THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KIMBERLY DIEI, *Plaintiff*, v. RANDY BOYD, *et al*., *Defendants*.	**CIVIL ACTION NO.:** **2:21-cv-02071-JTF-cgc**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ALL CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

GREG HAROLD GREUBEL
PA Bar No. 321130; NJ Bar No. 171622015; CA Bar No. 343028; IA Bar No. 201452
(Admitted *pro hac vice*)
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
Tel: (215) 717-3473
Fax: (215) 717-3440
greg.greubel@thefire.org

EDD PEYTON
TN Bar No. 25635
SPICER RUDSTROM, PLLC
119 South Main, Suite 700
Memphis, Tennessee 38103
Tel: (901) 522-2318
Fax: (901) 526-0213
epeyton@spicerfirm.com

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS 2

Defendants Twice Punished Diei for Viewpoints She Expressed in Off-Campus, Personal Social Media Posts. 3

Diei Brought Suit Against Defendants to Vindicate Her Constitutional Rights. 4

LEGAL ARGUMENT 7

I. Diei's Graduation Does Not Moot Her Claims for Retrospective Declaratory Relief. 7

II. Defendants Are Not Entitled to Qualified Immunity on Diei's Claims for Damages. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Anders v. Cuevas, 984 F.3d 1166 (6th Cir. 2021) 16

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 13

Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 38 (6th Cir. 2005) 8

Cahoo v. SAS Analytics Inc., 912 F.3d 887 (6th Cir. 2019) 13, 14

Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) 8, 9, 10, 13

Fialka-Feldman v. Oakland University Board of Trustees, 639 F.3d 711 (6th Cir. 2011) 10, 11, 13

Hooban v. Boling, 503 F.2d 648 (6th Cir. 1974) 12

PeTA v. Rasmussen, 298 F.3d 1198 (10th Cir. 2002) 8, 9, 10

Powell v. McCormack, 395 U.S. 486 (1969) 8

Sandison v. Michigan High School Athletic Association, Inc., 64 F.3d 1026 (6th Cir. 1995) 11

Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019) 15, 16

Thompson v. Ohio State University, 990 F. Supp. 2d 801 (S.D. Ohio 2014) 14, 15

Yoder v. Univ. of Louisville, No. 3:09CV-205-S, 2011 WL 5434279 (W.D. Ky. Nov. 9, 2011) 11

Yoder v. University of Louisville, 526 F. App'x 537 (6th Cir. 2013) 11, 12

Under Local Rule 7.2 and this Court's Order dated June 23, 2023 (Order Granting Pl.'s Unopposed Mot. for Extension of Time to Respond to Defs.' Mot. to Dismiss, ECF No. 66), Plaintiff Kimberly Diei submits this Memorandum in Opposition to Defendants' Motion to Dismiss All Claims for Declaratory and Injunctive Relief. The Court should deny Defendants' motion to the extent that it seeks dismissal of Diei's claims for retrospective declaratory relief and compensatory damages.

INTRODUCTION

Over three years ago, the University of Tennessee Health Science Center College of Pharmacy used vague and overly broad professionalism policies to discipline graduate student Kimberly Diei and voted to expel her for "crude," "vulgar," and "sexual" viewpoints she expressed in off-campus, personal speech on social media. To this day, Diei does not know what policy she violated or what expression Defendants considered too "crude," "vulgar," and "sexual" for their doctoral students' social media activity.

Diei then sued Defendants because their actions violated her First Amendment rights, seeking injunctive relief, declaratory relief, and compensatory damages. Diei's declaratory relief claims are intertwined with her claims for compensatory damages as she has asked the Court to declare that Defendants' application of their policies to her speech violated her rights, entitling her to all damages that flowed from this constitutional injury.

In March 2021, Defendants moved to dismiss the Complaint, arguing Diei failed to state a claim for relief and asserting qualified immunity on behalf of the

individual defendants. While those motions were pending for more than two years, Diei was forced to continue self-censoring her speech in fear of again being subjected to the College's unconstitutional policies. In total, Diei was subject to the unconstitutional policies from her matriculation as a student in August 2019 until her graduation in May 2023.

Because Diei has graduated, Defendants now filed another motion to dismiss, arguing that Diei's claims for injunctive and declaratory relief are moot and reasserting qualified immunity to dismiss Diei's claims for compensatory damages. While Diei's graduation may moot her claims for prospective injunctive relief, her claims for retrospective declaratory relief and compensatory damages continue to present a live controversy. Defendants are also not entitled to qualified immunity because it is clearly established that instituting disciplinary proceedings against a student in retaliation for protected speech violates the First Amendment. That makes sense because many students carry hundreds of thousands of dollars in student loan debt, and it is simply unbelievable that a vote to expel a student for protected speech would not deter a student of ordinary firmness from engaging in protected speech.

Accordingly, this Court should deny Defendants' motion to dismiss to the extent that it seeks dismissal of Diei's claims for retrospective declaratory relief and monetary damages.

STATEMENT OF FACTS

Defendants punished Diei in both 2019 and 2020 for constitutionally protected viewpoints expressed on her off-campus social media accounts. Defendants never

provided Diei with any of the policies under which she was punished, merely stating that her expression was "crude," "vulgar," and "sexual." After the second disciplinary proceeding, Diei sued Defendants to seek redress for the violation of her First and Fourteenth Amendment rights.

Defendants Twice Punished Diei for Viewpoints She Expressed in Off-Campus, Personal Social Media Posts.

Diei began posting on her personal social media accounts in 2016. (Compl., ¶ 21.) After Diei enrolled at the College of Pharmacy in 2019, the College's Professionalism Committee ("Committee"), led by Chairperson George, twice punished her for protected expression on these personal accounts. (*Id.*, ¶ 82.) Defendants' first disciplinary proceeding into Diei's protected speech was in September 2019. (*Id.*, ¶ 42.) Although Diei has not based her claims on that disciplinary proceeding, the Committee indicated that her posts violated the College of Pharmacy's professionalism policies because they were "crude," "vulgar," and "sexual." (*Id.*, ¶ 43.) Diei neither received nor had access to Defendants' "various professionalism policies" after her matriculation as a student. (*Id.*, ¶¶ 36–40.) During this first investigation, neither Chairperson George nor the Committee provided Diei with the professionalism policies under which she was investigated. (*Id.*, ¶ 36.)

Defendants again investigated Diei's social media expression based on an anonymous complaint in August 2020. (*Id.*, ¶ 55.) The Committee identified a few examples of Diei's allegedly unprofessional posts, like those featuring sexual commentary or profanity. (*Id.*, ¶ 59.) But Defendants did not cite or quote any specific policy Diei had allegedly violated. (*Id.*, ¶¶ 66–69.) The Committee ultimately voted to

expel Diei from the College of Pharmacy because of the "crude," "vulgar," and "sexual" speech expressed on her personal social media accounts. (*Id.*, ¶¶ 80–82.) Diei appealed her expulsion to Dean Marie Chisholm-Burns. (*Id.*, ¶ 89.) The undersigned counsel sent Dean Chisholm-Burns a letter explaining that the Committee's actions violated Diei's First and Fourteenth Amendment rights. (*Id.*, ¶ 90.) From September 4, 2020, to September 25, 2020, Diei anxiously waited to learn Dean Chisholm-Burns's decision. (*Id.*, ¶¶ 90–92, 100.) During this early three-week period, Diei believed her career in pharmacy would be ended permanently simply because the Committee disfavored the viewpoints she shared in her off-campus social media posts. (*Id.*, ¶ 100.) Ultimately, Dean Chisholm-Burns overturned Diei's expulsion in September 2020. (*Id.*, ¶¶ 92.)

Although Diei was not expelled, she was forced to self-censor on her social media accounts from September 2020 until her graduation in May 2023. Given her prior experiences, Diei reasonably feared that the Committee still disfavored her viewpoints and would try to expel her from the College once again. (*Id.*, ¶ 97.) Unfortunately, the fear that led Diei to self-censor her protected speech for the nearly three-year period between the Committee's vote to expel her and her graduation harmed Diei's mental health, causing her emotional distress that continues to this day.

Diei Brought Suit Against Defendants to Vindicate Her Constitutional Rights.

On February 3, 2021, Diei sued Defendants for violating her rights under the First and Fourteenth Amendments, seeking declaratory and injunctive relief and

damages. (Compl., ¶¶ 112, 125, 140, 155, 165.) Diei's First and Second Causes of Action, brought against all Defendants in their official capacities, are facial challenges to the College's professionalism for overbreadth and vagueness. (*Id.*, ¶¶ 101–25.) Diei's Third Cause of Action, brought against all Defendants in their official capacities, is an as-applied challenge to Defendants' punishment of Diei under the College's professionalism policies. (*Id.*, ¶¶ 126–40.) Diei's Fourth Cause of Action, brought against Defendants President Boyd and Chairperson George in their individual capacities, is an as-applied challenge for Defendants' punishment of Diei under the College's professionalism policies. (*Id.*, ¶¶ 141–155.) Diei's Fifth Cause of Action, brought against Chairperson George in her individual and official capacities, is an as-applied claim for First Amendment retaliation. (*Id.*, ¶¶ 156–165.)

Diei sought four separate declaratory judgments in her complaint: (1) one stating that the College of Pharmacy's professionalism policies are unconstitutionally overbroad on their face under the First and Fourteenth Amendments; (2) one stating that the College failed to provide notice of its policies to Diei and that these policies are unconstitutionally vague under the First and Fourteenth Amendments; (3) one stating that the College's policies as applied to Diei are unconstitutional; and (4) one stating that Chairperson George unconstitutionally retaliated against Diei because of Diei's protected speech. (*Id.*, ¶¶ A–D.) Only the first of these four requests for declaratory relief are prospective, as the latter three ask the court to declare that Defendants violated Diei's constitutional rights in the past.

On March 1, 2021, Defendants filed two motions seeking dismissal of Diei's complaint. (Individual Capacity Defs.' Mot. to Dismiss Fourth and Fifth Causes of Action, ECF No. 24; Official Capacity Defs.' Mot. to Dismiss First, Second, and Third Causes of Action, ECF No. 25.) Relying on materials outside the complaint, these motions argued that the College's policies were constitutional, that Defendants had not taken actual adverse action against Diei, and that the Individual Defendants were entitled to qualified immunity. (ECF No. 24, 10–20; ECF No. 25, 3–14.) Diei filed a consolidated response correctly arguing that she had sufficiently alleged violations of her constitutional rights and that Defendants' actions violated clearly established law, barring their assertion of qualified immunity. (Pl.'s Resp. in Opp'n to Mots. To Dismiss, ECF No. 32 at 11–32.) These motions and the issues presented in them have been fully briefed for more than two years. Plaintiff's counsel also filed a memorandum in support of production of certain FERPA-protected documents on June 27, 2022. (Pl.'s Mem. In Supp. Of Produc. Of Certain FERPA-Protected Docs, ECF No. 60-1.)

While all these motions were still pending, Diei graduated from the College of Pharmacy on May 8, 2023. Defendants then filed this Motion, basing their argument on mootness off Diei's graduation. (Defs.' Mot. to Dismiss All Claims for Declaratory and Injunctive Relief for Lack of Subject Matter Jurisdiction, ECF No. 64.) Defendants' new Motion also reasserts their argument on qualified immunity already included in their original motion.

As argued below, this Court should deny Defendants' motion to dismiss to the extent that it seeks dismissal of Diei's claims for retrospective declaratory relief and monetary damages.

LEGAL ARGUMENT

Diei's claims for damages and retrospective declaratory relief continue to present a live dispute with consequences for both sides. Diei has sought three declaratory judgments stating that Defendants' past conduct violated her constitutional rights. Because Diei still has standing for her damages claim, her corresponding claims for declaratory relief are not moot. Contrary to Defendants' suggestion (Defs.' Mot., 9 of 13), there is no Sixth Circuit case holding that a student-plaintiff's graduation moots all of their claims for declaratory relief.

Defendants also reprise their argument that they are entitled to qualified immunity because Diei has not cited a case in which a court held that a vote to expel a student would deter her from continuing to engage in protected speech. But Sixth Circuit case law clearly establishes that even the threat of disciplinary proceedings chills student speech. Moreover, Defendants disregard that Diei has alleged that her speech was in fact chilled by Defendants' threat of discipline for over three years—a fact that they must take as true.

I. Diei's Graduation Does Not Moot Her Claims for Retrospective Declaratory Relief.

Defendants concede that Diei's graduation does not moot her damages claim. The parties also agree that Diei's graduation moots her claims for *prospective* declaratory and injunctive relief. (Defs.' Mot., 9 of 13.) The central dispute is whether

Diei's claims for *retrospective* declaratory relief are now also moot.[1] (*Id.*) The answer is no. Diei's claims for compensatory damages and retrospective declaratory relief continue to "supply the constitutional requirement of a case or controversy" necessary for standing. *Powell v. McCormack*, 395 U.S. 486, 497 (1969) (citation omitted) (holding that the failure of a plaintiff's claims for injunctive relief does not moot separate claims for declaratory relief that continue to present a case or controversy).

Claims for retrospective declaratory relief continue to present a live controversy so long as they are tied to a claim for damages. *PeTA v. Rasmussen*, 298 F.3d 1198, 1202–03 (10th Cir. 2002); *Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004). In *PeTA*, a group of protestors brought a First Amendment action against several school officials who threatened to enforce a state statute against them. 298 F.3d at 1200. The plaintiffs sought injunctive relief, declaratory relief, and monetary damages. *Id.* at 1202–03. Because the defendants admitted that the statute did not apply to the plaintiffs' conduct, the court held that PeTA's claims for prospective relief had "become moot." *Id.* at 1203. But the court rejected the mootness argument for each of PeTA's claims for retrospective declaratory relief—those declaratory relief claims that were "intertwined with a claim for monetary damages" and asked the court "to declare whether a past constitutional violation occurred." *Id.* at 1202 n.2. Because PeTA still had live claims for damages arising from the plaintiffs' past injury,

[1] The Sixth Circuit has made clear that graduation does not moot student-plaintiffs' claims for damages, explaining that "the existence of a damages claim ensures that this dispute is a live one and one over which Article III gives [the court] continuing authority." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir. 2005).

it still "ha[d] standing to assert" its claims for retrospective declaratory relief. *Id.* at 1203.

Similarly, in *Crue v. Aiken*, the court held that the plaintiffs' claims for retrospective declaratory relief could continue after superseding events had mooted their claims for injunctive relief. 370 F.3d at 677. The plaintiffs in that case—a group of university students and faculty—brought a First Amendment challenge to a directive issued by the university chancellor. *Id.* at 676–77. After the plaintiffs obtained an injunction preventing the university from enforcing the directive, university officials rescinded it. *Id.* at 677. The Seventh Circuit held that while this mooted the plaintiffs' injunction, their "requests for declaratory relief and for damages remain[ed]." *Id.* The plaintiffs sought a declaratory judgment stating that the directive as enforced against them "violated their First Amendment rights." *Id.* Because this claim for declaratory relief was retrospective and paired with their claim for damages, the plaintiffs still had standing to pursue it. *Id.* at 677–78.

In this case, Diei seeks three declaratory judgments that are retrospective and relate to her compensatory damages claim. Diei's complaint requests retrospective declaratory judgments: (1) the College failed to provide notice of its policies to Diei before punishing her, and that these policies are unconstitutionally vague; (2) the College's policies as applied to Diei are unconstitutional; and (3) Chairperson George unconstitutionally retaliated against Diei because of Diei's protected speech. (Compl., ¶¶ B–D.) Like the plaintiffs in *PeTA* who sought retrospective declaratory relief, each of Diei's claims for a declaratory judgment are "intertwined with a claim

for monetary damages" and ask the court "to declare whether a past constitutional violation occurred." *PeTA*, 298 F.3d at 1202 n.2. Moreover, like the *Crue* plaintiffs whose claims for compensatory damages and retrospective declaratory relief were not mooted by the rescission of an unconstitutional policy, the fact that Diei is no longer subject to the policies does not affect her standing to seek compensatory damages and retrospective declaratory judgments. *Crue*, 370 F.3d at 677 ("When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive.").

Defendants make no attempt to distinguish between Diei's claims for prospective and retrospective declaratory relief, simply asserting that her graduation has mooted all of them. (Defs.' Mot., 9 of 13.) Contrary to the Defendants' claim, no Sixth Circuit case suggests student-plaintiffs' claims for retrospective declaratory relief become moot due to their graduation. A review of the relief sought by the plaintiffs and the disposition of the cases cited by Defendants show that those cases do not help their argument.

In *Fialka-Feldman v. Oakland University Board of Trustees*, a student-plaintiff sued his university after it denied him residence in on-campus housing. 639 F.3d 711, 713 (6th Cir. 2011). The plaintiff sought two forms of relief against the university: an injunction requiring the school to approve his housing application and money damages for the initial rejection. *Id.* The Sixth Circuit in that case held that only the injunctive relief the plaintiff had obtained from the district court had become

moot because he left the university.[2] *Id.* at 713–14. Similarly, in *Sandison v. Michigan High School Athletic Association, Inc.*, two high school students obtained an injunction against their high schools allowing them to participate in track meets. 64 F.3d 1026, 1029 (6th Cir. 1995). The students also obtained an injunction preventing an interscholastic athletic association from penalizing their schools for allowing the students to compete in previous track meets. *Id.* On appeal, the Sixth Circuit vacated as moot only the part of the injunction permitting the plaintiffs to continue participating in track meets because the plaintiffs had graduated and were no longer eligible to compete. *Id.* at 1030–31. On the other hand, the court held that the plaintiffs' injunctive claim against the athletic association was *not* moot, as it was essentially retrospective: The association could still penalize the students' schools for their past conduct. *Id.*

Defendants also rely on *Yoder v. University of Louisville* to assert that all of Diei's claims for declaratory relief should be dismissed as moot. 526 F. App'x 537, 543 (6th Cir. 2013). The Sixth Circuit in that case stated that it agreed with the district court that the plaintiff's graduation mooted her claims for declaratory relief. *Id.* But the district court decision did not address or even mention declaratory relief. *See Yoder v. Univ. of Louisville*, No. 3:09CV-205-S, 2011 WL 5434279 (W.D. Ky. Nov. 9, 2011). The plaintiff's declaratory claims also did not factor into the Sixth Circuit's

[2] The plaintiff's claim for compensatory damages in the case failed as a matter of law, but the court did not dismiss it due to mootness. *Fialka-Feldman*, 639 F.3d at 714.

mootness analysis, which focused solely on the plaintiff's claims for prospective injunctive relief. *Yoder*, 526 F. App'x at 543.

Finally, one case cited by Defendants shows that courts ought to decide a student-plaintiff's claims for damages and declaratory relief even if their injunctive relief is moot. In *Hooban v. Boling*, a law student brought a civil rights action against officials of the University of Tennessee, who had classified him as a non-resident and thus required him to pay higher tuition. 503 F.2d 648, 649 (6th Cir. 1974). The plaintiff's suit sought injunctive relief, declaratory relief, and monetary damages, alleging that the university's tuition policies were unconstitutional both facially and as applied to himself. *Id.* Although the Sixth Circuit "view[ed] the prayer for injunctive relief as moot since [the plaintiff] already ha[d] graduated from the law school," it did not dismiss his claims for damages and declaratory relief as moot. *Hooban*, 503 F.2d at 650 n.1. Instead, the court addressed the merits of the plaintiff's constitutional claims for damages and declaratory relief against the challenged university regulations. *Id.* at 650–54.

The cases cited by Defendants do not suggest that Diei's graduation has mooted all of her claims for declaratory relief. Diei's graduation may have mooted her claims for prospective relief: as she is no longer subject to the College's professionalism policies, the Court can no longer provide concrete prospective relief. But the Court can and should still provide Diei with relief for the constitutional injury that Defendants have already inflicted. Diei presents three claims for retrospective declaratory judgments stating that Defendants' past conduct violated her

constitutional rights, and her graduation does not change those claims. Because Diei still has standing to seek compensatory damages flowing from this injury, she also has standing to seek "a declaratory judgment as a predicate to a damages award." *Crue*, 370 F.3d at 677. Diei's claims for compensatory damages and retrospective declaratory relief arising from Defendants' past conduct ensure that this case is one "with consequences for both parties" in which the Court can still provide "effectual relief." *Fialka-Feldman*, 639 F.3d at 713–14 (citation omitted).

II. Defendants Are Not Entitled to Qualified Immunity on Diei's Claims for Damages.

While admitting that Diei's damages claims are not mooted by her graduation, Defendants reassert their qualified-immunity defense. Defendants' argument focuses on Diei's alleged failure to cite "a case that clearly establishes that her constitutional rights were violated when she was 'nearly expelled' from school . . . —but not actually expelled—because of her social media posts." (Defs.' Mot., 12 of 13.) But demonstrating the law was clearly established does "not require a case directly on point[.]" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).[3] On this point, the Sixth Circuit has advised that "an official can be on notice that his conduct violates established law even in novel factual situations." *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 898 (6th Cir. 2019) (citation omitted). "'[A]n action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general

[3] Plaintiff fully incorporates her arguments regarding qualified immunity in her consolidated response to Defendants' motions to dismiss as if set forth fully herein. (Pl.'s Resp. in Opp'n to Mots. to Dismiss, ECF No. 32 at 29–32.)

reasoning that a court employs.'" *Id.* (citation omitted). As these cases show, Defendants overstate the degree of specificity required to defeat qualified immunity.

At any rate, Diei's claims would survive even under their strict view, because Sixth Circuit precedent clearly establishes that a defendant instituting disciplinary proceedings against a student in retaliation for protected speech is sufficient to deter a student of ordinary firmness from engaging in protected speech. In *Thompson v. Ohio State University*, a student brought a First Amendment retaliation claim against a professor who had filed a complaint accusing the student of violating the student code of conduct. 990 F. Supp. 2d 801, 809 (S.D. Ohio 2014). The professor moved to dismiss the retaliation claim under Rule 12(b)(6), arguing that the filing of charges by itself cannot deter a student from continuing to engage in protected speech. *Id.* The court disagreed, explaining that "[t]o the extent [the defendant] alleges that the filing of charges is not enough of an adverse action to chill a person of ordinary firmness, the Court is unpersuaded." *Id.*

The professor further argued that he was entitled to qualified immunity because "there was no 'clearly established law' that would have put [the professor] on notice that the 'mere filing of a conduct charge' would be an adverse action for First Amendment retaliation purposes." *Id.* at 812 (citation omitted). The court again rejected the professor's argument, noting that the plaintiff specifically alleged that the professor made the report *because of* the plaintiff's protected speech. This is significant because "[i]n the context of a retaliation claim, the focus of the qualified immunity analysis is on the retaliatory intent of the defendant." *Id.*

The Sixth Circuit recently reaffirmed the principle that a threat of adverse action is sufficient to chill protected speech. In *Speech First, Inc. v. Schlissel*, the court explained that "the threat of punishment from a public official who *appears* to have punitive authority can be enough to produce an objective chill." 939 F.3d 756, 764 (6th Cir. 2019) (emphasis in original) (finding that plaintiff had established the injury element of "standing because the threat of punishment is sufficient).

Like the plaintiff in *Thompson* who alleged that the professor "initiated student misconduct charges against the plaintiff in retaliation for plaintiff's allegations of race discrimination," 990 F. Supp. 2d at 812, Diei has alleged that "Chairperson George's investigation and vote to dismiss Diei from the College of Pharmacy in September 2020 were also retaliatory actions against Diei because of her First Amendment protected speech . . . ." (Compl., ¶ 158.) Moreover, Diei has alleged that Chairperson George's conduct did, in fact, chill Diei's exercise of her right to engage in expressive First Amendment activity. (*Id.*, ¶¶ 96–98, 160.) Finally, Diei believed that she would be expelled from the College from September 4, 2020, to September 25, 2020, a nearly three-week period during which Diei suffered emotional distress and actual monetary damages due to missing work. (*Id.*, ¶ 100.) Considering that most graduate students in this country need their degree to enter their chosen profession and have accumulated hundreds of thousands of dollars in student loan debt, it is simply unbelievable a committee vote to expel a student for protected speech would not deter a student of ordinary firmness from engaging in protected

speech. *See Schlissel*, 939 F.3d at 765 (finding that the mere threat of an investigation and "implicit threat of consequence[s]" objectively chills speech).

Finally, Defendants ignore that Diei has pled that her speech was chilled by Defendants' actions for over three years. (Compl., ¶ 96.) Even when defendants move to dismiss on the basis of qualified immunity, "[a]s with any other motion to dismiss, we perform this analysis while accepting the plaintiff's factual allegations as true and drawing all reasonable inferences in his favor." *Anders v. Cuevas*, 984 F.3d 1166, 1175 (6th Cir. 2021). Thus, Defendants cannot simply ignore Diei's well-pled allegations.

CONCLUSION

For these reasons, this Court should deny Defendants' Motion to Dismiss All Claims for Declaratory and Injunctive Relief for Lack of Subject Matter Jurisdiction to the extent that it seeks dismissal of Plaintiff Diei's claims for retrospective declaratory relief and monetary damages.

Respectfully Submitted,

/s/ Greg H. Greubel
GREG HAROLD GREUBEL
PA Bar No. 321130; NJ Bar No. 171622015; CA Bar No. 343028; IA Bar No. 201452
(admitted *pro hac vice*)
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
Tel: (215) 717-3473
Fax: (215) 717-3440
greg.greubel@thefire.org

/s/ Edd Peyton
EDD PEYTON
TN Bar No. 25635
SPICER RUDSTROM, PLLC
119 South Main, Suite 700
Memphis, Tennessee 38103
Tel: (901) 522-2318
Fax: (901) 526-0213
epeyton@spicerfirm.com

CERTIFICATE OF SERVICE

Plaintiff's counsel confirms that a true and correct copy of the foregoing was served via the Court's electronic filing system on this day, June 23, 2023. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated below and parties may access this filing through the Court's electronic filing system.

Frank H. Lancaster
UNIVERSITY OF TENNESSEE
Office of General Counsel
719 Andy Holt Tower
Knoxville, TN 37996-0170
Tel: (865) 974-2544
flancast@tennessee.edu

Counsel for Defendants Randy Boyd, Christa George, Brad Box, John Compton, Kara Lawson, Alan Wilson, Amy Miles, Charles Hatcher, Decosta Jenkins, Donnie Smith, Jamie Woodson, Kim White, and William Rhodes

Greg H. Greubel
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
Tel: (215) 717-3473
greg.greubel@thefire.org

Edd L. Peyton
SPICER RUDSTROM PLLC
119 South Main Street
Suite 700
Memphis, TN 38103
Tel: (901) 522-2313
epeyton@spicerfirm.com

Counsel for Plaintiff Kimberly Diei

Dated: June 23, 2023

/s/ Greg H. Greubel
Greg H. Greubel