Action, ECF No. 12-9. Beginning on March 11, investigators interviewed more

than 150 chapter members regarding their experiences with Greek life on campus. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 14. As of the afternoon of March 15, INCompliance's preliminary fact-finding investigation had concluded, and the University lifted the interim measures imposed in the March 1 and 6, 2024, notices. IFC Action, ECF No. 12-10. In a campus-wide email sent at 4:11 pm on March 15, 2024, Patricia Perillo, Vice President for Student Affairs, notified the University community that, "[e]ffective immediately, we are lifting the temporary pause on new member and alcohol-related activities, and related no-contact orders which the University issued on March 1, 2024. Thirty-two IFC and PHA chapters are cleared to return to normal activities." IFC Action, ECF No. 12-10.[8]

To date, the University has not reinstated the temporary interim measures imposed by the March 1 and March 6, 2024, orders.

LEGAL STANDARD

Under Rule 12(b)(1), Plaintiffs bear the burden of proving the existence of subject matter jurisdiction. *Demetres v. E. W. Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015). "When a defendant makes a facial challenge to subject matter jurisdiction, 'the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.'" *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). The Fourth Circuit has affirmed that sovereign immunity is a jurisdictional bar. *See Cunningham v. Gen. Dynamics Info. Tech., Inc*., 888 F.3d 640, 649 (4th Cir. 2018) ("sovereign

[8] As a result of evidence the University obtained suggesting involvement in, or responsibility for, hazing or other incidents that threatened the health and safety of the campus community, the University continued its investigation of five IFC chapters, pursuant to the Code of Conduct. IFC Action, ECF No. 12-10. Plaintiffs, however, were free to resume their normal activities on March 15, 2024.

immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction.") (quoting *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009)); *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.").

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the Court is required to "'take the facts in the light most favorable to the plaintiff,'" the Court "need not accept legal conclusions couched as facts or 'unwarranted inferences, unreasonable conclusions, or arguments.'" *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (internal citation omitted)). "The mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive" a motion to dismiss. *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citing *Iqbal*, 556 U.S. at 678).

Qualified immunity is an "immunity from suit rather than a mere defense to liability" and thus should be decided "at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (internal citations omitted). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

ARGUMENT

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED AS MOOT.

Article III of the U.S. Constitution limits the Court's jurisdiction to cases and controversies. *Eden, LLC v. Justice*, 35 F.4th 166, 169 (4th Cir. 2022) (citations omitted). "The mootness doctrine is an important part of that limitation, preventing [courts] from advising on legal questions 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* (quoting *Fleet Feet, Inc. v. NIKE, Inc.*, 986 F.3d 458, 463 (4th Cir. 2021)); *see also Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, 843 F.3d 583, 588 (4th Cir. 2016) ("[A] case is moot when 'our resolution of an issue could not possibly have any practical effect on the outcome of the matter.'") (quoting *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010)). "This is so even though such case presented a justiciable controversy at an earlier point in time and an intervening event rendered the controversy moot." *Int'l Coal. for Religious Freedom v. State of Maryland*, 3 F. App'x 46, 49 (4th Cir. 2001) (citing *Calderon v. Moore*, 518 U.S. 149, 150 (1996)).

Plaintiffs' complaint is moot because it is undisputed that the University lifted the temporary interim measures at issue on March 15, 2024. Compl. at ¶ 58; IFC Action, ECF No. 12-10. Moreover, although Plaintiffs vaguely assert that Defendants continue to violate their constitutional rights, they do not allege that the interim measures were reinstated at any time after March 15, 2024, or that other, unconstitutional restrictions were imposed on Plaintiffs after that date. Nor do Plaintiffs contest the University's ability to regulate student organizations through the Code of Conduct. Therefore, "[w]in or lose, [Plaintiffs] have already received the 'precise relief' they sought in this case: termination of the challenged . . . orders." *Eden, LLC*, 36 F.4th at 170 (citation omitted).

Additionally, although courts recognize a "voluntary cessation" exception to the mootness doctrine "when a defendant voluntarily ceases its allegedly improper behavior, if there is a reasonable chance that the behavior will resume," *id.* at 170-71, that exception does not apply here. The temporary measures challenged by Plaintiffs in this case were a direct response by the University to a specific series of events in late-February 2024, including the following:

- On February 22, 2024, OSC received an anonymous report from a parent that their son was being subjected to harmful hazing by Fraternity 1, including being forced to stay outside in the cold for several hours on the evening of February 21, 2024, which necessitated a trip to the University Health center for suspected hypothermia, cleaning satellite houses, and scrubbing floors until 2:30 am. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 5; IFC Action, ECF No. 12-4.

- On February 27, 2024, OSC received an anonymous report that multiple unidentified fraternities were engaged in life-threatening hazing activities with new members, including being beaten with a paddle, being burned with cigarettes and torches, having to lie on nails, being forced to consume a live fish, chewing tobacco and urine, and being forced to drink alcohol. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 7; IFC Action, ECF No. 12-5.

- On March 1, 2024, there were two separate incidents of alcohol transports involving new members of PHA chapters who had reportedly attended chapter events on the evening of February 29, 2024, only several hours after University officials held a meeting with chapter leaders to address concerns about hazing and alcohol abuse at chapter events. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 9.

- Also on March 1, 2024, OSC received an anonymous referral from a parent of a new member of Fraternity 2 alleging hazing by the chapter, including locking new members in the basement and breaking glass on the floor for new members to clean up. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 10; IFC Action, ECF No. 12-7.

- Data from the University Health and Counseling centers showed an increase in visits to both centers by IFC and PHA chapter members during the month of February. IFC Action, ECF No. 12-1, Bond Aff. at ¶ 11; IFC Action, ECF No. 12-8.

It is exceedingly unlikely that the same unprecedented confluence of events—all of which directly implicated the health and safety of new chapter members—which led to the decision to

impose the temporary measures in the March 1 and 6 orders will reoccur.[9] Thus, there is no reasonable chance that the temporary restrictions imposed in the March 1 and 6 orders will be reimposed upon Plaintiffs. *See Eden, LLC*, 36 F.4th at 170-171 (concluding that defunct executive orders issued in response to COVID-19 were not likely to be reimposed one year after they were terminated, in light of availability of vaccines and other evidence, even though the governor retained the authority to reimpose them).

Plaintiffs ask this Court to issue "an opinion advising what the law would be upon a hypothetical state of facts." *Catawba Riverkeeper Found.*, 843 F.3d at 589 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). However, courts "may only decide cases that matter in the real world," and cannot provide relief in cases that "pose only hypothetical and speculative harm." *Id.* (citation and internal quotation marks omitted). This Court cannot grant Plaintiffs the relief they seek because the University has already lifted the temporary interim measures they are challenging. Accordingly, Plaintiffs' complaint should be dismissed as moot.

II. PLAINTIFFS' § 1983 CLAIMS AGAINST THE UNIVERSITY ARE BARRED BY ELEVENTH AMENDMENT IMMUNITY.

Plaintiffs § 1983 claims against the University must be dismissed because the University is immune from such suits under the Eleventh Amendment. The University is a constituent institution of the University System of Maryland, an independent unit of the State of Maryland. *See* Md. Code Ann., Educ. §§ 12-101(b)(6)(i)(2); 12-102(a); *Maryland Stadium Auth. v. Ellerbe Becket Inc*., 407 F.3d 255, 257-58 (4th Cir. 2005) (recognizing same). As such, the University is an arm of the State and partakes of its Eleventh Amendment immunity. *See Palotai v. Univ. of*

[9] In fact, the University has implemented multiple new measures to minimize the likelihood that such events will reoccur, including establishing a Fraternity and Sorority Life Working Group and reviewing existing training programs on recruitment and alcohol-related activities. IFC Action, ECF No. 12-10.

Maryland Coll. Park, 959 F. Supp. 714, 716 (D. Md. 1997) ("The immunity that the Eleventh Amendment confers extends also to state agencies and instrumentalities. The University of Maryland is such an arm of the State partaking of the State's Eleventh Amendment immunity.") (internal quotation marks and citation omitted).

The Fourth Circuit has set forth three exceptions to a State's Eleventh Amendment immunity.

> First, "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). . . . Second, "the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004). . . . Third, "[a] State remains free to waive its Eleventh Amendment immunity from suit in a federal court." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002).

Lee-Thomas v. Prince George's County Pub. Sch., 666 F.3d 244, 249 (4th Cir. 2012). None of these exceptions is applicable in this case.

First, Congress has not abrogated States' Eleventh Amendment immunity in connection with 42 U.S.C. § 1983. *See Pennhurst*, 465 U.S. at 120 ("[I]f a § 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting any relief on that claim."); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"). "While Congress may abrogate a State's Eleventh Amendment immunity by express statutory language, it has long been settled that 42 U.S.C. § 1983, which is the ultimate basis for [plaintiff's] claim here, does not effect such an abrogation." *In re Sec'y of*

Dep't of Crime Control & Pub. Safety, 7 F.3d 1140, 1149 (4th Cir. 1993) (internal citations omitted).

Second, the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908), is also inapplicable to claims against the University. The Supreme Court has stated that "the exception is narrow: It applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146 (1993) (internal citations omitted).

Finally, although State legislatures are free to enact statutory waivers of Eleventh Amendment immunity (*see College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999)), the University has not waived its Eleventh Amendment immunity. *See* Md. Code Ann., Educ. § 12-104(i)(4) ("Nothing in this subsection shall be construed to waive or abrogate the immunity of the University System of Maryland under the Eleventh Amendment to the United States Constitution."); *Hyde v. Maryland State Bd. of Dental Examiners*, No. 1:16-CV-02489-ELH, 2017 WL 2908998, at *7 (D. Md. July 7, 2017) ("Maryland has not waived its Eleventh Amendment immunity to a [§ 1983] suit . . . in federal court.").

Because the University has not consented to being sued in federal court, and because no exception to the State's Eleventh Amendment immunity applies, the Court lacks subject matter jurisdiction over Plaintiffs' § 1983 claims against the University, and they should be dismissed with prejudice.

III. PLAINTIFFS' CLAIMS AGAINST THE UNIVERSITY EMPLOYEES IN THEIR OFFICIAL CAPACITIES FOR RETROSPECTIVE OR MONETARY RELIEF ARE BARRED BY ELEVENTH AMENDMENT IMMUNITY.

Plaintiffs also bring § 1983 claims against the University employees in their official capacities. However, any such claims "seeking monetary or retrospective damages are barred by the Eleventh Amendment." *Middlebrooks v. Univ. of Md.*, 980 F. Supp. 824, 828 (D. Md. 1997); *see Will*, 491 U.S. at 71 ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.") (citations omitted). Eleventh Amendment immunity also bars "judgments against state officers declaring that they violated federal law in the past." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, and *Ex parte Young* does not permit "compensatory or other retrospective relief" against state employees in their official capacities. *Id.* at 145. Accordingly, the Court lacks subject matter jurisdiction over § 1983 claims brought against the University employees in their official capacities seeking monetary or retrospective damages, or declaratory relief, and such claims should be dismissed with prejudice.

IV. PLAINTIFFS' CLAIMS FOR PROSPECTIVE INJUNCTIVE RELIEF SHOULD BE DISMISSED BECAUSE THERE IS NO ALLEGED ONGOING VIOLATION OF FEDERAL LAW.

In Count Six of their Amended Complaint, Plaintiffs seek a declaratory judgment declaring "the Original Order and the Amended Order, and any other similar directives Defendants believe appropriate to impose on Plaintiffs, to be unconstitutional on their face and as applied to the Plaintiffs." Compl. (ECF No. 1) at ¶ 119. In Count Five, Plaintiffs seek a permanent injunction "prohibiting Defendants from restricting Plaintiffs' speech or associational rights without predeprivation notice, an opportunity to be heard, and post-deprivation hearing rights." Compl. (ECF No. 1) at ¶ 115. Plaintiffs also request injunctive relief and a declaratory judgment against all Defendants in connection with their First Amendment and Due Process claims in Counts One

through Three. Compl. (ECF No. 1) at ¶¶ 81, 91, 103. However, because there is no alleged *ongoing* constitutional violation, Plaintiffs' claims for prospective relief are also barred by the University's Eleventh Amendment immunity.

It is undisputed that the University lifted the temporary interim measures at issue in this case on March 15, 2024. Compl. (ECF No. 1) at ¶ 58. Although Plaintiffs make the conclusory assertion that Defendants continue to violate Plaintiffs' constitutional rights, they fail to make any *factual* allegations that there are ongoing practices or policies that are violating their constitutional rights. The University's action in lifting the temporary interim measures on March 15, 2024, rendered any injunctive relief that could be sought by Plaintiffs nugatory on that date. Thus, Defendants are entitled to dismissal of all Plaintiffs' claims for prospective injunctive relief, regardless of whether such claims are couched as a request for injunctive relief or for a declaratory judgment. *See MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F. Supp. 3d 364, 372-73 (D. Md. 2020) ("Under the *Ex parte Young* exception, private litigants may sue state officials for injunctive relief or seek a declaratory judgment, so long as the relief sought is prospective in nature and *remedies an ongoing harm*.") (emphasis added); *see also Int'l Coal. for Religious Freedom*, 3. F. App'x at 49 ("[T]he limited exception to Eleventh Amendment immunity created by *Ex parte Young* provides *only* for prospective injunctive relief from a continuing violation of federal law, and not for declaratory relief for a past violation of federal law.") (emphasis in original) (citations omitted).

V. PLAINTIFFS' CLAIMS FOR MONETARY RELIEF AGAINST THE UNIVERSITY OFFICIALS IN THEIR INDIVIDUAL CAPACITIES ARE BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

To the extent that Plaintiffs seek monetary damages against the University employees in their individual capacities, such claims are barred by the doctrine of qualified immunity. The

"doctrine of qualified immunity is designed to ensure that government officials performing discretionary functions can exercise their duties 'free from the specter of endless and debilitating lawsuits.'" *Jackson v. Hogan*, 2016 WL 6680209, at *4 (D. Md. Nov. 14, 2016) (quoting *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991)). To determine qualified immunity, the Court conducts a two-pronged inquiry:

> First, we must decide ***whether a constitutional right would have been violated*** on the facts alleged. Next, assuming that the violation of the right is established, courts must consider whether the right was ***clearly established*** at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right.

Cloaninger ex. rel. Estate of Cloaninger v. McDevitt, 555 F.3d 324, 330-31 (4th Cir. 2009) (emphasis added). "Courts are 'permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'" *Hodge v. Coll. of S. Maryland*, 121 F. Supp. 3d 486, 500 (D. Md. 2015) (quoting *Pearson*, 555 U.S. at 236).

As Defendants established in their Opposition to the IFC plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, Defendants did not violate Plaintiffs' First Amendment or Due Process rights. *See* IFC Action, ECF No. 12 at 14-16 (the University imposed the least restrictive alternative possible to advance its compelling interest of promptly identifying any chapters engaging in potentially life-threatening activities, including hazing, while simultaneously protecting new or prospective members from harm pending such investigation); at 17-22 (Plaintiffs received notice and an opportunity to be heard prior to the imposition of the temporary measures and opportunities to be heard thereafter).

Even assuming *arguendo* that the temporary measures in the March 1 and 6 orders could be considered a violation of Plaintiffs' constitutional rights, the University employees are entitled

to dismissal based on qualified immunity because such rights were not "clearly established" at the time. *See Cloaninger*, 555 F.3d at 330-31. Qualified immunity shields "bad guesses in gray areas" and permits liability only "for transgressing bright lines." *Raub v. Campbell*, 785 F.3d 876, 881 (4th Cir. 2015) (citations and internal quotation marks omitted). It protects officials from "being blindsided by liability derived from newly invented rights or new, unforeseen applications of pre-existing rights." *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995).

Although the law "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017)). "Clearly established law should not be defined at a high level of generality. *Pauly*, 580 U.S. at 79 (internal quotation marks and citation omitted). "Rather, the clearly established law must be particularized to the facts of the case." *Safar v. Tingle*, 859 F.3d 241, 246 (4th Cir. 2017) (quoting *Pauly*, 580 U.S. at 79) (internal quotation marks omitted). In deciding whether a right is "clearly established," federal district courts are generally limited to "the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." *Doe ex rel. Johnson v. So. Carolina Dep't of Social Servs.*, 597 F.3d 163, 176 (4th Cir. 2010).

To the extent that any of Plaintiffs' constitutional rights were allegedly violated, such rights were not clearly established. The Supreme Court has "recognized that First Amendment rights must be analyzed in 'light of the special characteristics of the school environment.'" *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The University's "mission is education," and it possesses the "authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.* Plaintiffs do not appear to challenge the propriety of the Code of Conduct or its

application to students and student organizations, such as Plaintiffs. Rather, Plaintiffs appear to dispute whether the University had any "evidence (or even an accusation) that the continued interaction between members and new members of the Plaintiff Chapters posed a substantial threat to themselves or others or to the stability and continuation of normal University operations, as the Code of Student Conduct requires." Compl. at ¶ 56. However, it is undisputed that the University received multiple specific and credible allegations of widespread hazing and alcohol and drug abuse by multiple unidentified chapters. The University also reviewed data demonstrating that there was a significant increase in visits to the Health and Counseling centers by chapter members. IFC Action, ECF No. 12-8. There were also two alcohol transports involving excessive alcohol consumption by new members of PHA chapters who had reportedly attended chapter events on the same evening that University officials warned chapter leaders about the consequences of further violations of the Code of Conduct, including alcohol related violations. Consequently, there was ample evidence to support the University's belief that the imposition of the temporary interim measures imposed in the March 1 and 6 orders was necessary to protect the safety and health of University students.

Defendants did not violate any "clearly established" due process rights of Plaintiffs. Due process requires only "notice and a meaningful opportunity to be heard." *Iota XI Chapter of the Sigma CHI Fraternity v. Patterson*, 538 F. Supp. 2d 915, 924–25 (E.D. Va. 2008) (citing *Tigrett v. Rector & Visitors of Univ. of Va.,* 290 F.3d 620, 630 (4th Cir. 2002), *aff'd on other grounds,* 566 F.3d 138). The "process due is flexible and depends on context" *Doe v. Virginia Polytechnic Inst. & State Univ.*, 77 F.4th 231, 236 (4th Cir. 2023) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)) and "requires analysis of the governmental and private interests that are affected." *Mathews*, 424 U.S. at 334.

Here, it is questionable whether Plaintiffs can demonstrate a private, constitutionally protected interest in their current members communicating with new or prospective members about Greek life. *See, e.g., Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 444 (3d Cir. 2000), *as amended* (Nov. 29, 2000) (holding that fraternity did not have a constitutionally protected expressive association because the chapter did not take "a public stance on any issue of public political, social, or cultural importance" and "[a] few minor charitable acts do not alone make a group's association expressive . . . .").

In contrast, the University's interests are clear and significant. "[E]ducation is perhaps the most important function of state and local governments." *Goss v. Lopez,* 419 U.S. 565, 576 (1975) (quoting *Brown v. Board of Education,* 347 U.S. 483, 493 (1954)). Courts have recognized the interests of a university in "preserving . . . resources to serve its primary function of education," "protecting vulnerable witnesses," and "providing a safe environment for" students. *Walsh v. Hodge*, 975 F.3d 475, 484 (5th Cir. 2020); *Williams v. Pennsylvania State Univ.*, No. 4:20-CV-00298, 2023 WL 6626789, at *27 (M.D. Pa. Oct. 11, 2023) (noting a university has well-established interests including "maintaining safety on its campus and within its student body [as well as] a strong interest in allocating resources to best achieve its educational mission and the educational component of its disciplinary process.") (citation and internal quotation marks omitted); *Caldwell v. Univ. of New Mexico Bd. of Regents*, 510 F. Supp. 3d 982, 1052 (D.N.M. 2020) (citing cases in support of a university's interest in maintaining a safe environment and preserving its resources). Given the reports of potentially deadly and unlawful activities by multiple fraternities and sororities, and the concern that current members would pressure new members not to implicate their chapters during any investigation, Defendants had an important

interest in investigating the serious allegations of risks to students' health and safety without interference by current members and without allowing dangerous hazing activities to continue.

Because of the important interests at stake, "[i]n the academic setting particularly, the Supreme Court has recognized that the requirements of due process may be satisfied by something less than a trial-like proceeding." *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 74 (4th Cir. 1983). Imposing "even truncated trial-type procedures might well overwhelm administrative facilities . . . and . . . cost more that it would save in educational effectiveness." *Goss,* 419 U.S. at 583. Here, the fraternities and sororities had notice of the allegations during the meeting on February 29 and an opportunity to comment on them and provide additional information during that meeting and afterwards, including anonymously. Given the limited duration and scope of the University's restriction, this was sufficient to meet basic due process requirements.

The IFC plaintiffs did not cite any cases in their Motion for Temporary Restraining Order and Preliminary Injunction, and Defendants are unaware of any case, suggesting that it is unconstitutional for university officials to impose a temporary pause on some fraternity and sorority activities while they investigate allegations of serious incidents of hazing, alcohol abuse, and other dangerous activities that threaten the health and safety of the students. Plaintiffs acknowledge that the University is authorized to conduct investigations into serious allegations of hazing and that it can impose interim and permanent sanctions on chapters that have engaged in such activities. Moreover, institutions are obligated to keep their campuses safe from unreasonable risks that are foreseeable (*i.e.*, of which they knew or should have known), *see Rhaney v. Univ. of Md. E. Shore*, 388 Md. 585, 601-02 (2005), and the University acted reasonably in taking action to reduce foreseeable risks of harm to students connected with hazing

activities. Accordingly, in the absence of any clearly established law holding that the University's actions were unconstitutional, and in light of the University's responsibility to act reasonably to address known risks, the University employees are entitled to qualified immunity.

VI. PLAINTIFFS' STATE CONSTITUTIONAL CLAIM SHOULD BE DISMISSED.

In Count Four, Plaintiffs allege freedom of speech and freedom of association violations under Article 40 of the Mayland Constitution's Declaration of Rights ("Article 40"). Article 40 is read generally in *pari materia* with the First Amendment. *Nefedro v. Montgomery County*, 414 Md. 585, 592 n.5 (2010). Therefore, for the reasons that Defendants have not violated the First Amendment, they have not violated Article 40.

In addition, Plaintiffs' Article 40 claims should be dismissed because they are barred by the State's Eleventh Amendment and sovereign immunity. A claim against the State for money damages for violation of the Maryland Declaration of Rights is a tort claim and is subject to the Maryland Tort Claims Act, State Gov't §§ 12-101 – 12-110 and Cts. & Jud. Proc. § 5-522. *See, e.g.*, *Lee v. Cline*, 384 Md. 245, 256 (2004). The Maryland General Assembly has not waived Eleventh Amendment immunity for tort claims. *See* Md. Code Ann., State Gov't § 12-103(2) (stating that the Maryland Tort Claims Act does not "waive any right or defense of the State or its units, officials, or employees in an action in a court of the United States or any other state, including any defense that is available under the 11th Amendment to the United States Constitution"); *Carter v. Bowie State Univ.*, No. GJH-20-2725, 2022 WL 717043, at *10 (D. Md. Mar. 9, 2022) (dismissing remaining state law claims against University and several of its employees "[b]ecause Maryland has not waived its Eleventh Amendment Immunity to suit" in federal court); *Bumgardner v. Taylor*, No. CV RDB-18-1438, 2019 WL 1411059, at *6 (D. Md. Mar. 28, 2019) (dismissing state law claims against state agency and individual defendants in their

official capacities as barred by the doctrine of sovereign immunity, "as they are akin to claims asserted against" the state agency itself, despite fact that Maryland law does not distinguish between "official capacity" and "individual capacity" for state constitutional claims).[10]

The University employees are also entitled to immunity for state law tort claims pursuant to Section 5-522(b) of the Courts and Judicial Procedures Article, which provides that "State personnel . . . are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence . . . ." Plaintiffs fail to allege any facts that the University employees acted with malice or gross negligence. "To establish malice, a plaintiff must show that the government official 'intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.'" *Nero v. Mosby*, 890 F.3d 106, 127 (4th Cir. 2018) (*quoting Bord v. Baltimore County*, 220 Md. App. 529, 555 (2014)). "A government official commits gross negligence 'only when he or she inflicts injury intentionally or is so utterly indifferent to the rights of others that he or she acts as if such rights did not exist.'" *Nero*, 890 F.3d at 128 (*quoting Cooper v. Rodriguez*, 443 Md. 680, 708 (2015)). Plaintiffs do not allege any facts that Defendants' decision to implement the temporary interim measures was improperly motivated.

Accordingly, the Court should dismiss Plaintiffs' state law claims against the University employees as barred by Eleventh Amendment and state sovereign immunity.

[10] Plaintiffs have also failed to properly effect service of their Article 40 claim against the University by serving the State Treasurer. *See* Md. Code Ann., State Gov't § 12-108(a).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Respectfully submitted,

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