

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

**JOHN ALEXANDER
ZAPATA HINCAPIE,
Plaintiff,**

V.

Civil Action No. 5:23-cv-00045

**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.

JURY DEMANDED

**PLAINTIFF’S RESPONSE TO DEFENDANTS’
FIRST AMENDED MOTION TO DISMISS**

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I.FACTUAL ALLEGATIONS	1
II.ARGUMENT	9
A. Standard of Review	9
B. Texas Tech Is Not Entitled to Sovereign Immunity with Respect to Plaintiff’s Title VI Claim	10
C. Plaintiff’s Claims Against the Individual Defendants in Their Official Capacities Are Not Duplicative of His Claims Against Texas Tech	11
D. Defendants Are Not Entitled to Qualified Immunity with Respect to Plaintiff’s Due Process Claims	11
E. Defendants Are Not Entitled to Qualified Immunity with Respect to Plaintiff’s Equal Protection Claims	15
F. Plaintiff Asserts a Viable Section 1981 Claim, and Defendants Are Not Entitled to Qualified Immunity.	18
G. Plaintiff States a Viable Title VI Claim Against Texas Tech University.	19
H. Defendants’ Arguments Concerning Title VI Retaliation Fail	20
I. Defendants’ Arguments Concerning Title VI and Teacher-on-Student Harassment Fail	22
J. Plaintiff Has Adequately Pled His Request for a Master’s Degree and Legal Basis Exists for Him to Obtain Such Relief	22
K. Plaintiff Does Not Rely on the Long History of Discrimination in the Department to Serve as the Basis for His Claims	24
L. Plaintiff Has Adequately Alleged Entitlement to Injunctive Relief	25
M. Plaintiff May Seek Punitive Damages Against the Individual Defendants	25
III.CONCLUSION	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

CASES

<i>Abner v. Kan. City S. R.R. Co.</i> , 513 F.3d 154 (5th Cir. 2008).....	25
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	10
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	23
<i>Boshaw v. Midland Brewing Co.</i> , 32 F.4th 598 (6th Cir. 2022).....	21
<i>Daniel v. Univ. of Texas Southwestern Med. Ctr.</i> , 960 F.3d 253 (5th Cir. 2020).....	9
<i>Doe v. White</i> , 440 F. Supp. 3d 1074 (N.D. Cal. 2020).....	14
<i>Eiland v. Wolf</i> , 764 S.W.2d 827 (Tex. App.—Houston [1st Dist.] 1989, writ denied).....	19
<i>Fairley v. Stalder</i> , 294 Fed. Appx. 805 (5th Cir. 2008).....	11
<i>Marlowe v. LeBlanc</i> , 2022 U.S. App. LEXIS 16128 (5th Cir. June 10, 2022).....	11
<i>Paterson v. Weinberger</i> , 644 F.2d 521 (5th Cir.1981).....	10
<i>Perry v. VHS San Antonio, L.L.C.</i> , 990 F.3d 918 (5th Cir. 2021).....	19
<i>Peters v. Jenney</i> , 327 F.3d 307 (4th Cir. 2003).....	21
<i>Plummer v. Univ. of Houston</i> , 860 F.3d 767 (5th Cir. 2017).....	15
<i>Rigdon v. Ga. Bd. of Regents</i> , 2008 U.S. Dist. LEXIS 59422 (S.D. Ga. August 4, 2008).....	15

<i>Scott v. United States Bank Nat’l Ass’n</i> , 16 F.4th 1204 (5th Cir. 2023).....	21
<i>Shakeri v. ADT Sec. Services, Inc.</i> , 816 F.3d 283 (5th Cir. 2016).....	10
<i>Smith v. Wade</i> , 461 U.S. 30 (1983).....	25
<i>Southwell v. Univ. of Incarnate Word</i> , 974 S.W.2d 351 (Tex. App.—San Antonio 1998, pet. denied).....	19
<i>Spallone v. United States</i> , 493 U.S.276 (1990).....	24
<i>Thomas v. Gee</i> , 850 F. Supp. 665 (S.D. Ohio 1994).....	15
<i>Threat v. City of Cleveland</i> , 6 F.4th 672 (6th 2021).....	21
<i>Tobias v. University of Texas at Arlington</i> , 824 S.W.2d 201 (Tex. App.—Fort Worth 1991).....	19
<i>Turner v. Pleasant</i> , 663 F.3d 770 (5th Cir. 2011).....	10
<i>University of Tex. Health Sci. Ctr. v. Babb</i> , 646 S.W.2d 502 (Tex. App.—Houston [1st Dist.] 1982, no writ).....	18
<i>Univ. of Tex. Med. Sch. at Hous. v. Tran</i> , 901 S.W.2d 929 (Tex. 1995).....	15
<i>Walker v. Livingston</i> , 381 Fed. Appx. 477 (5th Cir. 2010).....	11
STATUTES, RULES, AND REGULATIONS	
Fed. R. Civ. P. 65.....	23
Texas Education Code § 61.003.....	14

Plaintiff John Alexander Zapata Hincapie (“Mr. Zapata”) hereby submits his Response to Defendants’ First Amended Motion to Dismiss (the “Motion”) and would respectfully show the Court as follows:

I. FACTUAL ALLEGATIONS¹

Mr. Zapata was a Hispanic doctoral student at the Chemical Engineering Department (the “Department”) at Texas Tech from the Fall of 2016 to the Fall of 2021. Plaintiff’s First Amended Complaint (“FAC”), at ¶ 19. Texas Tech is a public university located in Lubbock, Texas, and receives federal financial assistance. *Id.* Mr. Zapata is an immigrant to the United States, having moved to the United States from Medellin, Colombia, in 2013. FAC, at ¶ 20. Mr. Zapata came to the United States on a scholarship to the University of Oklahoma. *Id.* Prior to receiving his Master’s degree in Chemical Engineering from the University of Oklahoma in 2016, Mr. Zapata completed his undergraduate degree in Colombia. *Id.*

Mr. Zapata became a PhD student in the Department within the Edward E. Whitacre Jr. College of Engineering at Texas Tech (the “College of Engineering”) in the Fall 2016 semester and continued in the doctoral program within the Department until December 10, 2021, graduating with a 3.92 grade point average. FAC, at ¶ 21.

Mr. Zapata’s PhD advisor and dissertation chair, Dr. Sindee Lou Simon, exhibited disparate and discriminatory behaviors towards him for several years motivated by and targeting Mr. Zapata’s race (Hispanic) and national origin (Colombia). FAC, at ¶ 24. The PhD students in the Department are predominantly Asian students from Asian countries of origin. *Id.* Similarly, during the time frame of Mr. Zapata’s PhD study around 50% of the faculty of the Department

¹ Plaintiff does not repeat all factual allegations here, given their complexity. Instead, he summarizes them briefly here and respectfully refers the Court to his First Amended Complaint for the more complete account.

was composed of Asian professors, originally from Asian countries. *Id.* Dr. Simon discriminated in favor of these Asian students and against Mr. Zapata and other Hispanics. *Id.* Right from the start, she would yell at Mr. Zapata inappropriately and insist that he speak only in English, regardless of the circumstances—behaviors she never exhibited towards the Asian PhD students in the Department. *See* FAC, at ¶¶ 28-31.

Dr. Simon’s discriminatory conduct led to severely damaging consequences when, in the Spring of 2021, Mr. Zapata sought to defend his doctoral dissertation and to graduate with other similarly situated Asian PhD students in the Department. FAC, at ¶ 25. Dr. Simon did everything in her power to impede Mr. Zapata from graduating during the Spring of 2021: she cut his PhD funding, which forced him to work as a teaching assistant, she delayed the timing of his qualifying exam in comparison to his group members, and she failed to provide him with a specific time frame to defend his PhD prior to the Spring 2021 deadline. *Id.* *See also* FAC, at ¶¶ 36-38, 40-43. Dr. Simon’s other four advisees during the Spring 2021 semester were all Asian from Asian countries of origin and were not treated in this manner. *See* FAC, at ¶¶ 25, 36-38. By on or about April 21, 2021, Mr. Zapata had completed exactly the same PhD degree requirements as the other four advisees in all other respects. FAC, at ¶ 25. Nevertheless, Dr. Simon did not even allow him to select his own dissertation committee members, contrary to university policy and contrary to the manner in which his Asian colleagues were treated. FAC, at ¶ 39. Furthermore, after a long period of delay, Dr. Simon suddenly announced that Mr. Zapata had not passed his qualifying exam, despite having given no indication of this earlier, and thus forced further delay in his dissertation defense. FAC, at ¶¶ 46-48.

In March 2021, Dr. Simon initiated the process to change Mr. Zapata’s international status from a student to a legal worker in the United States representing to the US government

that Mr. Zapata was going to graduate in August 2021. FAC, at ¶ 45. In May 2021, but after the Spring 2021 graduation deadline, Mr. Zapata successfully defended his doctoral dissertation and Dr. Simon and all the rest of the dissertation committee members signed his oral defense and thesis-dissertation approval form, indicating that both his written dissertation and his oral presentation were successful. FAC, at ¶¶ 26, 52. However, Dr. Simon compounded the damage she had already done by requiring Mr. Zapata to make a series of untimely revisions to his written dissertation, two weeks prior to the Summer 2021 commencement, after Dr. Simon had already left Texas Tech to work as a full-time employee at North Carolina State University (“NC State”). FAC, at ¶¶ 26, 53, 55-56. Such an action taken after signing the dissertation approval form, after working full-time for another university, and after changing a student’s international status is inconsistent with accepted standards within the Department, within the Graduate School, and within the wider academic community. *Id.* On information and belief, Dr. Simon engaged in no such conduct with respect to any of Mr. Zapata’s Asian peers. FAC, at ¶ 26.

Over the summer of 2021, confronted with Dr. Simon’s obvious intentional conduct in refusing to perform the final steps for his graduation after leaving the university, Mr. Zapata contacted the Graduate School multiple times in an effort to obtain a remedy and had Dr. Brandon Weeks, Dean of Research and Graduate Programs, assigned to be his dissertation approver. FAC, at ¶ 57. Nevertheless, Dr. Simon continued to insist on further corrections, despite continuing to change what corrections she actually wanted Mr. Zapata to make. FAC, at ¶¶ 59, 61-62. None of the Asian PhD students in the Department were subjected to such treatment. *Id.* Then, when Mr. Zapata informed Dr. Weeks of this problem, instead of offering assistance, Dr. Weeks informed Mr. Zapata that he had to comply with a “two-publications” requirement that had been imposed on none of his Asian peers. FAC, at ¶ 60.

Mr. Zapata then began requesting the assistance of the other Individual Defendants in addressing the discriminatory behavior of Dr. Simon and the discriminatory application of the two-publications requirement. FAC, at ¶ 63. However, instead of assisting Mr. Zapata, these Individual Defendants went out of their way to facilitate and to endorse Dr. Simon's conduct, informing Mr. Zapata that he simply needed to comply with Dr. Simon's discriminatory dictates, despite these Individual Defendants' knowledge of the unequal application of the two-publication requirement, their ability to alter Dr. Simon's discriminatory dictates, and the impermissible continuation of Dr. Simon as Mr. Zapata's dissertation chair according to Texas Tech's own policies. FAC, at ¶¶ 64-70. In August of 2021 and beyond, with no resistance from any of the other Individual Defendants, Dr. Simon simply kept on demanding further "corrections." FAC, at ¶¶ 76-83, 85, 90-91. Dr. Sheridan, the Dean of the Graduate School and the Vice Provost for Graduate and Postdoctoral Affairs, in particular, not only pushed Mr. Zapata to comply with Dr. Simon's demands but also prodded him to complete the process, despite the fact that it was Dr. Simon who continued to obstruct that completion. FAC, at ¶¶ 79, 84.

On or about September 26, 2021, Mr. Zapata emailed Dr. Sheridan about the "two publications" requirement, which by this point rested solely in the hands of Dr. Simon. FAC, at ¶ 86. Dr. Sheridan replied that he could not provide guidance on this "requirement" and instructed Mr. Zapata to direct his energy towards completing his dissertation. *Id.* The Dean of the College of Engineering, Dr. Albert Sacco Jr., was also copied on this email and told Mr. Zapata on September 27, 2021, that he needed "...to get that 2nd paper out ASAP...if this is not the case, please let me know for in[sic] has an impact on my agreement to help with your spousal accommodation." *Id.* Mr. Zapata reasonably construed these words as a threat to his previously granted spousal accommodation and his instructor position in the Department. *Id.*

On or about September 28, 2021, Mr. Zapata retained an attorney to help him initiate a formal grievance process pursuant to Texas Tech policies, due to the possibility of losing his job as a result of his complaints about Dr. Simon's behavior and the unequal treatment of the "two publications" policy, the ever-expanding list of dissertation "corrections" sent by Dr. Simon, and Texas Tech's refusal to help him resolve this matter. FAC, at ¶ 87. The grievance letter was filed on October 14, 2021, with Dr. Sheridan, who left the grievance unaddressed. *Id.* No committee was ever convened to address Mr. Zapata's grievance letter. *Id.* No formal decision regarding his grievance letter was ever communicated to Mr. Zapata, as required by Texas Tech's own policies. *Id.*

Mr. Zapata resigned his full-time instructor position from the Department on October 25, 2021, effective November 8, 2021, giving two-weeks' notice. FAC, at ¶ 92. Resigning from his job was a very difficult decision, not only because of lost income, but also because, as a person with diabetes, Mr. Zapata lost his health insurance coverage to get affordable life-sustaining medication. *Id.* Also, with his international status changed as a worker and without a job, Mr. Zapata had only ninety days to find another job or be forced to leave the United States, where he had lived for the past eight years. *Id.*

Only after multiple further iterations of email exchanges of a similar nature did Dr. Simon finally on November 12, 2021, a week after the November 5 official university deadline to submit the dissertation, put an end to the dissertation process by giving her final approval to the dissertation. FAC, at ¶ 93. Shockingly, the previous day, on November 11, 2021, after Mr. Zapata's resignation from his full-time job became effective, the Associate Dean of Research and Graduate Programs, Dr. Weeks, went to talk to one of the classes Mr. Zapata used to teach and referred to him as a "terrorist" in front of his previous students, presumably as a form of public

retaliation against Mr. Zapata for his efforts to protect his rights and to ensure the fairness of Texas Tech's processes and procedures. FAC, at ¶ 94.

As discussed above, the selective enforcement of the "two publications" policy against Mr. Zapata and only against Mr. Zapata further demonstrates discrimination and arbitrariness on the part of Defendants. FAC, at ¶ 95. About two weeks prior to Mr. Zapata's Summer 2021 commencement, the Department and the Graduate School informed Mr. Zapata that they would enforce a policy with respect to him regarding PhD students needing two publications to qualify to graduate, despite the fact that they enforced this supposed "policy" against none of Mr. Zapata's Asian groupmates during the Spring 2021 semester and other Asian PhD students during subsequent semesters. *Id.* This "two publications" policy states the following: "PhD students are required to have two publications accepted in peer reviewed journals or indexed conference proceedings accepted by chair prior to their defense. These are minimums and individual departments can have higher standards." *Id.* The policy does not appear in the Department's handbook, which purports to contain the policies, requirements, and procedures governing the Department. *Id.* It is also absent from the university catalog as a requirement for graduation from the Department's PhD program. *Id.* It can be found only in the Whitacre College of Engineering 40.20 operation policy ("WCOE OP 40.20") available only on the Whitacre College of Engineering website, and, on information and belief, was first made available more than two years after Mr. Zapata had enrolled in the Department. FAC, at ¶ 96. Neither Mr. Zapata nor other PhD students in the Department had been directed to this website as a guide to the policies governing the requirements of the Department. *Id.*

Mr. Zapata is aware of at least ten (10) similarly situated students, all Asian and of Asian national origins, who were permitted to graduate despite not meeting the "two publications"

requirement, and several of whom enrolled during the same semester as Mr. Zapata. FAC, at ¶ 98. Six (6) of these Asian students had Dr. Simon as their PhD advisor and were Mr. Zapata's research groupmates. *Id.* Three (3) of these six (6) were from China and graduated from Texas Tech in the Spring 2021 semester with a PhD with only one paper accepted or published prior to their doctoral defense. *Id.* At least one of these individuals still has only one published paper even to this day. *Id.* Two (2) were from Bangladesh and graduated from Texas Tech in the Fall 2019 and Spring 2021 semesters with a PhD with only one paper accepted or published prior to their doctoral defense. *Id.* Others published a second paper only long after their graduation from Texas Tech. *Id.* One (1) student from India graduated with two publications in the Fall 2019, but on one of those publications he was listed as third author, such that it would not have qualified as a publication at all for purposes of the "two publications" requirement as it was finally communicated to Mr. Zapata by Dr. Chen and the other Graduate Committee members (Dr. Wei Li, Dr. Siva Vanapalli, and Dr. Harvinder Singh). *Id.*

Four of the six individuals discussed above who had Dr. Simon as their dissertation advisor were awarded their PhDs in Spring 2021, precisely when Mr. Zapata expected to graduate. FAC, at ¶ 98. Neither Texas Tech nor any of the other Defendants enforced the "two publications" policy against any of the ten individuals discussed above who were permitted to graduate before, during, and after Mr. Zapata expected to graduate. *Id.* This policy was disparately applied to Mr. Zapata because he was Hispanic. *Id.* Despite the fact that Mr. Zapata reached out to the Individual Defendants for their help in addressing this disparate treatment, they did nothing but cooperate in subjecting him to it. FAC, at ¶¶ 99-113.

On or about November 14, 2021, after Dr. Simon finally fully approved his doctoral dissertation, Mr. Zapata sent an email to Dr. Sheridan asking him if he would now receive his

PhD. FAC, at ¶ 114. Dr. Sheridan replied to Mr. Zapata on or about November 19, 2021, making it clear that he still wanted Mr. Zapata to keep working with Dr. Simon to get his second publication submitted and accepted. *Id.* After Mr. Zapata followed up the same day about why he was still required to fulfill the “two publications” rule, when the second publication now depended entirely on Dr. Simon’s actions, Dr. Sheridan replied on or about November 22, 2021, defending the position that Mr. Zapata still needed to have another paper accepted and published. *Id.* Dr. Sheridan continued to deny Mr. Zapata a PhD degree based on the “two publications” rule, despite the evidence Mr. Zapata had provided on October 14, 2021. *Id.* Dr. Sheridan was fully aware that the “two publications” policy was disparately applied to Mr. Zapata. *Id.*

On or about December 2, 2021, the Associate Dean of Research and Graduate Programs, Dr. Weeks, asked Mr. Zapata to meet with him. FAC, at ¶ 117. In this meeting, Dr. Weeks proposed that Mr. Zapata send an email to Dr. Sacco asking him for “a special disposition” towards the approval of Mr. Zapata’s PhD degree for the Fall 2021 given that Dr. Simon had finally submitted a publication the previous day. *Id.* None of Mr. Zapata’s former Asian peers, who were allowed to graduate without meeting the “two publications” rule, were required to ask for “a special disposition.” *Id.* Nonetheless, Mr. Zapata accepted Dr. Weeks’ suggestion since he was desperate to finally obtain his PhD and get out of a toxic environment. *Id.* The same day, on December 2, 2021, Mr. Zapata sent an email to Dr. Sacco asking for the “special disposition.” *Id.* The “special disposition” he sought was a waiver of the requirement that he waits until the second publication was actually accepted by a scientific journal before he could graduate. *Id.* On December 2, 2021, a few minutes after Mr. Zapata asked for the “special disposition,” Dr. Sacco replied and waived the acceptance requirement of Mr. Zapata’s second publication, noting simply: “Given the circumstances, I agreed to waive the acceptance

requirement.” FAC, at ¶ 118. Only then was Mr. Zapata permitted to graduate. FAC, at ¶ 119.

Mr. Zapata filed discrimination charges with the Office for Civil Rights (“OCR”) and with the Equal Employment Opportunity Commission (“EEOC”) on or about August 31, 2022. FAC, at ¶ 148. These entities have not yet signaled to Mr. Zapata that their respective investigations are complete. *Id.* As a result of the discriminatory behavior by Texas Tech and several of its officials, Mr. Zapata has been severely damaged in the following ways: he lost money; he lost his job; he lost his health insurance—a particularly grave consequence for a person with diabetes; he was required to pay money and remain in the PhD program for additional academic semesters; he was left without funding while forced to continue as a PhD student; he lost his personal belongings; he also lost his intellectual ideas and was deprived of proper recognition for those ideas; his mental health deteriorated; his ability to reside in the United States was jeopardized; he was forced to make life-altering decisions like moving away from the home he started to build with his partner; he was prevented from proposing to his girlfriend during his graduation ceremony; he is currently being denied an MS degree, to which he is entitled if the same standards are applied to him as have been repeatedly applied to his former Asian PhD student peers. FAC, at ¶¶ 138-149. Mr. Zapata suffered these injuries entirely because Dr. Simon and other Texas Tech officials discriminated and retaliated against him in violation of his constitutional rights. *Id.*

II. ARGUMENT

A. Standard of Review

In “evaluating a Rule 12(b)(1) motion to dismiss, [the Court] must take all of the factual allegations in the complaint as true, but [is] not bound to accept as true a legal conclusion couched as a factual allegation. A district court is empowered to find facts as necessary to determine whether it has jurisdiction.” *Daniel v. Univ. of Texas Southwestern Med. Ctr.*, 960

F.3d 253, 256 (5th Cir. 2020) (internal quotation marks, ellipses, and brackets omitted).

However, where, as here, a movant under Rule 12(b)(1) relies only on its motion without any attached evidence, the movant’s challenge to subject matter jurisdiction is a facial attack, and the court’s inquiry into the motion to dismiss is based on the sufficiency of the plaintiff’s pleadings. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir.1981).

Dismissal under Fed. R. Civ. P. 12(b)(6) is only appropriate when the “plaintiff has not alleged enough facts to state a claim to relief that is plausible on its face and has failed to raise a right to relief above the speculative level.” *Shakeri v. ADT Sec. Services, Inc.*, 816 F.3d 283, 290 (5th Cir. 2016) (citations and internal quotation marks omitted). Furthermore, in evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court “must construe facts in the light most favorable to the nonmoving party, as a motion to dismiss under 12(b)(6) is viewed with disfavor and rarely granted.” *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (citations and internal quotation marks omitted). Upon application of these standards, this Court should deny Defendant’s Motion in its entirety.

B. Texas Tech Is Not Entitled to Sovereign Immunity with Respect to Plaintiff’s Title VI Claim.

Despite Defendant’s overly broad contention, Texas Tech is not entitled to sovereign immunity with respect to Plaintiff’s Title VI claim—the only claim for which Texas Tech itself is named as Defendant. Texas Tech requests and receives financial assistance and funding from the federal government. FAC, at ¶ 151. The United States Supreme Court has recognized that “Section 1003 of the Rehabilitation Acts Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, expressly abrogated States’ sovereign immunity against suits brought in federal court to enforce Title VI” *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

C. Plaintiff's Claims Against the Individual Defendants in Their Official Capacities Are Not Duplicative of His Claims Against Texas Tech.

Defendants contend that Plaintiff's claims against the Individual Defendants in their official capacities are duplicative of his claims against Texas Tech. However, they are not.

Plaintiff's claims against the Individual Defendants in their official capacities are claims for injunctive relief under federal law. As the Fifth Circuit has explained, "*Ex parte Young* allows, under certain circumstances, the plaintiff to seek injunctive relief under Section 1983." *Walker v. Livingston*, 381 Fed. Appx. 477, 479 (5th Cir. 2010). These circumstances arise when the plaintiff seeks a remedy against "state officials to force compliance with the Constitution and federal law" *Fairley v. Stalder*, 294 Fed. Appx. 805, 811 (5th Cir. 2008). That is what Plaintiff is seeking here when he names the Individual Defendants in their official capacities.

Furthermore, it should be noted that Plaintiff asserts claims against the Individual Defendants in their personal capacities as well, including against Dr. Simon who was not even an employee of Texas Tech for most of the relevant time period and had no authority to act as dissertation chair according to Texas Tech's own policies and who, therefore, would enjoy no sovereign immunity in any event.

D. Defendants Are Not Entitled to Qualified Immunity with Respect to Plaintiff's Due Process Claims.

Defendants contend that they are entitled to qualified immunity² with respect to Plaintiff's due process claims because (1) those claims fail as a matter of law, and (2) Plaintiff's due process rights in this context were not clearly established at the time of the conduct at issue

² It should be noted that the defense of qualified immunity is not available to the Individual Defendants when sued in their official capacities. *See, e.g., Marlowe v. LeBlanc*, 2022 U.S. App. LEXIS 16128, *6 (5th Cir. June 10, 2022). Thus, Defendants' arguments concerning qualified immunity relate only to claims against them in their personal capacities. As shown in the text above, those arguments fail even there.

in this matter. Defendants are wrong on both counts.

As an initial matter, Plaintiff's due process claims do not fail as a matter of law. After spending page after page of briefing summarizing due process jurisprudence in the abstract and unnecessarily noting that Plaintiff's claims do not fit into certain broad categories, Defendants ultimately seek to undermine those claims merely by mischaracterizing them.

First, Defendants mischaracterize Plaintiff as basing his claims on the fact that "contrary to his academic superior . . . in his opinion his dissertation was so 'perfect' that it did not need corrections." Motion, at 15. This mischaracterization is absurd, and Plaintiff alleges no such thing. Rather, he alleges that Dr. Simon engaged in countless procedural anomalies as a mechanism for obstruction, such as requiring him to make innumerable changes in the dissertation *after she had already approved it as final by signing his approval form at his dissertation defense*, that she never employed with Asian PhD students in the Department. *See, e.g.,* FAC, at ¶¶ 25-26. No dissertation is ever perfect either before or after its finalization. Noting that simple and obvious fact, however, does not address or account for the circumstance of a dissertation supervisor who delays even the defense of Plaintiff's dissertation, contrary to her approach to those of her Asian students (*see, e.g.,* FAC, at ¶¶ 25-26), and then steadfastly refuses to allow the dissertation to proceed after having formally indicated her approval—again contrary to her approach to any Asian student under her purview. The dispute lies not in the precise merits of the dissertation itself. The dispute lies in whether Dr. Simon approached the dissertation differently for Plaintiff than she did for similarly situated Asian students.

Second, Defendants mischaracterize the "two-publication rule" as irrelevant based on the view that the application of the rule did not ultimately hinder his graduation. Motion, at 16. However, Defendants' argument here overlooks at least two critical points. As an initial matter,

Defendants did not waive the two-publication rule. They only waived the requirement that the publication, once completed, had to be accepted by a relevant journal before Plaintiff could graduate. *See, e.g.*, FAC, at ¶ 118. Plaintiff still had to complete the publication itself, unlike any Asian PhD student in the Department. *See, e.g.*, FAC, at ¶ 118. Moreover, the application of the “two-publication rule” to Plaintiff alone demonstrates that it was not merely Dr. Simon herself that delayed Plaintiff’s graduation through discriminatory motives. By imposing the “two-publication rule” on Plaintiff and not on Asian PhD students in the Department, the other individual Defendants endorsed and facilitated Dr. Simon’s discriminatory actions and omissions. By waiving the acceptance requirement only after Dr. Simon had finally given her assent finally to submit the second publication, — even in contradiction to the wording of the “two publications policy” — Defendants show only that much more clearly how their own motivations coincided with those of Dr. Simon and the arbitrary and capricious nature of their application of the “two publications” policy.

Defendants then contend that not every deviation from a university’s own rules is actionable. Motion, at 16-17. However, Plaintiff does not base his claims merely on the bare fact that Texas Tech University and the individual defendants deviated from rules and policies. Rather, he bases his claims on the fact that Defendants deviated from these rules and policies because of his race and country of national origin. It is the motivations behind the deviations that form the core of his claims. Deviations from rules and policies because of race and country of national origin are by their very nature violations of the Fourteenth Amendment, regardless of Defendants’ contorted efforts to suggest otherwise.

Defendants then contend that the defense of a dissertation is necessarily a rigorous process, that a dissertation advisor must exercise significant judgment in handling that process,

and that other individual Defendants simply deferred to Dr. Simon's judgment in her capacity as the dissertation advisor. Motion, at 17. While the defense of a dissertation is unquestionably rigorous, this Court must accept Plaintiff's allegations as true with respect to the defense of his own dissertation for purposes of the motion to dismiss stage of these proceedings. Plaintiff has alleged with substantial supporting factual allegations that Dr. Simon crafted her approach on the basis of discriminatory motivations rather than any reasoned professional judgment and that the other individual Defendants endorsed and facilitated that approach. Defendants may not evade those allegations simply by alleging otherwise in their Motion.

Similarly, Defendants may not extract individual allegations from their context and pretend that Plaintiff bases his constitutional claims merely on the fact that Dr. Simon required corrections. Motion, at 18. Rather, as explained above, it is the procedural anomalies that surrounded those corrections that lie at the root of Plaintiff's claims. Dr. Simon forced Plaintiff to make unnecessary changes to the dissertation after she had already approved it at the dissertation defense in a manner utterly like anything she imposed on any Asian PhD students in the Department. Plaintiff complains not of the bare fact of a requirement of corrections, but rather of his disparate treatment on the basis of his race and national origin.

Finally, Defendants argue that Plaintiff has no property interest in higher education. Motion, at 18-19. However, Defendants overlook the fact that Plaintiff need not prove a property interest in higher education in the abstract.³ The Fifth Circuit has recognized that

³ Provisions of the Texas Education Code, such as § 61.003, which use the language of entitlement, weigh strongly in favor of recognizing such property interests. Furthermore, Plaintiff has alleged a contractual relationship with Texas Tech, which would create property interests as well. *See, e.g., Doe v. White*, 440 F. Supp. 3d 1074, 1087-1088 (N.D. Cal. 2020) (summarizing the law across circuits in this area and noting the impact of a contractual relationship on property interests in higher education).

students in Texas have a liberty interest in higher education. *Plummer v. Univ. of Houston*, 860 F.3d 767, 773 (5th Cir. 2017) (citing *Univ. of Tex. Med. Sch. at Hous. v. Tran*, 901 S.W.2d 929, 929-30 (Tex. 1995)). Furthermore, courts have held that students in higher education have a protected liberty interest in the right to pursue education free of racial discrimination. In *Thomas v. Gee*, 850 F. Supp. 665 (S.D. Ohio 1994), for example, in evaluating the discriminatory treatment of a black female in medical school, the court held that:

This interest -- the right to pursue her education free of racial discrimination -- is a fundamental right not just implicitly protected by the Constitution but expressly protected by the Equal Protection Clause. This, then, is one of those cases referred to by the Sixth Circuit in which the spheres of equal protection and substantive due process "overlap. . .so that a violation of one will constitute a violation of the other."

See also, e.g., Rigdon v. Ga. Bd. of Regents, 2008 U.S. Dist. LEXIS 59422, *6 (S.D. Ga. August 4, 2008) (“[T]he Court’s denial of qualified immunity on the due process claim turned primarily on evidence that the process may have been rigged against Plaintiff for reasons of racial discrimination and retaliation.”) Likewise, here, Plaintiff alleges that Defendants violated his right to pursue his education free of racial discrimination. This right does not differ in its implications based on the level of education one has attained. Rather, it is implicit at all levels of education and all levels of governmental action in that it is guaranteed expressly by the Equal Protection Clause of the Fourteenth Amendment itself. Thus, when Defendants contend that the rights at issue are not “clearly established” because they do not exist at all (Motion, at 19), Plaintiff respectfully responds that the rights at issue were both formulated and clearly established by the express language of the Fourteenth Amendment and by the myriad of cases since its enactment prohibiting racial discrimination in governmental action.

E. Defendants Are Not Entitled to Qualified Immunity with Respect to Plaintiff’s Equal Protection Claims.

Defendants also claim qualified immunity with respect to Plaintiff’s Equal Protection

claims. However, their arguments in support of such qualified immunity fail.

Defendants again rely on factual suppositions that go to the merits of Plaintiff's claims. They contend, for example, that Dr. Simon merely required corrections to Plaintiff's dissertation as part of her reasoned judgment as a dissertation advisor. Motion, at 20. They further claim that Plaintiff offers only subjective opinion that the corrections were unnecessary. *Id.* However, Defendants once again overlook the fact that Plaintiff does not base his discrimination claims on the bare fact of corrections, but rather on the fact that Dr. Simon imposed unnecessary corrections long after both she and the rest of the dissertation committee had approved Plaintiff's dissertation at a dissertation defense which itself had been inappropriately delayed, all in marked contrast to the manner in which she addressed the circumstances of the Asian PhD students in the Department. *See, e.g.*, FAC, at ¶ 26. Defendants observe that Plaintiff does not allege that Dr. Simon never required Asian students to make corrections to their dissertations. Motion, at 20. Of course, Plaintiff makes no such absurd allegation. He does, however, allege that Dr. Simon never required Asian students to make such corrections to their dissertation after having already approved their dissertation, changed their international status, and in the midst of other procedural anomalies which, individually and collectively, demonstrate a pattern of disparate treatment. *See, e.g.*, FAC, at ¶¶ 26, 53, 55-56. *See generally* Section I above. In fact, that pattern is precisely what Plaintiff alleges. Furthermore, he does not present such allegations in conclusory fashion. He supports the allegations with detailed factual allegations which, instead of addressing, Defendants routinely ignore or mischaracterize. Defendants may not brush away Plaintiff's allegations merely by ignoring or distorting their substantive content.

Defendants then contend that the "two-publications" requirement "involved academic decision-making by Dr. Simon." Motion, at 20. However, Plaintiff nowhere alleges that Dr.

Simon imposed this requirement on him. Rather, he alleges that other Defendants insisted that it was required of all PhD students in the Department, despite the fact that it was never imposed on Asian PhD students. *See, e.g.*, FAC, ¶¶ 60, 95, 98. Nothing in Plaintiff's allegations suggest that the requirement was imposed only on him because of some sort of academic analysis.

Defendants once again distort Plaintiffs' allegations in an effort to shoehorn them into the ordinary academic context. The manner in which Defendants acted towards Plaintiff was anything but ordinary. Plaintiff alleges that he was treated differently on the basis of his race and country of national origin. This Court should evaluate his allegations as they are presented, rather than as Defendants would have them be.

Defendants then repeat many of the same arguments that they made with respect to the due process claims, such that Plaintiff respectfully refers the Court to Section II.D above. Plaintiff once again notes that Defendants foist a reductionist framework onto Plaintiff's pleading which does not match the actual allegation in the Complaint. Plaintiff alleges that Dr. Simon was motivated by discriminatory motives and that the other Defendants endorsed and facilitated her actions designed to further those motives. In any event, Defendants' argument ultimately reduces to the following assertion: "[F]or 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." Motion, at 21. Such an assertion asks this Court to ignore Plaintiff's factual allegations in their entirety and simply to assume that it is implausible for intentional discrimination on the basis of race and national origin to take place in an academic institution of higher education. Such assumption run completely counter to the standard by which this Court should be guided in evaluating a motion to dismiss, as described in Section II.A above.

F. Plaintiff Asserts a Viable Section 1981 Claim, and Defendants Are Not Entitled to Qualified Immunity.

Defendants contend that Plaintiff's Section 1981 claims fail because factual issues exist as to whether the contractual materials referenced by Plaintiff in his allegations can be interpreted as binding on Defendants. Motion, at 22-25. However, with this argument, Defendants once again ask this Court to make inappropriate factual determinations.

As an initial matter, Defendants argue that Plaintiff did not allege the source of the contractual relationship between himself and Texas Tech and its agencies. On the contrary, Plaintiff specifically points to the Department's handbook and the policies referenced in that handbook as the source of that contractual relationship. *See, e.g.*, FAC, at ¶ 174. While Defendants would have Plaintiff provide more detail with respect to this handbook and its implications, no such heightened pleading requirement exists here. Plaintiff has not alleged fraud or any claim subject to Fed. R. Civ. P. 9(b). He has pointed to a very specific document as the source of the contractual relationship. That is sufficient for purposes of notice pleading. Defendants further complain that Plaintiff does not allege the identity of the individual or individuals who told him that the Departmental handbook contained the requirements that would govern his advancement through the program and his ultimate graduation. Again, no such heightened pleading requirements apply. Plaintiff has provided sufficient information to establish the contractual relationship for notice pleading purposes.

Defendants then cite several cases as having "addressed whether a university handbook constitutes a contract under Texas law." Motion, at 23. Defendants cite these cases for the proposition that some such handbooks might not constitute contracts by virtue of express disclaimers or provisions that terms might change over time. *Id.* However, none of these cases were decided at the pleading stage. *See, e.g., University of Tex. Health Sci. Ctr. v. Babb*, 646

S.W.2d 502 (Tex. App.—Houston [1st Dist.] 1982, no writ) (affirming temporary injunction as modified); *Eiland v. Wolf*, 764 S.W.2d 827, 838 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (reversing judgment after *de novo* review of bench trial record); *Tobias v. University of Texas at Arlington*, 824 S.W.2d 201, 211 (Tex. App.—Fort Worth 1991) (affirming summary judgment); *Southwell v. Univ. of Incarnate Word*, 974 S.W.2d 351, 355-6 (Tex. App.—San Antonio 1998, pet. denied) (affirming summary judgment). Thus, the very cases cited by Defendants themselves demonstrate that the issues bound up with the analysis of whether or not a contract existed are not properly decided on a motion to dismiss, but only after presentation of the obligation to provide more detail on these issues in a notice pleading.

Defendants further contend that Plaintiff’s Section 1981 claim must fail against the Individual Defendants because he did not have any contractual relationship with them as individuals. However, in *Perry v. VHS San Antonio, L.L.C.*, 990 F.3d 918, 932-3 (5th Cir. 2021), the Fifth Circuit acknowledged that, in circumstances in which individual defendants are only nominally third parties and are acting on behalf of the contracting entity when they engage in otherwise actionable discriminatory acts and omissions, they may be liable under Section 1981.

Defendants’ further argument that a Section 1981 claim against the Individual Defendants in their official capacities is barred by sovereign immunity has been addressed in Section II.C above. In general, claims against such defendants in their official capacities for injunctive relief are brought pursuant to *Ex parte Young* and thus survive sovereign immunity.

G. Plaintiff States a Viable Title VI Claim Against Texas Tech University.

In seeking to defeat Plaintiff’s Title VI claim at the pleading stage, Defendants once again resort to mischaracterizing or ignoring Plaintiff’s allegations. They reduce Plaintiff’s claims to the simple allegation that his dissertation advisor required him to make corrections on his dissertation and held him to a “two-publication” requirement. As explained at length in

Section II.D above, Plaintiff alleges far more than this. He alleges that, with the help of the other Defendants, Dr. Simon engaged in procedural anomalies not applied to the Asian PhD students in the Department for the express purpose of obstructing Plaintiff's graduation due to discriminatory motives. Once again, Defendants may not simply ignore Plaintiff's allegations or contort those allegations to fit their arguments.

Defendants then argue that “[w]hen a Title VI claim does not involve an official policy of intentional discrimination, he is relegated to alleging an ‘appropriate person’ had actual knowledge of the discrimination [and] responded with deliberate indifference by failing to institute corrective measures.” Motion, at 27. However, Plaintiff expressly alleges that a number of Individual Defendants had actual knowledge of the discrimination, including Dr. Albert Sacco, Jr., the Dean of the College of Engineering (FAC, at ¶ 11), Dr. Mark A. Sheridan, Dean of the Graduate School and Vice Provost for Graduate and Postdoctoral Affairs (FAC, at ¶ 12), and Dr. Brandon Weeks, the Dean of Research and Graduate Programs at relevant times (FAC, at ¶ 13). *See, e.g.*, FAC, at ¶¶ 99-114, Dr. Botte, Chair of the Department (FAC, at ¶ 105), Dr. Chau-Chyun Chen, Graduate Advisor of the Department (FAC, at ¶ 110). He also alleges facts that can reasonably be construed as showing deliberate indifference on the part of these and the other Defendants in that they actively endorsed and facilitated Dr. Simon's discriminatory actions and omissions. *See, e.g.*, FAC, ¶ 99-114. These allegations may not be ignored at the pleadings stage, but suffice to require consideration on the merits.

H. Defendants' Arguments Concerning Title VI Retaliation Fail

Defendants contend that Plaintiff's claims for retaliation under Title VI fail. Motion, at 27-30. However, their arguments fail.

Defendants rely primarily on the proposition that Plaintiff first engaged in protected activity by filing a formal grievance in October 2021. Motion, at 29. However, in so assuming

Defendants ignore the cases they themselves cite. *See, e.g., Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003) (“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.”). The Fifth Circuit concurs with this analysis. *See, e.g., Scott v. United States Bank Nat’l Ass’n*, 16 F.4th 1204, 1209 (5th Cir. 2023) (“[T]o qualify as a protected activity, the employee’s conduct must have opposed the employer’s practice and that opposed practice must have been unlawful.”) (internal quotation marks omitted). Thus, there is no requirement that the opposition have taken the form of the submission of a formal grievance. Plaintiff alleges that he opposed Dr. Simon’s conduct throughout the summer of 2021. He alleges that Defendants retaliated to such opposition in a variety of ways, including, for example, assisting Dr. Simon in obstructing Plaintiff’s finalization of his dissertation and imposing the “two-publications” requirement—a requirement they applied to him, but not to the Asian PhD students in the Department. For the same reasons, Defendants’ arguments concerning Dr. Simon’s lack of knowledge of Plaintiff’s grievance submission are meritless. The formal grievance submission was not the earliest instance of protected activity in which Plaintiff engaged. He had been engaged in such activity the entire preceding summer.

Defendants then complain that these alleged examples of retaliation are not material. They contend without support that only suspension or dismissal actions can constitute “material actions.” Motion, at 30. However, there is no such requirement. The Sixth Circuit has, for example, held merely that a plaintiff proves an adverse employment action that is not *de minimis*. *See, e.g., Threat v. City of Cleveland*, 6 F.4th 672, 678-9 (6th 2021). *See also, e.g., Boshaw v. Midland Brewing Co.*, 32 F.4th 598, 604 (6th Cir. 2022) (noting that an adverse employment action could be delay or denial of a promotion).

Defendants' arguments concerning Plaintiff's retaliation claims thus revolve around mischaracterizations of both fact and law. This Court should deny Defendants' Motion.

I. Defendants' Arguments Concerning Title VI and Teacher-on-Student Harassment Fail.

Defendants contend that the Fifth Circuit does not recognize a Title VI claim for teacher-on-student harassment. Motion, at 31. However, Plaintiff does not base his Title VI claims on such allegations. Rather, Plaintiff alleges the factual circumstances surrounding Dr. Simon's harassment directed towards him and other Hispanics as support for his allegations that her actions were motivated by discriminatory intent and that, by endorsing and facilitating such actions, the other Defendants engaged in discrimination themselves. Thus, Plaintiff's allegations concerning Dr. Simon's harassment do not form the core of his claims, but serve rather as components of the factual framework that give evidentiary support to those core claims.

J. Plaintiff Has Adequately Pled His Request for a Master's Degree and Legal Basis Exists for Him to Obtain Such Relief.

Despite Defendants' arguments to the contrary, Plaintiff has adequately pled his request for a Master's degree, and this Court has the authority to grant such a request. Defendants complain that he does not allege that he requested such a degree during his time at Texas Tech or that he submitted an application to the appropriate officials or agencies of Texas Tech. However, these contentions miss the point. Plaintiff alleges that Asian PhD students in the Department were consistently presented with information and opportunities allowing them to receive a Master's degree in conjunction with their work on the PhD, despite the fact that Plaintiff was presented with no such information and opportunities and the fact that such information and opportunities were not contained within the formal written policies of the Department. *See, e.g.*, FAC, at ¶¶ 138-149. Plaintiff could thus not reasonably have requested or applied for the degree, as he had no way of knowing the possibility of obtaining it existed.

Defendants then contend that Plaintiff's allegations of disparate treatment are implausible because "to suggest that TTU would conceal the availability of a degree, any degree, from the general public or from students, much less against persons based on race, is . . . fundamentally contrary to TTU's obvious interest in the advancement of education" Motion, at 32.

Defendants thus once more ask this Court to make assumptions about their general character and to find that allegations of wrongdoing must be dismissed because they are not the type of individuals or entities to do such things. Such arguments are frivolous and cannot support a motion to dismiss. After all, the concept of plausibility as a test for the viability for pleadings has nothing to do with how the Court views the parties involved or the likelihood of those parties engaging in the alleged conduct. Rather, 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). Plaintiff has done so.

Defendants also seek to discredit Plaintiff's request for a Master's degree simply because he already had a Master's degree. Motion, at 33. This argument would only make sense if Plaintiff's prior Master's degree were in precisely the same area as the Master's degree he now seeks. It was not.

Likewise, Defendants' scoffing arguments concerning Plaintiff's allegation that he wanted to propose at his graduation are out of place. The fact that he alleges wrongdoing against Texas Tech and various individual defendants does not mean that his graduation meant nothing to him and that its ceremonial circumstances carried no weight. He adequately alleges the contrary, and Defendants' related arguments amount to nothing but belittling caviling.

Although Defendants describe Plaintiff's request for the Master's Degree as retroactive and challenge Plaintiff to cite applicable legal authority, their argument misses the mark on this

front as well. Plaintiff's request, like all requests for injunctive relief, is prospective. For legal authority, Plaintiff need point no further than Fed. R. Civ. P. 65. *See also Spallone v. United States*, 493 U.S. 265, 276 (1990) ("When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers.")

K. Plaintiff Does Not Rely on the Long History of Discrimination in the Department to Serve as the Basis for His Claims.

Contrary to Defendants' contentions, Plaintiff does not rely on the long history of discrimination in the Department to serve as the basis for his claims. Rather, as discussed in Section II.D above, Plaintiff points to numerous procedural anomalies directed only at Plaintiff and not at the Asian PhD students in the Department to serve as that basis. Plaintiff supplements his factual allegations with a discussion of the Department's history because it adds additional factual support for the proposition that the decisions made related to Plaintiff arose out of discriminatory motivations. Defendants appear to argue that Plaintiff must show individualized discrimination and cannot rely on historical context to prove his allegations. Plaintiff has no intention of relying on historical context, except to show that the individualized discrimination he experienced is not an outlier. The fact that Defendants complain of Plaintiff's allegations concerning this historical context is particularly ironic in light of their earlier complaint that Texas Tech and the associated Defendants are simply not the sort of individuals or entities that would engage in such discriminatory conduct. Defendants contend that Plaintiff's claims should be analyzed through the *McDonnell Douglas* analytical framework. Plaintiff agrees, at least with respect to issues regarding circumstantial rather than direct evidence, and will prove up his claims through that framework at the appropriate time. However, that appropriate time has not arrived at the motion to dismiss stage.

L. Plaintiff Has Adequately Alleged Entitlement to Injunctive Relief.

Defendants contend that Plaintiff has no entitlement to injunctive relief because he cannot show irreparable harm from the delay in his graduation. Motion, at 35-36. However, Plaintiff does not seek injunctive relief to prevent delay in his graduation. As his graduation has already occurred, such relief would be meaningless. Rather, Plaintiff seeks prospective relief in the form of an order enjoining continued enforcement against Plaintiff of discriminatory policies and practices and continued refusal to provide a Master's degree that Defendants have provided the Asian PhD students in the Department—a refusal which thus itself constitutes continued enforcement against Plaintiff of discriminatory policies and practices.

M. Plaintiff May Seek Punitive Damages Against the Individual Defendants.

Defendants contend that Plaintiff may not seek punitive damages against them because of the bar against recovering such damages against Texas Tech under Title VI. However, Plaintiff may recover such damages against the Individual Defendants under Section 1983. *See, e.g., Smith v. Wade*, 461 U.S. 30, 56 (1983) (“We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference in the federally protected rights of others.”) Section 1981 also allows for punitive damages. *See, e.g., Abner v. Kan. City S. R.R. Co.*, 513 F.3d 154, 160-1 (5th Cir. 2008).

III. CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that this Court deny Defendants’ Motion in its entirety.

DATED: August 31, 2023

Respectfully submitted,

/s/ Mark Whitburn
Mark Whitburn
Texas Bar No. 24042144
Whitburn & Pevsner, PLLC
2000 E. Lamar Blvd., Suite 600
Arlington, Texas 76006
Tel: (817) 653-4547
Fax: (817) 653-4477
mwhitburn@whitburnpevsner.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on counsel of record for Defendants on August 31, 2023, through the electronic filing service as follows:

Jason T. Contreras
Assistant Attorney General
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

/s/ Mark Whitburn