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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JOHN ALEXANDER ZAPATA
HINCAPIE,
Plaintiff,

V.

TEXAS TECH UNIVERSITY,
Dr. Sindee Lou Simon,
Dr. Albert Sacco, Jr.,
Dr. Mark A. Sheridan,
Dr. Brandon Weeks,
Dr. Gerardine Gabriela Botte,
Dr. Chau-Chyun Chen,
Dr. Siva Vanapalli,
Dr. Wei Li,
Dr. Harvinder Singh Gill,
Defendants.

CIVIL ACTION NO. 5:23-cv-00045

JURY DEMANDED (Plaintiff)

**DEFENDANTS' FIRST AMENDED BRIEF IN SUPPORT OF FIRST AMENDED
MOTION TO DISMISS**

Defendants Texas Tech University (TTU), Dr. Sindee Lou Simon, Dr. Albert Sacco, Jr., Dr. Mark A. Sheridan, Dr. Brandon Weeks, Dr. Gerardine Gabriela Botte, Dr. Chau-Chyun Chen, Dr. Siva Vanapalli, Dr. Wei Li, and Dr. Harvinder Singh Gill (the Individual Defendants) (all defendants collectively as “Defendants”) file this First Amended Brief in Support of their First Amended Motion to Dismiss because Plaintiff’s claims are barred as a matter of law, he has failed to state a claim upon which relief can be granted, and because the individual Defendants are entitled to qualified immunity. In support, Defendants respectfully offer the following for consideration by the Court:

I. PRELIMINARY STATEMENT

By Plaintiff's own admission, he was admitted by TTU as a doctoral student and was awarded a Ph.D. degree, graduating with a near perfect grade point average of 3.92. He does not allege that TTU disciplined him for any type of misconduct or that TTU dismissed him for academic or

misconduct reasons. Instead, in a vast department-wide scheme to discriminate against him “entirely” because he is a Hispanic from Colombia, he alleges teacher-on-student harassment when speaking Spanish, that Asian Ph.D. students were treated more favorably than him with respect to certain degree requirements, that actions were taken by his dissertation advisor to discriminate against him, that numerous other professors “endorsed and facilitated” Dr. Simon’s behavior towards him, and that actions were taken to retaliate against him for seeking equitable treatment, thus resulting in a delay in his graduation. He further alleges that after previously obtaining the same degree from the University of Oklahoma in 2016, TTU should have retroactively awarded him a Master of Science degree that he neither applied for nor earned while working toward his Ph.D. The law does not support his claims among other reasons because his allegations fail to demonstrate the violation of any constitutional protected right or that any materially adverse action was taken against him; therefore, all claims should be dismissed with prejudice.

II. BACKGROUND

A. Claims and Procedural History

On March 7, 2023, Plaintiff filed suit alleging claims under Title VI of the Civil Rights Act of 1964 for race and national origin discrimination and retaliation, 42 U.S.C. § 1981, as well as the Equal Protection and Due Process clauses of the Fourteenth Amendment, through 42 U.S.C. § 1983. Doc. No. 1. In response, on June 9, 2023, Defendants filed a Motion to Dismiss along with a brief in support. Doc. Nos. 8, 9. On June 30, 2023, Plaintiff filed a First Amended Complaint (Amended Complaint). Doc. No. 11. Therein, Plaintiff dropped his Title VI discrimination and retaliation claims “against all defendants” and is now only asserting them against Texas Tech University. See Amended Complaint at p. 56. The Amended Complaint is also “peppered” with newfound allegations largely relating to his “opinion” expressed *ad nauseum* therein that corrections to his dissertation were not

necessary and further allegations relating to the purported inequitably applied “two-publication” requirement. Plaintiff further tries to “downplay” the undisputable fact that the “two-publication requirement was waived for him by explaining that it was merely a waiver of the “acceptance requirement.” Amended Complaint at ¶ 118. It was a “waiver” regardless of this distinction and it is without dispute that Plaintiff graduated in December 2021. *Id.* at ¶ 21. Interestingly, Plaintiff nowhere alleges in the Amended Complaint that he actually complied with the two-publication requirement but instead only repeatedly complained about it.

Plaintiff seeks monetary damages, injunctive relief, declaratory relief, compensatory damages, punitive damages, costs including attorney’s fees, that TTU award him a non-thesis master’s degree, that Defendants participate in annual mandatory trainings on discrimination, and that TTU adopt a meaningful grievance procedure for resolving complaints of discrimination. Amended Complaint at pgs. 61-62.

Defendants dispute Plaintiff’s allegations and contend that any allegedly adverse actions taken against him while at TTU were due to legitimate, non-discriminatory, non-retaliatory reasons,¹ most notably the exercise of professional academic judgment in connection with meeting all university requirements to be awarded a Ph.D.

With respect to the Amended Complaint, Plaintiff and his counsel simply reviewed Defendants’ initial Motion to Dismiss and inserted newfound allegations in a clear attempt to overcome dismissal of his claims. He fails in this regard because none of the original or newfound

¹ Defendants note that as a doctoral student at TTU, Plaintiff displayed a combative, disagreeable attitude that did not comport with his obligation to accept instruction and direction from his academic superiors, including Dr. Simon, in connection with meeting all degree requirements. This is nowhere more evident than in his clear resistance to making corrections to his written dissertation requested by his Ph.D. advisor and dissertation chair. The common practice of making dissertation corrections applied equally to all Ph.D. candidates, not just Hispanic, Colombian ones. His “international status” was simply not a factor. See Amended Complaint at ¶ 88.

allegations can serve as a basis to overcome this motion. Accordingly, Defendants now file this First Amended Motion to Dismiss, which for the reasons stated herein should be granted thereby dismissing with prejudice Plaintiff's claims against all Defendants.

B. Plaintiff's Allegations

Plaintiff is a Hispanic from Colombia that immigrated to the United States in 2013. Amended Complaint at ¶¶ 8, 19-20. He received his undergraduate degree in Colombia and then received a Master of Science degree in Chemical Engineering from the University of Oklahoma in 2016. *Id.* at ¶ 20. In the Fall of 2016, he was admitted into TTU's Chemical Engineering Department as a doctoral student. *Id.* at ¶ 19. Plaintiff "expected" to graduate in the Spring 2021, but based on the allegations in this suit, it was delayed until December 2021, at which time he was awarded a Ph.D. *Id.* at ¶ 19-21, 43, 99. He is currently residing in Wisconsin, but he did not provide any information about his current employment status in his Complaint. *Id.* at ¶ 8. However, based on information and belief, Plaintiff is currently gainfully employed as a senior chemist at ECC in Pewaukee, Wisconsin, and has been employed in this position since January 2022. Thus, he obtained gainful employment within a month of his December 2021 graduation from TTU. The reason Plaintiff did not include this information in his pleadings is because this proves that he suffered no material harm arising from his allegations in this lawsuit.

During his Ph.D. studies at TTU, Plaintiff alleges that his dissertation advisor, Dr. Sindee Lou Simon,² discriminated against him and created a hostile educational environment "entirely" because of his race and national origin. *Id.* at ¶ 2. In this regard, he claims that Dr. Simon yelled at him without

² While Plaintiff alleges Dr. Simon to have something against him because he is a Hispanic from Colombia, he praises her credentials as a "well-known scholar in the area of polymer science and the kinetics of glass, a Horn Professor-the university's highest faculty designation-and the chair of the Department during the period of 2012-2019." *Id.* at ¶ 27.

provocation, but did not yell at Asian students, “harass[ed]” him when he spoke his native language (i.e., Spanish), but did not criticize Asians for doing the same, and placed degree requirements on him that were not imposed on Asian Ph.D. students, including a two-publication requirement. *Id.* at ¶¶ 2, 29-30, 68, 91, 93-94, 103.

He also alleges that TTU hired him as a full-time Instructor (\$69,000.00 annual salary), which began in the Fall 2021 on August 18, 2021, but that he was forced to resign from this job on October 25, 2021. *Id.* at ¶¶ 22, 81, 99-100. His cited reason for resigning was to dedicate himself fully to making corrections to his dissertation and to work on the required second publication. *Id.* at ¶ 91. According to Plaintiff, Dr. Simon “did everything in her power” to delay his graduation “in every way possible,” including delaying the timing of his qualifying exam and delaying the publication process. *Id.* at ¶¶ 2, 25, 125, 128, 136-37. In addition, Plaintiff claims Defendants delayed the official confirmation of degree completion. *Id.* at ¶ 128. He also complains that Dr. Simon required him to make numerous untimely or, in his self-serving “opinion,” unnecessary revisions and corrections to his written dissertation, as he acknowledges asking Dr. Simon to “reconsider the list of revisions.” *Id.* at ¶¶ 26, 61-62, 77-78, 83-85.

A newfound allegation is that Dr. Weeks informed him “for the very first time” there was a “two-publications” policy but that he did not enforce this policy on any Asian Ph.D. students that were allowed to graduate in previous semesters, which continued “even after [Plaintiff’s] eventual graduation.” *Id.* at ¶ 60. Thus, it was not only Dr. Simon but now also Dr. Weeks that was not treating him equally because of his “international status.” *Id.* at ¶¶ 60, 88.

Plaintiff does not allege anywhere in his Complaint that Asian Ph.D. students were not required to make dissertation corrections as requested by Dr. Simon or by a different dissertation advisor.

He further alleges that a slew of others at TTU, namely the individual Defendants, somehow “endorsed and facilitated” Simon’s behavior. *Id.* at ¶¶ 3, 24, 79, 92, 131, 137.

Plaintiff improperly inserts legal argument in the “Facts” section masquerading as a “factual allegation” that Dr. Sheridan’s alleged “refusal” to consider the discriminatory and arbitrary nature of Dr. Simon’s approach and to endorse Simon’s approach going forward “endorsed and facilitated” Simon’s discriminatory approach thus constituting an independent act of discrimination itself. *Id.* at ¶ 79.

Plaintiff also alleges that from July 2021 to December 2021, he “reached out” to numerous TTU offices about the discrimination, retaliation and disparate treatment, but was told to reach out to other departments, that his concerns were dismissed and that he was told to keep working with Dr. Simon. *Id.* at ¶¶ 129-30.

Nowhere in Plaintiff’s Complaint does he allege that an official TTU policy is facially discriminatory based on race or national origin. He also does not allege that TTU’s grading practices were unfairly applied based on race or national origin, much less could he based on a near perfect 3.92 GPA.

Almost one full year after his December 2021 graduation, Plaintiff contacted TTU in or around September 2022 demanding that he be awarded a Master of Science degree. *Id.* at ¶¶ 138, 142-46. The award of the Master of Science degree was an alleged “secret” that Defendants only notified Asian students about, apparently nowhere to be found on Texas Tech’s website or in any written catalogs or other materials. *Id.* at ¶ 146.

TTU declined to retroactively award him this additional degree. *Id.* at ¶ 136. Plaintiff claims this was improper because Asian Ph.D. students were awarded this degree “along the way” in conjunction with a Ph.D. degree, but prior to graduating with the Ph.D. degree. *Id.* at ¶ 145.

Nowhere in his Complaint does he allege that during his Ph.D. studies at TTU did he ever inquire into the receipt of a master's degree, better yet that he was either told he was not eligible for one or that his inquiry was ignored or disregarded. Further, nowhere in his Complaint does he allege that he submitted the required application for a master's degree to the appropriate department or college but was improperly denied admission. He also did not allege that other non-Hispanic Ph.D. students who had already graduated contacted TTU asking for the same master's degree retroactively and that TTU awarded it to them. Rather, he contends that he could simply graduate "with a ... MS degree *without fulfilling the usual university policies or without even having enrolled in the MS program*, having enrolled *only* in the PhD degree program." *Id.* at ¶ 138 (emphasis added).

Despite TTU offering Plaintiff an instructor position as a spousal accommodation for his girlfriend, Paola Guerrero Rodriguez, a tenure-track Assistant Professor of Spanish in TTU's Classical & Modern Languages & Literatures department, he even goes so far as to suggest that Defendants attempted to sabotage his relationship with his girlfriend by not allowing him to graduate in the Summer of 2021. *Id.* at ¶¶ 50-51, 64, 71, 120-21. He was also not permitted to propose to her at the December 2021 graduation ceremony, which of course in Plaintiff's mind was a retaliatory act. *Id.* at ¶¶ 120-21.

According to Plaintiff, Dr. Simon also discriminated against other Hispanics, whereby she imposed the same two-publication requirement on them to graduate as she did on him. *Id.* at ¶ 24, 31, 34, 125-26. Plaintiff also believes that the alleged "long history of discrimination" at TTU dates back to 1973 based solely on the number of degrees conferred by the Chemical Engineering department, with more Ph.D. degrees conferred on Asians than other ethnicities, including Hispanics. *Id.* at ¶ 132.

In September 2021, Plaintiff hired an attorney to help with a grievance letter, which was filed on October 14, 2021, about two months before his December 2021 graduation. *Id.* at ¶¶ 87, 143. He

alleges it was never addressed and no formal decision was communicated to him about the grievance. *Id.* at ¶ 87. Nevertheless, Plaintiff admits he graduated in December 2021. *Id.* at ¶¶ 21, 70.

III. STANDARD OF REVIEW

A. Dismissal is proper when there is no subject matter jurisdiction

Federal Rule of Civil Procedure 12(b)(1) authorizes a federal court to dismiss a claim for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). The party seeking to invoke jurisdiction bears the burden of demonstrating its existence. *See Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). “[T]here is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court.” *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) (citations omitted). An action may be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) on any of three separate grounds:

- (1) the complaint standing alone;
- (2) the complaint supplemented by undisputed facts evidenced in the record; or
- (3) the complaint, the undisputed facts, and the court’s resolution of disputed facts. *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1384 (5th Cir. 1989). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) motion before addressing any motion as to the merits. *Ramming*, 281 F.3d at 161.

B. Dismissal is proper when a plaintiff has failed to state a claim upon which relief can be granted

In deciding a Federal Rule of Civil Procedure 12(b)(6) motion, the Court must “accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina*

Canal Breaches Litig., 495 F.3d 191, 205–06 (5th Cir. 2007). To state a claim upon which relief may be granted, Plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face,” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and must plead those facts with enough specificity “to raise a right to relief above the speculative level.” *Id.* at 555. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “A claim for relief is implausible on its face when ‘the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.’ ” *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 679).

While, under Federal Rule of Civil Procedure 8(a)(2), a complaint need not contain detailed factual allegations, Plaintiffs must allege more than labels and conclusions, and, while a court must accept all of the Plaintiffs’ allegations as true, it is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). A threadbare or formulaic recitation of the elements of a cause of action, supported by mere conclusory statements, will not suffice. *See id.* But, “to survive a motion to dismiss” under *Twombly* and *Iqbal*, a plaintiff need only “plead facts sufficient to show” that the claims asserted have “substantive plausibility” by stating “simply, concisely, and directly events” that Plaintiff contends entitle him or her to relief. *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014) (per curiam) (citing Fed. R. Civ. P. 8(a)(2)-(3), (d)(1), (e)). The United States “Supreme Court has made clear that a Rule 12(b)(6) motion turns on the sufficiency of the ‘factual allegations’ in the complaint.” *Smith v. Bank of Am.*,

N.A., 615 F. App'x 830, 833 (5th Cir. 2015) (quoting *Johnson*, 135 S. Ct. at 347), and the Federal Rules of Civil Procedure “do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted,” *Johnson*, 135 S. Ct. at 346.

IV. ARGUMENT AND AUTHORITY

A. TTU is a State Agency entitled to Eleventh Amendment Immunity

The Eleventh Amendment provides that: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI; “The Eleventh Amendment strips courts of jurisdiction over claims against a state that has not consented to suit.” *Pierce v. Hearn Indep. Sch. Dist.*, 600 Fed.Appx. 194, 197 (5th Cir. 2015) (per curiam) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01 (1984)).

The Fifth Circuit has stated: “Eleventh Amendment immunity operates like a jurisdictional bar, depriving federal courts of the power to adjudicate suits against a state.” *Union Pac. R. Co. v. La. Pub. Serv. Comm’n*, 662 F.3d 336, 340 (5th Cir. 2011). “The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States, and by its own citizens as well.” *Lapides v. Bd. of Regents*, 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L.Ed. 2d 806 (2002). Indeed, “[t]he amendment has been judicially construed to bar federal jurisdiction over suits brought against a state by its own citizens, despite the absence of language to that effect.” See *Jagnandan v. Giles*, 538 F.2d 1166, 1177 (5th Cir.), *cert. den.*, 432 U.S. 910, 97 S. Ct. 2959, 53 L.Ed. 2d 1083 (1977). Both federal and pendent state law claims are barred from being asserted against a state in federal court. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 119–21 (1984).

For Eleventh Amendment immunity purposes, a suit against a state agency is a suit against the state. *Pennhurst State School & Hosp.*, 465 U.S. at 100. It is well settled that, unless waived,

Eleventh Amendment immunity deprives a federal court of jurisdiction to hear a suit against the State of Texas or one of its agencies. *Id.*; *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974).

TTU is a coeducational institution of higher education within the Texas Tech University System, created by the Texas Legislature. TEX. EDUC. CODE §§ 109.001, 109.101, *et seq.*; TEX. EDUC. CODE § 61.003(3) (including Texas Tech University in the definition of “[g]eneral academic teaching institution”); TEX. GOV. CODE § 572.002(10)(B) (defining “State agency” as “a university system or an institution of higher education as defined by Section 61.003, Education Code, other than a public junior college”).

The Fifth Circuit has held that state agencies, including branches of state universities, are immune from suits for money damages under the Eleventh Amendment. *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). The Eleventh Amendment cloaks Texas Tech University with sovereign immunity as a state institution. *United States v. Tex. Tech Univ.*, 171 F.3d 279, 289 n. 14 (5th Cir. 1999); see also *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (agreeing with the University of Houston’s argument that “it enjoys immunity from unconsented-to suit in federal court under the Eleventh Amendment”). Therefore, TTU is entitled to the same immunity as the State itself. *See Pennhurst State Sch.*, 465 U.S. at 100.

B. Plaintiff’s claims against the Individual Defendants in their Official Capacities are Duplicative claims against TTU

Insofar as plaintiff sued several individual defendants in their official capacities, it is manifest that official capacity suits, “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Thus, “an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.” *Id.*; *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) (“Official capacity suits generally represent another way of pleading an action against an entity of which an officer is an agent.”).

Because official-capacity claims are, in reality, against that same entity, they are subject to dismissal as duplicative. See, e.g., *Garza v. Escobar*, 972 F.3d 721, 734 (5th Cir. 2020); *Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001). Additionally, “an employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer.” *Franka v. Velasquez*, 332 S.W.3d 367, 382-83 (Tex. 2011). Accordingly, all such duplicative claims asserted by Plaintiff against the individual Defendants in their official capacities should be dismissed.

C. Liability under 42 U.S.C. § 1983 and Qualified Immunity

Title 42 U.S.C. § 1983 creates a damages remedy for the violation of federal constitutional or statutory rights under color of state law. Specifically, § 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any ... person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

42 U.S.C. § 1983.

Because § 1983 merely provides a remedy for designated rights, rather than creating any substantive rights, “an underlying constitutional or statutory violation is a predicate to liability.” *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997). To establish § 1983 liability, the plaintiff must establish the following three elements: (1) deprivation of a right secured by the United States Constitution or federal law; (2) that occurred under color of state law; and (3) was caused by a state actor. *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004).

Qualified immunity is a defense to § 1983 claims that “shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.” *Reichle v. Howards*, 566 U.S. 658, 664 (2012). The Supreme Court has held that courts may grant qualified immunity on the ground that a purported right was not “clearly established” by prior case law, without resolving the often more difficult

question of whether the purported right exists at all. *Id.* According to the Supreme Court, “This approach comports with our usual reluctance to decide constitutional questions unnecessarily.” *Id.* The Supreme Court has further held that, “A clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’ ” *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015).

“Where no controlling authority specifically prohibits a defendant’s conduct[,] ... the law cannot be said to be clearly established.... [G]eneralizations and abstract propositions are not capable of clearly establishing the law.” *Smith v. Davis*, 507 Fed.App’x. 359, 361 (5th Cir. 2013). While there need not be a case directly on point, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Mullenix*, 577 U.S. at 11. “Put simply, qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’ ” *Id.* at 12. The Supreme Court has repeatedly advised courts “not to define clearly established law at a high level of generality,” explaining that, “The dispositive question is ‘whether the violative nature of particular conduct is clearly established.’ ” *Id.*

Once a government official asserts the defense of qualified immunity, the burden shifts to the plaintiff to negate the defense. *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009). To overcome a claim of qualified immunity, a plaintiff must demonstrate: (1) that the official violated a statutory or constitutional right; and (2) that the right was “clearly established” at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The Supreme Court has held that, “lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first.” *Id.* at 735.

In response to a qualified immunity defense, “plaintiffs suing governmental officials in their individual capacities must allege specific conduct giving rise to the constitutional violation.”

Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 443 (5th Cir.1999); see also, FED.R.CIV.P. 7(a). This specificity of facts necessary in cases when qualified immunity has been asserted is referred to as the “heightened pleading” requirement, which requires a plaintiff to plead “allegations of fact which focus specifically on the conduct of the individual who caused the plaintiff’s injury.” *Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir.1999). In the § 1983 context, this standard translates in part into the requirement that the plaintiff “identify defendants who were either personally involved in the constitutional violation or whose acts are causally connected to the constitutional violation alleged.” *Anderson*, 184 F.3d at 443; *DeLeon v. City of Dallas*, 141 F. App’x 258, 261 (5th Cir.2005).

D. Plaintiff’s Constitutional claims Fail as a Matter of Law – Individual Defendants Entitled to Qualified Immunity

Plaintiff alleges the violation of his rights under the Due Process and Equal Protection clauses of the U.S. Constitution. Amended Complaint at ¶¶ 149, 157, 165. The allegations upon which Plaintiff bases these claims do not rise to the level of a constitutional right.

1. Due process claim

“To be entitled to the procedural protections of the Fourteenth Amendment, a plaintiff must demonstrate he was deprived of either a liberty or a property interest.” *Smith v. Davis*, 507 F. App’x 359, 362 (5th Cir. 2013).

Liberty interests arise from either “the Constitution itself, by reason of guarantees implicit in the word liberty,” or from “an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Liberty interests that arise from the Constitution extend beyond “freedom from bodily restraint.” *Roth*, 408 U.S. at 572. They also include the right to contract, to engage in “the common occupations of life,” to gain “useful knowledge,” to marry and establish a home to bring up children, to worship God, and to enjoy “those privileges long recognized ... as essential to the orderly pursuit of happiness of free men.” *Id.* On the other hand, state-created liberty

interests are “generally limited to freedom from restraint” *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

Plaintiff does not allege that Defendants barred or limited his access to campus, denied him from engaging in educational pursuits as an enrolled TTU student or in any way limited his freedom from restraint. Instead, he alleges he had to meet a “two-publication” requirement that was not imposed on Asian students towards fulfilling academic requirements to be awarded a Ph.D., and that contrary to his academic superior and dissertation advisor Dr. Simon, in his opinion his dissertation was so “perfect” that it did not need corrections. These allegations fail to plead a cognizable liberty interest.

Property interests “are not created by the Constitution.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Instead, they “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Id.* To have a property interest protected by due process, a person must “have a legitimate claim of entitlement” to the benefit, not merely “an abstract need or desire for it” or “a unilateral expectation of it.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

“Most case law involving due process in the educational setting concerns student dismissals or suspensions from academic institutions.” *Smith v. Davis*, 507 Fed.App’x. 359, 362 (5th Cir. 2013). This is not one of those cases. Here, Plaintiff does not allege that he was disciplined for any type of misconduct or that TTU dismissed him for academic or misconduct reasons. Instead, the crux of the “harm” he alleges is that his graduation was improperly delayed due to disparate treatment based on his race and national origin, most notably, by (1) having to meet the two-publication requirement which was not imposed on Asian Ph.D. students, (2) having to make corrections to his dissertation as required by his dissertation advisor, which Plaintiff claims were untimely requested or which he felt

were otherwise unnecessary or somehow improper, and (3) that numerous others in the department “endorsed and facilitated” Dr. Simon’s behavior towards him.

Ultimately, Plaintiff’s issue with the two-publication rule is irrelevant. As with all Ph.D. programs, not only at TTU, but at institutions of higher education across the country, students must successfully complete their doctoral dissertation and have it approved by a committee or an advisor in order to graduate. Once he completed his dissertation, the two-publication rule imposed by TTU’s Whitacre College of Engineering was waived, as Plaintiff himself admits, and he was allowed to graduate. Complaint at ¶¶ 21, 117-19. It was also still a waiver despite his attempt to downplay it as a waiver of the “acceptance requirement.” *Id.* at 117-118. Thus, it is disingenuous for Plaintiff to allege that Asian Ph.D. students did not have to comply with the two-publication rule, given his own admission that it was waived for him too. *Id.* Moreover, he has not alleged, nor can he, that Asian Ph.D. students were allowed to graduate without an approved final dissertation.

These allegations fail to allege the deprivation of a constitutionally protected property interest. This is because his pursuit of a Ph.D. was never jeopardized by way of either a disciplinary or dismissal action. Rather, even taking the allegations as true, Plaintiff can cite to no authority that a 7-month delay in graduating constitutes a deprivation of a right was “clearly established” at the time of the challenged conduct.

Moreover, with respect to TTU’s rules and policies, “[t]here is not a violation of due process every time a university ... [departs from or] violates its own rules.” *Levitt v. University of Texas*, 759 F.2d 1224, 1230 (5th Cir.), cert. denied, 474 U.S. 1034 (1985). “[U]nless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation.” *Id.*; *Garrett v. Mathews*, 625 F.2d 658, 660 (5th Cir.1980) (“Even if [a] university depart[s] from its own regulations, not every violation by an agency of [its own] rules rises to the level of a due process claim.”). Hence, even if

TTU applied the two-publication requirement on Plaintiff but not on Asian Ph.D. students, that is not tantamount to a constitutional deprivation, particularly since it was waived for him. Accordingly, having not established he was deprived of the constitutional minima, Plaintiff tying a purported due process violation to the purely academic two-publication requirement fails to support a colorable due process claim.

Plaintiff is essentially requesting this court “second guess” Defendants’ professional academic judgment. However, “[c]ourts are particularly ill-equipped to evaluate academic performance.” *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978). U.S. Supreme Court precedent requires courts to “show great respect for faculty’s professional judgement” and significantly limit any review of academic decisions. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). This necessarily includes the exercise of Dr. Simon’s professional academic judgment in requiring Plaintiff to make corrections to his dissertation prior to being awarded the highest academic degree conferred by a university. Without dispute, the process of earning a Ph.D.³ is rigorous and academically demanding and challenging. Being required to make dissertation corrections which Plaintiff felt were unnecessary simply does not rise to the level of a constitutional violation. And the other individual Defendants were simply deferring to Dr. Simon’s academic judgment as Plaintiff’s dissertation advisor.

“Courts must accept, as consistent with due process, an academic decision that is not beyond the pale of reasoned academic decision-making when viewed against the background of the student’s

³ A PhD dissertation is a substantial piece of independent research that is required of all students who are pursuing a doctorate degree. It is a piece of original work that has not been published elsewhere and, most importantly, makes a new contribution to the field. This contribution may be a new way of thinking about an existing topic or even a novel theory. The research performed for a dissertation is usually conducted over a period of several years to half a decade. <https://blog.wordvice.com/dissertation-vs-thesis-key-differences>.

entire career.” *Wheeler v. Miller*, 168 F.3d 241, 250 (5th Cir. 1999). This exceedingly narrow scope for judicial review of academic decisions applies to both due process and equal protection claims. *Id.* at 252. In academia, it is commonplace, in fact, the norm, for a dissertation advisor to require that the student correct or edit their dissertation. Hence, requiring corrections is not something “beyond the pale” of reasoned academic decision-making, particularly within the context of a doctoral dissertation. The narrow scope for judicial review necessarily precludes such allegations from being actionable.

Furthermore, Plaintiff has no protected property interest in higher education. The Fifth Circuit has held that, “Education—particularly post-graduate or professional education—is not a right afforded either explicit or implicit protection under the Constitution.” *Barnes v. Symeonides*, 44 F.3d 1005 (5th Cir. 1995). One federal district court has concluded there is a “protected property interest in higher education.” *Doe v. Univ. of Tex. Health Sci. Ctr.*, No. H-21-1439, 2021 WL 5882625, at *8 (S.D. Tex. Dec. 13, 2021). However, the passage from the Fifth Circuit cited by that court denotes only that there is a “liberty interest in [] higher education.” *Plummer v. Univ. of Hous.*, 860 F.3d 767, 773 (5th Cir. 2017). Plaintiff’s allegations fail to plead a cognizable liberty interest in higher education.

Plaintiff also cannot cite to any authority that he has a protected property interest in higher education. See *Pickett v. Tex. Tech Univ. Health Scis. Ctr.*, No. 5:20-CV-232-H-BQ, 2021 WL 5277556, at *14 (N.D. Tex. July 30, 2021), report and recommendation adopted in relevant part, No. 5:20-CV-232-H-BQ, 2021 WL 4316566 (N.D. Tex. Sept. 23, 2021). The Fifth Circuit has further observed that Texas has yet to recognize a property interest in “graduate higher education.” *Plummer*, 860 F.3d at 773. Indeed, the uncertainties elsewhere throughout the country on federal due process grounds should lead this court to err on the side of caution in recognizing new, unprecedented property rights. See *Doe v. White*, 440 F. Supp. 3d 1074, at 1088–89 (N.D. Cal. 2020) (observing the area as

“unsettled”).

For these reasons, Plaintiff can neither state a due process claim upon which relief can be granted nor demonstrate any due process right that was “clearly established” at the time of the challenged conduct. Stated another way, there are no “clearly established rights” in connection with being required to make dissertation corrections as requested by a dissertation advisor or the allegedly disparate application of the two-publication academic requirement towards earning a Ph.D. degree.

As Plaintiff has not proved the deprivation of a constitutionally protected interest, his due process claim necessarily fails and all individual Defendants are entitled to qualified immunity from this claim.

2. *Equal protection claim*

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat all similarly situated people alike. U.S. CONST. Amend. XIV; *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985).

“To state a claim of racial discrimination under the Equal Protection Clause and section 1983, the plaintiff must allege and prove that she received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.” *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 227 (5th Cir. 2012). A plaintiff bringing a class-of-one equal protection claim must allege “that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

As indicated above, the exceedingly narrow scope for judicial review of academic decisions applies to both due process and equal protection claims. *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999). To reiterate, in academia it is commonplace, in fact, the norm, for a dissertation advisor

to require that the student correct or edit their dissertation. Hence, requiring corrections is not something “beyond the pale” of reasoned academic decision-making, particularly within the context of a student’s career in earning a Ph.D. Plaintiff’s subjective “opinion” that requesting he make corrections that were unnecessary or improper is of no consequence to the analysis, especially since he did not allege that Asian Ph.D. students were never required to make dissertation corrections by Dr. Simon as their dissertation advisor.

The same rationale applies equally to Plaintiff’s assertion regarding the two-publication requirement – it essentially involved academic decision-making by Dr. Simon irrespective of his contention that it was imposed on him but not on Asian Ph.D. students. And just as significant, Plaintiff admits that Defendants waived the acceptance requirement of his second publication, as indicated in an email to him by Dr. Albert Sacco, Jr., Dean of the College of Engineering. Complaint at ¶¶ 11, 117-19. At any rate, the exercise of professional academic judgment is a rational basis for the alleged difference in treatment. See e.g., *Levi v. University of Texas at San Antonio*, 840 F.2d 277, 280 (5th Cir.1988); *Clements v. Nassau County*, 835 F.2d 1000, 1005–05 (2d Cir.1987) (in cases involving academic decisions, the university is entitled to judgment as a matter of law if there is evidence of a rational basis for the decision). The narrow scope for judicial review necessarily precludes this allegation from being actionable.

Additionally, most equal protection claims in the educational setting involving students are for dismissal actions. *Deyo v. Tomball Indep. School Dist.*, 144 F. Supp. 3d 905, 917 (S.D. Tex. 2015); *Shah v. Univ. of Tex. Sw. Med. Sch.*, 54 F. Supp. 3d 681, 705 (N.D. Tex. 2014); *Retzlaff v. de la Vina*, 606 F.Supp.2d 654, 658 (W.D.Tex.2009). This is not one of those cases. He does not allege that he was disciplined for any type of misconduct or that TTU dismissed him for academic reasons. Instead, the crux of his complaint is that his graduation was improperly delayed due to disparate treatment

based on his race and national origin, most notably, by (1) having to meet the two-publication requirement which was not imposed on Asian Ph.D. students, (2) having to make corrections to his dissertation as required by his dissertation advisor, which Plaintiff claims were untimely requested or which he felt were otherwise unnecessary or somehow improper, and (3) that numerous others in the department “endorsed and facilitated” Dr. Simon’s behavior towards him.

These allegations simply do not rise to the level of an equal protection violation. Plaintiff’s pursuit of a Ph.D. was never jeopardized by way of either a suspension or dismissal action. Rather, even taking the allegations as true, Plaintiff can cite to no authority that a seven-month delay in graduating constitutes a deprivation of a right was “clearly established” at the time of the challenged conduct, whether in the context of either a due process or equal protection analysis.

In fact, cases addressing a student’s delay in education or graduation generally arise under circumstances where a student has been suspended or dismissed, which once again is not the case here. *Doe v. Princeton Univ.*, 2020 WL 2097991, at *7 (D.N.J. May 1, 2020) (if the expelled student prevails on the merits of his underlying claims and is reinstated to Princeton, he will have suffered a delay in his education, analogous to a suspension); *Knoch v. Univ. of Pittsburgh*, 2016 WL 4570755, at *8–9 (W.D. Pa. Aug. 31, 2016) (addressing the interruption of education and delay in entering the workforce due to student’s suspension); *Howe v. Pennsylvania State Univ. – Harrisburg*, 2016 WL 393717, at *6 (M.D. Pa. Feb. 2, 2016) appeal dismissed (Mar. 29, 2016) (addressing delay in education due to a student suspension).

Finally, for Plaintiff to assert that intentional discrimination was at play to such a degree that it overrode professional academic judgment in requiring him to meet degree requirements is implausible and does not permit more than the possibility of misconduct. *Iqbal*, 556 U.S. at 679.

The law does not support an equal protection claim violation based on the allegations

presented by Plaintiff. As a result, Plaintiff has failed to state an equal protection claim upon which relief can be granted and the individual Defendants are entitled to qualified immunity because they could not have violated a “clearly established” constitutional right at the time of the challenged conduct.

E. Plaintiff Failed to State a Section 1981 claim upon which Relief can be Granted – Individual Defendants Entitled to Qualified Immunity

Plaintiff lodges his Section 1981 claim against “all individual Defendants,” claiming that “the Department’s handbook and other written policies of Texas Tech and its agencies created a contractual relationship between Texas Tech and Plaintiff.” Complaint at ¶ 174.

Section 1981 “guarantees to ‘[a]ll persons within the jurisdiction of the United States ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens.’ ” *Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 399 (5th Cir. 2021). Plaintiff’s burden to plead factual content to allow the Court to reasonably infer that each defendant is liable under Section 1981 requires that he “plead sufficient facts on all of the ultimate elements of [this] claim.” *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016).

To state a claim for relief under § 1981, a plaintiff must allege that (1) he or she is a member of a racial minority; (2) the defendant(s) had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, such as the making and enforcement of a contract. See *Perry v. VHS San Antonio Partners, L.L.C.*, 990 F.3d 918, 931 (5th Cir. 2021). “Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.” *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). “A § 1981 claim fails as a matter of law if the plaintiff lacks rights under the existing (or proposed) contract that

he wishes to make and enforce.” *Perry*, 990 F.3d at 931. Also, the contract at issue must be between the plaintiff and the defendant. *Id.* at 931-33.

“Claims against individual public officials under § 1981 are subject to the defense of qualified immunity[.]” *Foley v. University of Houston System*, 355 F.3d 333, 338 (5th Cir. 2003).

First, Plaintiff does not plead he has existing rights under any (non) existent contractual relationship between himself and TTU. In this regard, he fails to cite to or identify the source of any “existing contractual relationship.” Instead, he simply claims in conclusory fashion a “contractual relationship” based on a general reference to the Chemical Engineering department’s “handbook” and other unidentified, unspecified “written policies of Texas Tech and its agencies.” *Id.* at ¶ 174. He also does not identify the TTU “agencies” to which he is referring, nor does he explain those agencies’ role in establishing a contractual relationship. *Id.* Instead, he added the newfound allegation that he was “told” by someone he does not identify that “the handbook contained the requirements he would be expected to satisfy to obtain his graduate degree.” *Id.*

Several cases have addressed whether a university handbook constitutes a contract under Texas law. Those cases center on whether a school intends to be bound by the language in the handbook. *Eg. University of Tex. Health Sci. Ctr. v. Babb*, 646 S.W.2d 502 (Tex. App.—Houston [1st Dist.] 1982, no writ) (finding that a student catalog expressly stating that a student admitted under its terms could continue under the same catalog established a written contract because the university intended to be bound by its terms); *Eiland v. Wolf*, 764 S.W.2d 827, 838 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (distinguishing *Babb* and finding that no enforceable contract existed based on the express statement that the provisions of the university catalogue were subject to change); *Tobias v. University of Texas at Arlington*, 824 S.W.2d 201, 211 (Tex. App. —Fort Worth 1991), cert. denied, 506 U.S. 1049 (1993) (finding an express disclaimer of a contract negates the inference

of any intent to be bound by the university catalog); *Southwell v. Univ. of Incarnate Word*, 97 4 S.W.2d 351, 355-56 (Tex. App.—San Antonio, 1998, pet. denied) (finding a student bulletin did not itself create a contract between a university and a student because there was no intent to be bound when the college reserved the right to alter the bulletin without prior notice). As noted in *Eiland*, “[a] basic requisite of a contract is an intent to be bound, and the catalog’s express language negates, as a matter of law, an inference of such intent on the part of the university.” 764 S.W.2d at 838; see also RESTATEMENT (SECOND) OF CONTRACTS § 27, cmt. c (1981). Thus, when a handbook lacks express language evincing an intent to be bound and instead contains provisions that reserves a right to change or alter the policies contained in a student handbook, there is no contract because there is no intent to be bound.

In addition to failing to plead he has existing rights under any (non) existent contract between himself and TTU, Plaintiff also fails to plead that TTU has indicated in the generalized sources that he references any intent to be bound. Accordingly, Plaintiff’s allegation regarding the existence of a contractual relationship is impermissibly vague, conclusory in nature and fails to plead any reasonably sufficient or specific language in any TTU written materials that demonstrate the existence of a contractual relationship.

Because Plaintiff has failed to plead sufficient facts on all elements of this claim, it does not meet the plausibility standard under *Iqbal* and its progeny. Plaintiff’s claim under Section 1981 is implausible since the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.

Further, Plaintiff fails to plead that he entered into a contract between himself and any individual Defendant. Instead, he only pleads any alleged contractual relationship between himself and TTU.

Also, any Section 1981 claim against the individual Defendants in their official capacities is barred by sovereign immunity since a claim against them in this capacity is a claim against the state. *Kentucky*, 473 U.S. at 166. The Fifth Circuit has concluded that § 1981 is not a congressional waiver of a state's Eleventh Amendment immunity. See *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981). The Texas legislature has also not waived immunity with respect to § 1981. See *Cephus v. Texas Health and Human Services Comm'n*, 146 F.Supp.3d 818, 838 (S.D. Tex. 2015) (finding that the Texas Health and Human Services Commission, a state agency, retains its sovereign immunity against the § 1981 claims).

Thus, Plaintiff has failed to state a claim upon which relief can be granted under Section 1981. Accordingly, all individual Defendants retain qualified immunity from this claim.

F. Plaintiff has Failed to State a Title VI claim against TTU upon which Relief can be Granted

Title VI, 42 U.S.C. § 2000d *et seq.*, was enacted as part of the landmark Civil Rights Act of 1964. It provides that:

“[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

42 U.S.C. § 2000d.

Title VI “prohibits only intentional discrimination.” *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 407 (5th Cir. 2015). Title VI does not protect individuals from unfair decisions, but only decisions that are made with discriminatory motive or intent. *Bisong v. Univ. of Houston*, 493 F. Supp. 2d 896, 905 (S.D. Tex. 2007) (citing *Nieto v. L & H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997)). Accordingly, the primary issue in Title VI cases is not whether a recipient of federal funding made an erroneous decision, but whether that decision was made with discriminatory motive. See *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th

Cir. 1995).

Thus, “[t]o receive compensatory damages, a Title VI plaintiff must prove discriminatory intent.” *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir.1996). In this regard, a Title VI claimant must set forth “specific allegations of acts that were taken with discriminatory intent[.]” *Mohamed for A.M. v. Irving Indep. Sch. Dist.*, 252 F. Supp. 3d 602, 627 (N.D. Tex. 2017).

To survive a motion to dismiss, Plaintiff’s allegations must create a reasonable inference that Defendant’s alleged discriminatory conduct was motivated by race, color, or national origin. See *Pathria v. Univ. of Texas Health Sci. Ctr. at San Antonio*, 531 F. App’x 454, 455 (5th Cir. 2013) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)).

Subjective belief alone cannot prove intentional discrimination. See, e.g., *Mohamed*, 252 F. Supp. 3d at 627–28; *Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1189 (5th Cir.1997) (holding that plaintiff’s subjective opinion, without more, is insufficient to establish a claim of discrimination).

Here, the sum and substance of Plaintiff’s complaint is that his graduation was delayed because Dr. Simon allegedly held him to a two-publication requirement, unlike Asian Ph.D. students, and that he was forced to make dissertation corrections that in his “opinion” were not necessary. As noted above, Plaintiff did not allege anywhere in his Complaint that Asian Ph.D. students were not required to make dissertation corrections. Irrespective of Plaintiff’s disagreement with Dr. Simon’s requested actions in connection with him meeting TTU degree requirements, these allegations do not rise to the level of an actionable Title VI claim. This is because at worst they can only be reasonably interpreted as merely unfair decisions, which is not protected under Title VI. This is particularly true with respect to the two-publication requirement, since however unfair Plaintiff felt that to be, it was admittedly waived for him and he was permitted to graduate. *Id.* at ¶¶ 21, 117-19.

Moreover, entities such as TTU cannot be held vicariously liable for an employee’s conduct

under Title VI. See *Wren v. Midwestern State Univ.*, Case No. 7:18-cv-00060, 2019 WL 501920, at *7 (N.D. Tex. Jan. 23, 2019); *Vouchides v. Houston Cmty. Coll. Sys.*, Case No. H-10-2559, 2011 WL 4592057, at *6 (S.D. Tex. Sept. 30, 2011); *Landry v. Cypress Fairbanks ISD*, Case No. 4:17-CV-3004, 2018 WL 3436971, at *6 (S.D. Tex. July 17, 2018). When a Title VI claim does not involve an official policy of intentional discrimination, a plaintiff must allege an “appropriate person—an official authorized to institute corrective measures—had actual knowledge of the discrimination and responded with deliberate indifference.” *Mohamed*, 252 F. Supp. 3d at 627.

Also, because Plaintiff did not allege the existence of an official policy of intentional discrimination, he is relegated to alleging an “appropriate person” had actual knowledge of the discrimination responded with deliberate indifference by failing to institute corrective measures. Although Plaintiff’s attorney submitted a purported “grievance” regarding Plaintiff’s allegations, he graduated a few months later in that very semester, so he can show no harm resulting from his perceived inaction by TTU. Instead, he alleges that the violations against him were “engaged in with reckless indifference.” Complaint at ¶ 155. This is insufficient to state a claim under Title VI. As a result, TTU cannot be held vicariously liable.

G. Plaintiff has Failed to State a Claim for Title VI Retaliation upon which Relief can be Granted

Title VI’s implementing regulations prohibit the recipient of federal funds from retaliating against any individual who makes a complaint or participates in an investigation under Title VI. 34 C.F.R. § 100.7(e). The Fifth Circuit assumes without deciding that Title VI includes a claim for retaliation. See *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 586 n.4 (5th Cir. 2020); *Bhombal v. Irving Indep. Sch. Dist.*, 809 F. App’x 233, 238 (5th Cir. 2020) (“[a]ssuming, without deciding” that a Title VI retaliation claim “is available” for the purpose of ruling on its viability at the motion to dismiss stage). The same elements are necessary to sustain a retaliation claim under both Titles VI

and VII. See *Jones v. S. Univ.*, 834 F. App'x 919, 923 (5th Cir. 2020) (applying the Title VII retaliation standard to a Title VI claim).

To successfully plead a Title VI retaliation claim, a plaintiff must show (1) that he engaged in a protected activity; (2) that Defendants took a material action against him; and (3) that a causal connection existed between the protected activity and the adverse action. *Jones v. S. Univ.*, 834 F. App'x 919, 923 (5th Cir. 2020). “A retaliation plaintiff must show that the funding recipient or its representatives took an adverse action against him because he complained of discrimination. That typically means the funding recipient itself signed off on the adverse action.” *Sewell*, 974 F.3d at 586.

“As in other civil rights contexts, to show protected activity, the plaintiff in a Title VI retaliation case need only ... prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring.” *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003); see also *Bisong v. Univ. of Hous.*, 493 F. Supp. 2d 896, 911–12 (S.D. Tex. 2007) (applying same). “In the educational context, it follows that the plaintiff must have been opposed to an unlawful educational practice.” *B.W. by next friends M.W.*, 2023 WL 128948, at *7.

Plaintiff's retaliation claim fails for a number of reasons. First, while it seems obvious, to state a claim for retaliation the alleged material actions against him must have occurred *after* engaging in protected activity. See *Davis v. Dallas Indep. School Dist.*, 448 Fed.Appx. 485, 493–94 (5th Cir.2011) (when protected activity occurs after the adverse decision, plaintiff cannot demonstrate causation for purposes of retaliation claim); *Balakrishnan v. Bd. of Supervisors of Louisiana State Univ. & Agr. & Mech. Coll.*, 452 F. App'x 495, 499 (5th Cir. 2011) (“... and these adverse actions occurred after she engaged in the protected activity”); *Douglas v. St. John Baptist Par. Libr. Bd. of Control*, 2022 WL 898746, at *15 (E.D. La. Mar. 28, 2022) (“But [an] adverse action that occurs before a ‘protected activity’ cannot form the basis of a retaliation claim.”).

The alleged material actions against him occurred *prior to* Plaintiff engaging in any protected activity. In this regard, Plaintiff alleges that “very early on after Dr. Simon became [his] advisor, he began experiencing discriminatory treatment at her hands.” Complaint at ¶ 27. One of the alleged actions against him occurred as early as August 2018, when she yelled at him in front of others when he was speaking with his Hispanic friends. *Id.* at ¶ 29. Another occurred on July 26, 2021, when he was informed in an email from Dr. Mark Sheridan, Ph.D., Vice Provost for Graduate & Postdoctoral Affairs & Dean of the Graduate School, that he must satisfy the two-publication requirement to meet doctoral degree requirements. *Id.* at ¶ 64. And another occurred on July 22, 2021, when he was informed by Dr. Simon that dissertation corrections were required. *Id.* at ¶ 59.

However, by Plaintiff’s own admission, it was not until October 14, 2021 that he filed a formal grievance letter against Dr. Simon regarding the two publication requirement and dissertation corrections. *Id.* at ¶ 87. Then, about ten months later in August 2022, he filed charges of discrimination with both the U.S. Department of Education Office of Civil Rights and the U.S. Equal Employment Commission. *Id.* at ¶ 148. Since the alleged material actions against him occurred prior to any protected activity, Plaintiff cannot state a claim for retaliation.

Second, Plaintiff failed to allege that Dr. Simon had any knowledge of Plaintiff’s October 2021 formal grievance, since logically, she must have knowledge of the protected activity in order to retaliate. “Fifth Circuit precedent requires evidence of knowledge of the protected activity on the part of the decision maker and temporal proximity between the protected activity and the adverse employment action.” See *Ramirez v. Gonzales*, 225 Fed.Appx. 203, 210 (5th Cir.2007); see also *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 799 (11th Cir.2000) (“[T]emporal proximity alone is insufficient to create a genuine issue of fact as to causal connection where there is un rebutted evidence that the decision maker did not have knowledge that the employee engaged in protected

conduct.”). Accordingly, he cannot establish prima facie element three regarding causation.

Third, the actions for which Plaintiff complains were not “material actions” which can support a Title VI retaliation claim. In this regard, based on the case law cited above, material actions under Title VI involve either suspension or dismissal actions, which he does not allege to have occurred. And even accepting as true Plaintiff’s claim that he should have graduated in the Spring 2021, not the Fall 2021, a mere delay in graduating is not actionable under Title VI either for discrimination or retaliation. Plaintiff can cite to no authority supporting the proposition that a mere 7-month delay in graduation is actionable under Title VI.

Finally, to the extent Plaintiff claims that not retroactively awarding him a master’s degree was in retaliation for his formal grievance and complaints, too much time passed to establish causation between the two events. The Supreme Court expressly noted that the temporal proximity must be “very close” to establish a prima facie case of retaliation by itself. *Clark County School District v. Breeden*, 532 U.S. 268, 273–74 (2001). The Fifth Circuit has held that a five-month lapse is too long without other evidence of retaliation. See *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 305 (5th Cir. 2020). Here, the length of time that passed between Plaintiff’s formal grievance on October 14, 2021 until being told in September 2022 that TTU would not retroactively award him a master’s degree was about eleven (11) months. Complaint at ¶¶ 87, 144. An eleven-month lapse in time is clearly too long for Plaintiff to establish causation, particularly since that is the only alleged material action that occurred *after* his grievance and complaints, and more importantly, after graduating with a Ph.D.

TTU further submits that its decision to not retroactively award Plaintiff a master’s degree is not a “material action” that can support a retaliation claim. For these reasons, Plaintiff has failed to state a retaliation claim upon which relief can be granted.

H. The Fifth Circuit does not Recognize a Title VI claim for Teacher-on-Student Harassment

Plaintiff asserts a teacher-on-student hostile environment claim based on Dr. Simon yelling at him and harassing him when he spoke his native language (i.e., Spanish) in a manner which she did not do with Asian Ph.D. students when speaking in their native language. Complaint at ¶ 2, 153.

The Fifth Circuit has recognized a racial discrimination claim under Title VI premised on a racially hostile environment arising from *student-on-student harassment*. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015) (emphasis added). Most recently about six months ago, the Fifth Circuit noted, however, that the bounds of their decision in *Fennell* did not extend to claims for teacher-on-student racial harassment. *B.W. by next friends M.W. v. Austin Indep. Sch. Dist.*, No. 22-50158, 2023 WL 128948, at fn. 1 (5th Cir. Jan. 9, 2023). The only types of cases recognized by the Fifth Circuit involving a teacher and student relate to sexual abuse. See, e.g., *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754 (5th Cir. 2015). This case does not involve sexual abuse allegations.

Plaintiff can cite to no authority that the Fifth Circuit has recognized a race discrimination claim under Title VI based on teacher-on-student harassment. This court should err on the side of caution and decline to recognize a teacher-on-student racial harassment claim. It is a new, unrecognized, and unprecedented cause of action. Thus, Plaintiff cannot state a claim for teacher-on-student harassment under Title VI.

I. Plaintiff's Request for a Master's Degree is Insufficiently Pled and No Legal Basis Exists to Entitle him to such Retroactive Relief

Not only has Plaintiff failed to plead allegations that would support his contention that he was improperly denied a Master of Science degree, such relief is not available under Title VI.

Plaintiff admittedly waited almost one full year after graduating to first claim that TTU should

have also awarded him a Master of Science degree while he was a doctoral student there. *Id.* at ¶¶ 138, 142-46. Nowhere in his Complaint does he allege that during his Ph.D. studies at TTU did he ever inquire into the receipt of a master's degree, better yet that he was either told he was not eligible for one or that his inquiry was ignored or disregarded. Further, nowhere in his Complaint does he allege that he submitted the required application for a master's degree to the appropriate department or college but was improperly denied admission. He also did not allege that other non-Hispanic or Asian Ph.D. students who had already graduated (i.e., similarly situated) had contacted TTU asking for the same master's degree retroactively and that TTU awarded it to them. Based on the failure to make such allegations, he has not pled a claim for which this requested relief can be granted.

Moreover, Plaintiff's newfound allegation that the award of the Master of Science degree was a "secret" that Defendants only notified Asian students about, apparently nowhere to be found on Texas Tech's website or in any written catalogs or other materials, and that this information was withheld from him based on race is entirely implausible. *Id.* at ¶ 146. This is because to suggest that TTU would conceal the availability of a degree, any degree, from the general public or from students, much less against certain persons based on race, is so fundamentally contrary to TTU's obvious interest in the advancement of education that such an allegation does not raise a right to relief above the speculative level or to permit this court to infer more than mere possibility of misconduct. *Twombly*, 550 U.S. at 555. In fact, information regarding degree programs and courses of study at TTU, including the Master's degree program that Plaintiff claims is a "secret," are available to the general public online.⁴ It is obvious that Plaintiff will allege anything to advance his case, however reckless and irresponsible.

What is also perplexing is that Plaintiff wants a degree that he admittedly was already awarded

⁴ The internet link for TTU's course catalog is <https://catalog.ttu.edu/>.

in 2016 by the University of Oklahoma. Amended Complaint at ¶ 20. This is tantamount to a licensed attorney going back to law school to earn another juris doctor degree. It is fundamentally non-sensical.

It is also baffling that in light of his numerous allegations of discrimination and retaliation that were allegedly made against him in the most mean-spirited and vicious way imaginable by the individual Defendants, Plaintiff wanted to partake in the highly personal, private ritual of marriage proposal at a university graduation ceremony *in front of and in the presence of the very same individuals*. The mere fact that Plaintiff is upset that graduation day wasn't "all about him" has no bearing on the analysis.

Additionally, nowhere under Title VI can be found any support for this requested relief. And Plaintiff can cite to no legal authority that a federal district court has jurisdiction to order a state university to retroactively award a degree to a former student. No such authority exists. Thus, this request for relief should be flatly rejected and dismissed.

J. Plaintiff Cannot Rely on allegations of a Pattern and Practice of Discrimination

Plaintiff alleges that TTU's Chemical Engineering Department has a "long history of discrimination" against Hispanics. Complaint at ¶¶ 132-37. This is without doubt an allegation impacting not just Plaintiff, but an entire class of individuals – Hispanics.

The burden-shifting analytical inquiry into intentional race discrimination claims is essentially the same for § 1981, § 1983, Title VI, and Title VII. *Baldwin v. Univ. of Texas Med. Branch*, 945 F. Supp. 1022, 1031 (S.D. Tex. 1996). In the absence of direct evidence of discrimination, the plaintiff may seek to establish a prima facie case with circumstantial evidence through a variation of the model set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* Additionally, the same elements are necessary to sustain a retaliation claim under both Titles VI and VII. See *Jones v. S. Univ.*, 834 F. App'x 919, 923 (5th Cir. 2020) (applying the Title VII retaliation standard to a Title VI

claim).

The Fifth Circuit has held that a pattern or practice case “is not a separate and free-standing cause of action but rather is ‘merely another method by which disparate treatment can be shown.’” *Celestine v. Petroleos de Venezuela, S.A.*, 266 F.3d 343, 355 (5th Cir. 2001) (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1219 (5th Cir. 1995)). A pattern or practice discrimination case is brought either by a governmental entity or as a class action to establish “that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers.” *Id.* (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360, 97 S.Ct. 1843 (1977)). The pattern and practice method of proof is used in class actions, while individual discrimination claims are relegated to the *McDonnell Douglas* framework. *See Scarlett v. Seaboard Coast Line R.R. Co.*, 676 F.2d 1043, 1053 (5th Cir. 1982) (“This is not a ‘pattern and practice suit’ by the government ... [n]or is this a private class action ... [a]n individual proceeding as an individual under Title VII must prove the elements of a discriminatory hiring claim as set forth in *McDonnell Douglas*. “). The Supreme Court has never applied the *Teamsters* method of proof in a private, non-class action lawsuit and has markedly recognized the distinction between individual discrimination claims and class actions:

The crucial difference between an individual’s claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual’s claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876, 104 S.Ct. 2794, 2799-2800 (1984).

Other courts of appeal and district courts have reached the same conclusion. *See, e.g., Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998), vac. on other grounds, 527 U.S. 1031, 119 S.Ct. 2388 (1999); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866-67 n. 6 (7th Cir. 1985)

(“Plaintiffs’ use of ‘pattern-or-practice’ language also seems to be misplaced, since such suits, by their very nature, involve claims of classwide discrimination, and the five plaintiffs, while attacking policies that would have affected all of Jewel’s women employees as a class, have stated only their individual claims, not a class action.”) (citations omitted); *Axel v. Apfel*, 2000 WL 1593446, *6 (D.Md. 2000); *Herendeen v. Mich. State Police*, 39 F.Supp.2d 899, 905 (W.D.Mich. 1999).

Fifth Circuit precedent clearly supports such an exclusion. *Scarlett*, 676 F.2d at 1053; *Mooney*, 54 F.3d at 1219-20 (upholding lower court’s rejection of “pattern or practice” instruction because individual plaintiffs failed to show they were entitled to such an instruction). In fact, since *Scarlett* and *Mooney*, the Fifth Circuit has held that a “pattern and practice of discrimination” claim was inapplicable to Title VII plaintiff’s individual claim of discrimination. *Roy v. U.S. Dept. of Ag.*, 115 Fed. App’x 198, 201 (5th Cir. 2004).

Plaintiff cannot properly articulate any separate and distinct claim based upon a pattern and practice of discrimination. He is making an individual claim of discrimination based on race and national origin, which is analogous to the claims of the plaintiffs in *Celestine*, *Scarlett*, *Mooney* and *Roy*, all of whom were relegated to the use of the *McDonnell Douglas* burden-shifting scheme. He has pled no class action claims, nor has the government brought this suit on behalf of TTU employees to protect them from some widely-practiced discriminatory practice by TTU. Thus, to the extent Plaintiff seeks to hold TTU liable for a pattern and practice of discrimination or offers this in support of his claims, the law of this circuit does not permit such a claim to be made. Accordingly, Plaintiff’s “pattern and practice” of discrimination argument should be flatly rejected.

K. Plaintiff is not entitled to Injunctive Relief

Plaintiff’s claims are without factual or legal basis and should be dismissed therefore entitling him to no relief whatsoever. Nevertheless, even if he can articulate any tangible harm, it would at

most be a purported seven-month delay in graduating and being conferred a Ph.D. degree. This is not an adequate basis to warrant injunctive relief.

“In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages.” *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). Cases addressing a delay in education or graduation hold that this is not irreparable harm, but rather harm that can be compensated through monetary relief. See *Shah v. Univ. of Texas Sw. Med. Sch.*, 2014 WL 4105964, at *4 (N.D. Tex. Aug. 21, 2014); *Doe v. Princeton Univ.*, No. 3:20-cv-4352-BRM-TJB, 2020 WL 2097991, at *7 (D.N.J. May 1, 2020) (holding, were plaintiff to prevail on merits and be reinstated as a student, plaintiff will have suffered a delay in education remediable through monetary damages); *Madej v. Yale Univ.*, No. 3:20-cv-133 (JCH), 2020 WL 1614230, at *6–7 (D. Conn. Mar. 31, 2020) (holding academic withdrawal means plaintiff’s degree conferral will be delayed, which is remedied through monetary compensation); *Doe v. Vassar Coll.*, No. 19-cv-9601 (NSR), 2019 WL 6222918, at *6 (S.D.N.Y. Nov. 21, 2019) (no irreparable harm where plaintiff lost ability to graduate with his class year); see also *Hodges v. Boa of Supervisors of La. St. Univ. & Agric. & Mech. Coll.*, No. 20-1456, 2020 WL 5017665, at *4 (E.D. La. Aug. 25, 2020) (compiling cases); *Doe v. N.Y. Univ.*, 666 F.2d 761, 774 (2d Cir. 1981) (holding that “a one-year delay in obtaining admission to graduate school for the purpose of pursuing professional studies ... is insufficient to warrant an injunction.”).

Here, Plaintiff cannot argue irreparable harm, particularly since any alleged delay in graduation was not due to a suspension or dismissal action. In fact, by Plaintiff’s own admission, he has already graduated. Thus, the law does not support any form of injunctive relief, whether temporary or permanent in nature.

L. Plaintiff is not entitled to Punitive Damages under Title VI

Punitive damages may not be awarded in private suits brought under Title VI. *Barnes v.*

Gorman, 536 U.S. 181, 189 (2002). Thus, Plaintiff's claim for punitive damages must be dismissed.

V. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that this motion be granted thereby dismissing with prejudice all claims asserted by Plaintiff. Defendants further request all other relief both at law and in equity to which they may be justly entitled, including but not limited to attorney fees and costs.

Respectfully submitted.

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