IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALPHA PSI CHAPTER OF THETA CHI FRATERNITY, *et al.* Plaintiffs, v. JAMES BOND, *et al.* Defendants.	:	No. 8:24-cv-00753-DLB
GAMMA MU CHAPTER OF KAPPA ALPHA THETA FRATERNITY, *et al.* Plaintiffs, v. JAMES BOND, *et al.* Defendants.	:	No. 8:24-cv-00753-DLB

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT OF PLAINTIFFS, GAMMA MU CHAPTER OF KAPPA ALPHA THETA FRATERNITY AND JANE DOES 1-6

Plaintiffs, the Gamma Mu Chapter of Kappa Alpha Theta Fraternity (the "Chapter"), and Jane Does 1–6 (the "Jane Doe Plaintiffs") (collectively, "Plaintiffs"), hereby submit this Response in Opposition to Defendants' Motion to Dismiss Plaintiffs' Compliant (the "Motion to Dismiss").

I. INTRODUCTION

On March 1, 2024, the University of Maryland issued a "guilt-by-association" type of directive to all members of certain fraternities and sororities that prohibited them from communicating with each other, including biological siblings, roommates, classmates, and significant others, about any and all topics. The University also banned most fraternal activity, despite charging no students or organizations with any actual violations of the University's policies. Essentially, Defendants implemented an overly broad directive to address a problem they never had, and did so using a method that did not confer any meaningful benefit on the University

community. Of importance here, Defendants' actions inflicted substantial harm to the constitutional rights of thousands of undergraduate students.

Remarkably, the University admits that no substantial or unresolved allegations were received about *any* sororities in the days or weeks leading up to Defendants decision to limit the Plaintiffs' First Amendment rights without due process. Instead, they cited anonymous, unsubstantiated, fantastical complaints about unidentified *fraternities* to justify their actions, claiming those *fraternity* concerns somehow also indicated a real threat to the safety and wellbeing of *sorority* members.

Without recognizing the impropriety of its actions, Defendants now seek to dismiss Plaintiffs' claims, arguing the case is moot because they eventually lifted the cease and desist directive after litigation was initiated. Not only do Defendants fail to properly identify the relief sought in Plaintiffs' Complaint, but Defendants seem to believe they can infringe upon clearly established constitutional rights without repercussion so long as they lift their unlawful directives before this Court can rule on challenges to such directives.

This behavior should not be rewarded, especially when Defendants have claimed they would like their actions to become a model for other universities around the nation. For these reasons, Defendants' Motion to Dismiss (ECF No. 21) should be denied, ensuring that public universities protect campus communities without simultaneously violating students' rights.

II. LAW AND ARGUMENT

a. Standard of Review

The Defendants move to dismiss Plaintiffs' Complaint under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted.

When a defendant makes a facial challenge to subject matter jurisdiction under Rule 12(b)(1), the plaintiff is afforded the same procedural protections as under Rule 12(b)(6), meaning the facts alleged in the complaint are taken as true. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). If the complaint alleges sufficient facts to invoke subject matter jurisdiction, the 12(b)(1) motion must be denied. *Id.*

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint, not to resolve factual disputes, the merits of a claim, or defenses. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243–44 (4th Cir. 1999) (quoting *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)). A complaint must only be plausible on its face, meaning it must contain factual content that allows the court to reasonably infer the defendant's liability. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). When considering a Rule 12(b)(6) motion, courts must examine the complaint as a whole, accept factual allegations as true, and construe those facts in the light most favorable to the plaintiff. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); L*ambeth v. Bd. of Comm'rs of Davidson Cnty*., 407 F.3d 266, 268 (4th Cir. 2005).

Generally, courts cannot consider documents outside the pleadings to resolve factual disputes at the motion to dismiss stage. *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007). Courts may, however, review documents attached or incorporated into the complaint, as well as those attached to a motion to dismiss, but only if they are integral to the complaint *and* their authenticity is not challenged. *Philips v. Pitt Cnty. Memorial Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Pasternak & Fidis P.C. v. Recall Total Info. Mgmt., Inc.*, 95 F. Supp. 3d 886, 894 (D. Md. 2015).

b. The Matter is Not Moot.

As Defendants acknowledge, there are exceptions to mootness, including the voluntary cessation doctrine. The voluntary cessation exception seeks to prevent a manipulative litigant from immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal, and then reinstating it immediately after. *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017).

As such, a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. Without that rule, courts would be compelled to leave a defendant free to return to his old ways. *Kobe v. Haley*, 660 Fed. App'x 281, *30–*31 (4th Cir. 2016). Stated differently, a case that would otherwise be moot is not moot if the underlying dispute is capable of repetition, yet evading review. *Id.* And the voluntary cessation of allegedly illegal conduct does not deprive a tribunal of the power to hear and determine a case so long as a dispute over the legality of the challenged practices remains. *Rivero v. Montgomery Cnty.*, 259 F. Supp. 3d 334, 341 (D. Md. 2017) (finding that, if it still can be said that the plaintiff suffered, or is threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision, the case is not moot).

Importantly, the party asserting mootness bears the "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to start up again. *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014). A defendant fails to meet its heavy burden when it retains the authority and capacity to repeat an alleged harm. Thus, for a claim to be moot after a defendant voluntary ceases a challenged practice, it must be clear that the defendant considers itself barred from reinstating the rescinded policy. *Porter v. Clarke*, 852 F.3d 358, 365 (4th Cir. 2017) (finding the voluntary cessation exception applied when nothing barred the Corrections Department from

reverting to the challenged policies in the future); *see also Wall*, 741 F.3d at 497 (explaining that the voluntary cessation exception applied when nothing suggested the defendant was barred or considered itself barred from reinstating the challenged policy).

Here, Defendants have not met their burden of showing that, if Plaintiffs' claims are dismissed, Defendants would not simply reverse course and repeat the challenged conduct. Defendants only lifted the directive after a lawsuit was filed challenging the constitutionality of the original directive(s). Importantly, the voluntary cessation conveniently occurred in the period of time between when a motion for a temporary restraining order was filed and when this Court set a date for argument on the motion. Defendants have not acknowledged any wrongdoing or assured that they will not infringe Plaintiffs' constitutional rights again.

To the contrary, as stated in the Complaint, Defendants have celebrated their behavior, believing their actions were appropriate. (ECF No. 1, ¶ 62.) Defendants have gone so far as to publicly encourage other universities to adopt Defendants' same approach for handling unsubstantiated, dubious, anonymous complaints about fraternities. (*Id.* at ¶ 63.) This stance suggests that Defendants are likely to repeat their actions if faced with similar complaints in the future, such as during the upcoming fall recruitment.

And even if Defendants were to publicly acknowledge that their actions were improper—which they have not done—such declarations would not moot this suit. *See Wall*, 741 F.3d at 498 ("Bald assertions of a defendant… that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot."). Lifting the cease-and-desist directive or discussing future mitigation efforts does not resolve the issues before the Court. Defendants have not prohibited UMD employees from imposing similar restrictions in the future and have shown no intent to refrain from similar actions.

Defendants' Motion to Dismiss lacks any assurance that they will not reinstate the directive if similar circumstances arise. They have not provided evidence that their practices—of engaging in blatant viewpoint discrimination, by restricting student speech based on speaker identity and content, and failing to provide any semblance of due process before or after infringing upon constitutional rights—have ended permanently. Instead, Defendants' avid defense of their cease and desist directive(s) and refusal to lift the restrictions until after litigation was filed to challenge the misconduct suggests this is more than likely to be repeated. (ECF No. 1, ¶ 59.) Therefore, the matter is not moot.

c. Defendants are Not Entitled to Eleventh Amendment Immunity.

Defendants assert that the Eleventh Amendment bars all of Plaintiffs' claims against the University and all individual, official-capacity Defendants.[1] Courts across the country have consistently rejected this argument, and the outcome should not be any different here.

While the Eleventh Amendment bars most claims against a public university and its representatives acting in their official capacities, "it does not thwart the claims against the officials in their official capacities" for injunctive relief. *Keerikkattil v. Hrabowski*, No. WMN-13-2016, 2013 U.S. Dist. LEXIS 135331, at *12 (D. Md. Sep. 23, 2013). Rather, under the doctrine of *Ex Parte Young*, a suit for prospective injunctive relief is not deemed a suit against the state and thus is not barred by the Eleventh Amendment. *Id.* It is irrelevant whether the University has consented to be sued for damages in federal court.

The U.S. Supreme Court previously held that "in determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a

[1] Defendants appear to concede that "state officials who are sued in their personal capacity are not protected by the Eleventh Amendment, regardless of the recovery sought." *Middlebrooks v. Univ. of Maryland at College Park*, 980 F. Supp. 824, 828 (D. Md. 1997).

'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255–56 (2011) (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). To this end, a court does "not consider the merits of the plaintiff's claims; it is enough that the complaint *alleges* an ongoing violation of federal law." (Emphasis in original.) *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005).

Further, in another federal case against a public university in which a plaintiff brought suit for various infringements of constitutional rights, the court noted:

> This request for injunctive relief is permissible because the Plaintiff "**can obtain injunctive relief against the university**, since official-capacity suits against state officials that seek only injunctive relief are permitted by 42 U.S.C. § 1983, and not forbidden by the Eleventh Amendment."

(Emphasis added.) *Doe v. Purdue Univ.*, No. 4:19-CV-00056-TLS-JPK (N.D. Ind. June 1, 2020), at *27 (citing *Power v. Summers*, 226 F.3d 815, 819 (7th Cir. 2000)).

Here, because the Complaint includes a specific request for injunctive relief against Defendants, the case can and should proceed against all Defendants. *See Complaint, Request for Relief*. (ECF No. 1, at 18.) Further, Plaintiffs' Complaint clearly indicates that the claims are asserted against Defendants in their official capacities, not just their individual capacities. Moreover, the Complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. (*Id.* at ¶¶ 60–61; 64–67; 69.) As such, the *Ex Parte Young* doctrine applies to avoid an Eleventh Amendment bar to suit.

Because the Eleventh Amendment does not apply as a bar to Plaintiffs' federal claims in this case—and therefore the Court has jurisdiction over Plaintiffs' federal claims—it also has supplemental jurisdiction over all other claims that arise out of the same case or controversy as the

claims that establish federal question jurisdiction. *See Marcas, L.L.C. v. Bd. of Cnty. Comm'rs*, 817 F. Supp. 2d 692, 730 (D. Md. 2011). Accordingly, Plaintiffs' state law claims are also not subject to dismissal.

d. Defendants are Not Entitled to Qualified Immunity.

Defendants also assert qualified immunity as a defense to bar suit against the individual Defendants in their personal capacities. Qualified immunity, an affirmative defense, protects governmental representatives acting in their personal capacities from federal claims when they act in objectively reasonable reliance on existing law. *Queen v. Prince George's Cnty.*, 188 F. Supp. 3d 535, 541 (D. Md. 2016). It does not protect state actors when they are "plainly incompetent or… knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This defense is only appropriate for dismissal when the *complaint* itself pleads the facts supporting the defense. *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011). Because Defendants rely almost entirely on facts outside the Complaint to claim qualified immunity, such statements must be disregarded as they are not judicially noticeable at this stage. Accordingly, Defendants' Motion to Dismiss based on these outside facts cannot be granted.

Qualified immunity balances the need to hold public officials accountable when they exercise power irresponsibly and the need to shield them from harassment, distraction, and liability when they perform their duties reasonably. Under this doctrine, state actors are not liable in their personal capacities under Section 1983 unless: (1) the allegations substantiate a violation of a federal statutory or constitutional right, and (2) the right was 'clearly established' such that a reasonable person would have known their actions violated that right. *Streater v. Wilson*, 565 F. App'x 208, 210 (4th Cir. 2014). A right is clearly established when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court

of the state, and a statute's plain language may also establish the law's contours. *Owens v. Balt. City State's Attorney's Office*, 767 F.3d 379, 399 (4th Cir. 2014).

Here, none of the individual Defendants have qualified immunity. There is no doubt Plaintiffs adequately allege throughout their Complaint that Defendants violated Plaintiffs' First Amendment rights of speech and association, along with their due process rights under the Fourteenth Amendment, when Defendants arbitrarily imposed the cease and desist directive without any semblance of notice or an opportunity to be heard.

Each Defendant was on notice that Plaintiffs' First Amendment speech and associational rights are inseparable aspects of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969). And even more specifically, a fraternal organization's right to expressive associational rights is well established, as seen in cases like *Iota Xi Chapter of the Sigma Chi Fraternity v. Patterson*, 538 F.Supp.2d 915, 923 (E.D. Va. 2008), aff'd on other grounds, 566 F.3d 138 (4th Cir. 2009), and *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F.Supp.2d 374, 391–92 (E.D.N.Y. 2006). Moreover, there is no doubt that this Court has previously required some notice and an opportunity to be heard before infringing upon such rights for a state actor to comply with the Due Process Clause of the Fourteenth Amendment. *Assocs. Com. Corp. v. Wood*, 22 F. Supp. 2d 502, 506 (D. Md. 1998). And even the University of Maryland's own published materials explicitly reference these constitutionally-protected rights. (ECF No. 1, ¶¶ 15-20).

Moreover, Plaintiffs' Complaint adequately described Kappa Alpha Theta's mission, which includes inculcating leadership skills and community values, thus protecting the Chapter and its members under the First Amendment's expressive associational right. (*Id.* at ¶ 6.) Plaintiffs have sufficiently asserted a clearly established, constitutionally protected liberty interest in these

rights. Plaintiffs have also adequately alleged they were not provided adequate notice or an opportunity to be heard before (or shortly after) the deprivation of their protected liberty interests. (*Id.* at ¶¶ 52–57.) Certainly, the Defendants' actions, implementing directives that restricted speech and associational rights without due process, were plainly incompetent or knowingly violated the law.[2]

In light of this existing caselaw, there is no doubt that, as of early March 2024, absent a narrowly-tailored means of addressing a compelling governmental interest—and certainly without the provision of minimal due process protections—Defendants violated Plaintiffs' rights by implementing, and maintaining in place, their cease and desist directive. So, while Defendants may assert the qualified immunity defense at later stages, it is unavailing at this preliminary stage. Plaintiffs sufficiently alleged facts suggesting the constitutional rights infringed were well-established at the time of the incidents and that Defendants violated Plaintiffs' constitutional rights.

III. CONCLUSION

For these reasons, Plaintiffs request that the Court enter an Order denying Defendants' Motion to Dismiss.

[2] Although Defendants' Motion to Dismiss suggests compliance with the pre-deprivation notice requirement by virtue of Defendants meeting with select members of fraternities and sororities before imposing the cease and desist directive, this is irrelevant at this stage for two reasons. First, such facts are not set forth in the Complaint, and therefore are not appropriate for consideration under 12(b)(6). Second, even if such facts were available for the Court to consider, Defendants do not suggest that *each* Plaintiff, including the Chapter and each individual Jane Doe Plaintiff, were invited to (or were able to) attend any such "notice" meeting.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties through the Court's electronic filing system. Parties may access this filing through the Court's system.

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