Stephen F. English, OSB No. 730843
SEnglish@perkinscoie.com
Misha Isaak, OSB No. 086430
MIsaak@perkinscoie.com
Jeremy A. Carp, OSB No. 173164
JCarp@perkinscoie.com
PERKINS COIE LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Telephone: +1.503.727.2000
Facsimile: +1.503.727.2222

Attorneys for Defendants tova stabin and the Communications Manager

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

v.

TOVA STABIN, in her individual capacity; and the **COMMUNICATION MANAGER** of University of Oregon Division of Equity and Inclusion, in his or her official capacity,

Defendants.

Case No. 3:22-cv-01181-HZ

DEFENDANTS' REPLY IN SUPPORT OF RULE 12(B)(1) MOTION TO DISMISS FOR LACK OF JURISDICTION

I. INTRODUCTION

Plaintiff raises three main arguments in his response brief. None of them are compelling. *First*, Plaintiff attempts to lower the standard for federal jurisdiction by disavowing foundational principles of justiciability and shifting the burden of persuasion to Defendants. The first principles of federal jurisdiction, however, cannot be ignored simply because they are inconvenient to a plaintiff, and it is a plaintiff's burden to overcome the presumption of permanence and good faith afforded to government defendants who voluntarily refrain from challenged conduct. *Second*, in a tacit acknowledgment that his original fear of future blocking was too speculative for jurisdiction, Plaintiff seeks a backdoor into federal court by adding a new challenge to other provisions of the social media guidelines—none of which have been applied to him. But he trades one speculative future injury for another, even more speculative future injury. Plaintiff may disagree with these provisions of the guidelines, but his relation to those provisions—and thus his ability to challenge them—is no different than any other member of the public. *Finally*, Plaintiff argues that his request for damages and declaratory relief saves this case from mootness. Defendants, however, have fully satisfied Plaintiff's damages request, and his request for declaratory relief does not provide an independent basis for exercising jurisdiction. Plaintiff thus cannot show that his claims present more than an "abstract dispute about the law," and the Court should dismiss them as moot.

II. ARGUMENT

A. Plaintiff distorts the mootness inquiry and ignores the presumption of good faith afforded to government defendants.

Plaintiff argues that Defendants conflate the mootness and standing doctrines. He contends that this alleged confusion is relevant because standing is an entirely "distinct" concept from mootness and that the principles underlying a standing analysis have no place in the mootness inquiry. (Pl.'s Br. at 2–4.) That argument is wrong on the law and a red herring designed to distract from the prohibition on exercising jurisdiction over speculative injuries.

As an initial matter, nowhere in their opening brief do Defendants claim that Plaintiff

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

lacked standing when he filed this lawsuit or that the Court should dismiss his claims for lack of standing. Plaintiff's insinuation to the contrary is unfounded.[1] Instead, Defendants' discussion of the limits placed on federal jurisdiction relies on foundational principles of justiciability that apply across *all* justiciability doctrines (i.e., ripeness, standing, and mootness). (*See* Defs.' Br. at 6–9.) As the Supreme Court has explained, "[i]nsofar as the concept of mootness defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope, *as with all concepts of justiciability*, must be derived from the fundamental policies informing the 'cases or controversies' limitation imposed by Art. III." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754 (1976) (emphasis added). This common purpose is why mootness is often described by courts as "standing set in a timeframe." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quotation omitted). What this means is simply that the same elements required to demonstrate a "case" or "controversy" at the start of a lawsuit (standing) must "subsist through all stages of the litigation" (mootness). *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). "A federal court is duty bound to dismiss [a] claim as *moot* if subsequent events unfold in a manner that undermines any one of the three pillars on which constitutional *standing* rests: injury in fact, causation, and redressability." *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 100 (1st Cir. 2006) (emphasis added).

The underlying measure of jurisdiction—be it at the outset of a case (standing) or after a case is filed (mootness)—is always whether a case presents an "actual, live controversy" or merely "abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969). Plaintiff attacks Defendants' exposition of this principle because it makes clear that federal jurisdiction does not and cannot extend to speculative future injuries or injuries based on a "subjective chill." For that reason, Plaintiff takes special issue with Defendants' discussion of the holdings in *Clapper*, suggesting

[1] Ironically, after accusing Defendants of erroneously drawing on standing doctrine and cases, Plaintiff proceeds to rely almost exclusively on standing and ripeness cases to argue that his claims are not moot. (Plt.'s Br. at 7–10 (citing and discussing, for example, *Virginia v. Am. Book Sellers Assoc.*, 484 U.S. 383 (1988) (standing); *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (standing); *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010) (standing); *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000) (standing and ripeness)).)

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

that they have no relevance to this case because *Clapper* was nominally a case about standing and involved government surveillance. (Pl.'s Br. at 3–4.) But the rules announced in *Clapper* are not limited to the facts or procedural posture of that case. It is now hornbook law that a threatened future injury—whether measured at the start of a lawsuit or later in a lawsuit—cannot be speculative. *See generally Wright v. Serv. Emps. Int'l Union Loc. 503*, --- F.4 ---, 2022 WL 4295626, at *3–5 (9th Cir. Sept. 19, 2022) (discussing *Clapper*'s treatment of speculative future injuries at length while affirming dismissal of case as moot). The same is true of a plaintiff's ability to manufacture jurisdiction by claiming a "subjective chill" from a future injury that is, on its own, too speculative to support jurisdiction. *See generally id.* at *5 (discussing *Clapper*'s treatment of First Amendment chilling). In fact, when considering mootness, this Court regularly cites *Clapper* for both propositions. *See, e.g.*, *Wolfe v. City of Portland*, 566 F. Supp. 3d 1069, 1082, 1086–87 (D. Or. 2021); *Wise v. City of Portland*, 539 F. Supp. 3d 1132, 1146 n.12 (D. Or. 2021); *Wolfe v. City of Portland*, No. 3:20-cv-1882-SI, 2022 WL 2105979, at *4 (D. Or. June 10, 2022).

As it applies to this case, the only relevant difference between standing and mootness is that there are narrow exceptions to the mootness doctrine that do not apply to standing. Defendants expressly acknowledged this fact in their opening brief and addressed the voluntary cessation exception at length—despite the justifications for that exception having no relevance to this case.[2] *See Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 191–92 (2000) (justifying the mootness exceptions based on "sunk costs to the judicial system" and the fact that "to abandon [a] case at an advanced stage may prove more wasteful than frugal"). Although Plaintiff argues that (unlike with standing) the burden is on a defendant to show that a case is moot, he ignores the presumption of permanence and good faith that a *plaintiff* must overcome when a government defendant represents that it will not repeat an injury-causing act. *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014).

[2] It is also analytically sound to "[f]irst" address "general mootness doctrine" and "[t]hen" to "address the exception[s]," as Defendants did in their opening brief. *Milwaukie Police Assoc. v. Bd. of Fire & Police Comm'rs of City of Milwaukie*, 708 F.3d 921, 929 (7th Cir. 2013).

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1120 N.W. Couch Street, Tenth Floor
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Fax: +1.503.727.2222

(*See* Defs.' Br. at 12 n.8.) Indeed, as this Court has held, it is "the *plaintiff* who must overcome the presumption of good faith" afforded to government defendants and "demonstrate that a reasonable expectation of recurrence exists." *Cocina Cultura, LLC v. Oregon*, No. 3:20-cv-01866-IM, 2021 WL 3836840, at *6 (D. Or. Aug. 27, 2021) (emphasis added). That is, the presumption of good faith "place[s] the burden on the plaintiff to show the case is *not* moot." *Id.*

Instead of pointing to errors in Defendants' analysis, Plaintiff's discussion of standing and mootness only serves to highlight his arguments' confusion of justiciability principles and his failure (or unwillingness) to address the law and facts marshalled by Defendants.[3]

B. Plaintiff attempts to remedy one speculative future injury with another, even more speculative future injury.

The dispositive issue in this case is whether Plaintiff faces a reasonable probability—not a "theoretical possibility"—that Defendants will block him again. Plaintiff devotes ample attention to speculating about how Defendants *might* act in the future—based mostly on his own opinion of Defendants and their protected speech—but little attention to the evidence in the record. (*See* Pl.'s Br. at 5–16.) That evidence affirmatively and overwhelmingly suggests that Plaintiff faces no probability of being blocked again for expressing his viewpoint. (*See* Defs.' Br. at 9–15.) Plaintiff was blocked on a single, isolated occasion by an individual employee who failed to apply the University's existing social media guidelines. (Park Decl. ¶¶ 5–6 & Ex. 2–3.) Upon learning of his allegations, the University corrected that departure by immediately unblocking him. (*Id.* ¶¶ 4 & Ex. 2.) The employee who erroneously blocked Plaintiff retired before this litigation arose and no longer works at the University. (*Id.* ¶ 8 & Ex. 3.) After learning about Plaintiff's allegations, the University also reminded staff that its social media guidelines expressly prohibit viewpoint discrimination and that this prohibition is absolute. (*Id.* ¶ 5.) And the University directly promised

[3] Plaintiff also incorrectly states that the Court must accept the allegations in his Complaint as true and draw all inferences in his favor. (Pl.'s Br. at 3.) That is simply not true when, as here, the court is resolving a *factual* challenge to its jurisdiction. "When a defendant factually challenges the plaintiff's assertion of jurisdiction, a court does not presume the truthfulness of [his] allegations and may consider evidence extrinsic to the complaint." *Wolfe*, 2022 WL 2105979, at *2.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

Plaintiff—who, again, was unblocked—that he will not be blocked again for expressing his viewpoint. (*Id.* ¶ 5 & Ex. 2.) Neither Plaintiff nor anyone else has been blocked since then.[4] These undisputed facts uniformly support the conclusion that Plaintiff faces no more than a "theoretical possibility" of being blocked. *Brach v. Newsom*, 38 F.4th 6, 14 (9th Cir. 2022) (quotation omitted).

Faced with this record, Plaintiff resorts to unsupported speculation about why Defendants *might* harm him in the future. (*See* Pl.'s Br. at 5–16.) Without any evidence to support his fears, however, these self-serving concerns cannot overcome the presumption of good faith afforded to Defendants. It is not enough that Plaintiff was blocked once before; indeed, if that were the standard, no claim based on a past harm would ever become moot. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("Past exposure to illegal conduct does not in itself show a present case or controversy for injunctive relief."). Plaintiff also relies on the fallacy that the University holding its own views about diversity and inclusion is proof that his views will be silenced. (*Id.* at 9–10.) Plaintiff cites no case for this sweeping proposition—no doubt because holding as much would require courts to penalize state actors for exercising their own free speech rights. Plaintiff also cites his *own opinion* as evidence that his fear of being blocked is objectively reasonable. (*Id.* at 9.) If this were sufficient evidence of how a government defendant is likely to act in the future, every plaintiff could sally forth with their own "expert" predictions to open the courthouse doors. Indeed, while "[t]he party challenging the presumption of mootness need not show that the . . . same or similar [harm] is a 'virtual certainty,' . . . a determination that such a reasonable expectation exists must be founded in the record . . . rather than on speculation alone." *Bd. of Trs. of Glazing Health and Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). Plaintiff is forced to rely on "speculation alone" for the simple reason that his fear is not "founded in the record."[5]

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[4] The University has received many thousands of posts on its social media accounts over the years. The fact that Plaintiff can point to only three occasions (including his own allegations) where a member of the public was *possibly* blocked due to a University employee's inadvertent failure to apply or follow the social media guidelines is strong evidence that the University consistently communicates and enforces its expectation of viewpoint neutrality.

[5] Based on Plaintiff's summary of his outspokenness and willingness to fight his own institution

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

Plaintiff asks the Court to disregard the record because he worries, without evidence, that Defendants' alleged "policy change[]" is temporary. (Pl.'s Br. at 11–16.) There are two problems with this argument. First, Defendants have not changed any policies or practices. Defendants have maintained the same social media guidelines throughout this case, and those guidelines expressly prohibit viewpoint discrimination. (Larson Decl. ¶¶ 4–6 & Ex. 1.) In other words, there is no past policy or practice of viewpoint discrimination to which Defendants could revert. This is not a case where Defendants resisted unblocking Plaintiff, offered no explanation for his unblocking, refused to represent that they would not block him again, strategically waited to unblock Plaintiff until late in the litigation, or hinted that they might block him again in the future. *See, e.g.*, *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1168 (9th Cir. 2022). Defendants' unconditional and immediate unblocking of Plaintiff (before they were even served) was a routine application of their *existing* guidelines, not an ad hoc or discretionary adoption of a *new* policy or practice. The contention that Defendants could hastily abandon their "new" policy simply does not line up with the facts of this case. Second, even if Defendants did have a past practice of unconstitutional blocking, which they do not, that would not be insufficient to overcome their presumed good faith. "We have previously found the heavy burden of demonstrating mootness to be satisfied in 'policy change' cases without even discussing procedural safeguards or the ease of changing course." *Rosebrock*, 745 F.3d at 974. As such, absent specific evidence giving "reason to doubt" the government, the presumed good faith of government defendants is evidence enough that they will not "chang[e] course." *Id.*

The shortcomings in Plaintiff's argument are revealed by his shifting positions. While his original Complaint and motion for a preliminary injunction focused on Defendant stabin's decision to block his posts, Plaintiff now repeatedly points to provisions of the social media guidelines which he finds objectionable, but which have never been applied or threatened to be applied to

(Portland State University), as well as the number of media outlets Plaintiff has spoken to about this case since it was filed, it strains credibility for him to argue that he is self-censoring to avoid being blocked on a University of Oregon social media account.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

him. (*See* Pl.'s Br. at 5–10, 15.) The thrust of his current argument is that, even if Defendants are not likely to repeat their past course of conduct, they may, someday, still block Plaintiff by other means. But this merely trades one speculative future injury for another, even more speculative future injury. Although the guidelines expressly prohibit viewpoint discrimination, Plaintiff asks the Court to take on faith that Defendants will apply these provisions to block him. Plaintiff, however, is no more likely than any other member of the public to be blocked pursuant to these provisions, meaning that he is no more entitled than they are to challenge them. That is, any abstract question about the legality of the provisions cannot save the case from becoming moot because Plaintiff has never been injured by them and offers no evidence (beyond rank speculation) that he, specifically, is likely to be injured by them in the future. "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution . . . and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–54 (1992).[6]

Plaintiff attempts to sidestep the speculative nature of any future injury by arguing that he is presently suffering a cognizable harm in the form of self-censorship. (*See* Pl.'s Br. at 7–8.) It is hard to understand the logic of Plaintiff's self-censorship position. He seems to say that, although Defendants are not currently censoring him, he is nonetheless censoring himself because he worries that Defendants *might* censor him. He does not say that he fears arrest, prosecution, or even public shaming if he tweets again in response to Defendants' Twitter posts; rather, what he fears is—apparently—that Defendants might do to him what he is in fact doing to himself.

To make this convoluted argument, Plaintiff cites—with no apparent sense of irony—a

[6] Although the Court need not address the merits of Plaintiff's claims because they are moot, the claims also lack merit. That is so because the language that Plaintiff attacks in the social media guidelines all falls beneath the guidelines' prime directive that University officials should not block social media posts based on viewpoint. In other words, the guidelines do not allow University employees to block comments that are racist, profane, or offensive if blocking such comments would amount to viewpoint discrimination.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

litany of pre-enforcement *standing* and *ripeness* cases about the ability to challenge threats of future prosecution and civil sanctions based on their present chilling of free speech. (*Id.*) Under this line of cases, plaintiffs may challenge punitive government restrictions on free speech before they face punishment if there is a "*genuine* threat of *imminent* prosecution and not merely an imaginary or speculative fear of [future] prosecution." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 772–73 (9th Cir. 2006) (emphasis added). "A chilling of First Amendment rights can," as such, "constitute a cognizable injury, so long as the chilling effect is not based on a fear of future injury that itself [is] too speculative to confer standing." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) (citing *Clapper*, 568 U.S. at 417–18). To determine whether an alleged threat of future prosecution or civil sanction is, in fact, "genuine" and "imminent," rather than "imaginary or speculative" (i.e., subjective), courts consider three factors: (1) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," (2) "the history of past prosecution or enforcement under the challenged statute," and (3) whether the plaintiff has "articulated a 'concrete plan' to violate the law in question." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000).

Plaintiff's reliance on this line of cases is misplaced. As an initial matter, the "relaxed standing analysis for pre-enforcement challenges" does not apply here. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010). This case, as Plaintiff emphasizes in his own brief, is not a standing case—it is a mootness case, focused on whether a particular injury (blocking) is likely to recur in the future, not occur in the first instance. But setting that fact aside, the Ninth Circuit has held that the standing analysis employed in these chilling cases is limited to circumstances where a plaintiff abstains from "allegedly protected speech in order to avoid *civil sanction* or *criminal penalty*." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 851 (9th Cir. 2007) (emphasis added). That is, the plaintiff must "risk[] civil sanction of criminal penalty" by speaking, *id.*, and "the penalty . . . must be high," *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 508 (9th Cir. 1991). Thus, although a plaintiff may suffer a cognizable injury from the

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

deterrent or "chilling" effect of threatened future sanctions, it requires that "the challenged exercise of governmental power" be "regulatory, proscriptive, or compulsory in nature" and that the plaintiff be "presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). This is not such a case.

Nevertheless, even if the Court were to apply the three-factor analysis from these cases, Plaintiff's alleged self-censorship is still based on a "subjective chill" and not a "genuine threat of imminent prosecution." *Sacks*, 466 F.3d at 772–73. The first factor favors Defendants because no one has "communicated a specific warning or threat" that they will block Plaintiff in the future, let alone under the specific provisions of the social media guidelines he now seeks to enjoin. *Thomas*, 220 F.3d at 1139; *see also Get Outdoors II, LLC, v. City of San Diego*, 506 F.3d 886, 892 (9th Cir. 2007) (holding that a plaintiff "cannot leverage [his] injuries under certain, specific provisions [of an ordinance] to state an injury under the . . . ordinance generally"). To the contrary, Defendants have specifically advised Plaintiff that he will not be blocked for expressing his viewpoint and that their social media guidelines expressly prohibit viewpoint discrimination. (*See* Park Decl. ¶¶ 5–6; Widdop Decl. ¶ 6 & Ex. 4.) These representations are entitled to a presumption of good faith, and Plaintiff offers no evidence to overcome that presumption. *Rosebrock*, 745 F.3d at 971; *see also Wash. Wilderness Coal. v. Walla Walla County*, 74 F.3d 1247 (9th Cir. 1996) ("[C]onceivably the ordinances could be enforced against [the plaintiff], but a threat of enforcement does not arise simply because the language of the ordinances leaves open this slim possibility.").

The second and third factors also favor Defendants. The second factor favors Defendants because Plaintiff cannot cite a single past application of the guidelines provisions he now allegedly fears. Although Plaintiff maintains that "he has already been censored for expressing a viewpoint," the isolated instance of blocking at issue in this case was not an application of the social media guidelines, and it certainly was not an application of the provisions Plaintiff now seeks to enjoin. (Pl.'s Br. at 9.) The third factor also favors Defendants because Plaintiff offers only vague "some day" intentions of interacting with the @UOEquity account. *Thomas*, 220 F.3d at 1140 (quotation

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

omitted). Specifically, he contends that he intends to interact with the account at some unspecified future date and time, but he fails to identify any specific posts he would engage with, what he would say, when he would do so, or whether he even believes that his posts would violate the offending provisions of Defendants' social media guidelines. (*See id.* (citing Gilley Supp. Decl. ¶¶ 16–21, ECF No. 33).) Thus, as in *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), where the plaintiffs merely asserted that they "wish and intend to engage in activities prohibited" by the challenged statute but failed to "specify any particular time or date" for doing so, Plaintiff does not say when, how, or under what circumstances he will allegedly violate Defendants' social media guidelines. 98 F.3d at 1126–27. "A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas*, 220 F.3d at 1139. Plaintiff's alleged future injury is therefore too speculative under even the more generous standard reserved for threats of prosecution and civil sanction.

C. Plaintiff received all the monetary relief he requested, and his prayer for declaratory relief is not an independent basis for jurisdiction.

Plaintiff lastly argues that, even if his claim for injunctive relief is moot, the Court still has jurisdiction over his claim for nominal damages. (*See* Pl.'s Br. at 21–23.) He also contends that his request for declaratory relief provides an independent basis for jurisdiction, regardless of whether his claims for damages and injunctive relief otherwise present a live "case" or "controversy." (*See id.* at 20–21.) Neither argument has merit.

Defendants do not dispute that a request for nominal damages may provide a plaintiff with the "personal interest" required to satisfy the "case" or "controversy" requirement. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). But the required "personal interest" needed to initiate a lawsuit must "exist[] throughout the proceedings." *Id.* This means that the satisfaction of a requested damages award moots a claim because it deprives the plaintiff of his "personal stake" in its outcome and leaves the court without any "relief" to award. *See, e.g.*, *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1145 (9th Cir. 2016) ("[A] claim [for damages] becomes moot once the plaintiff

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

actually receives all of the relief to which he or she is entitled on the claim."); *S. Cal. Painters & Allied Trades v. Rodin & Co.*, 558 F.3d 1028, 1036 (9th Cir. 2009) (holding that damages claim was moot where defendant had paid all requested damages); *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011) (same). There is no requirement, as Plaintiff suggests, that a claimant receive a "legal judgment adjudicating his rights." (Pl.'s Br. at 21.) *See, e.g.*, *Uzuegbunam*, 141 S. Ct. at 808 (Roberts, C.J., dissenting) (noting that "our cases have long suggested" a defendant may moot a claim by paying nominal damages "without the court needing to pass on [its] merits"); *McCauley v. TransUnion, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (holding that a plaintiff "is not entitled to keep litigating his claim simply because [the defendant] has not admitted liability"); *Cocina Cultura*, 2021 WL 3836840, at *10 (same). Because, here, Plaintiff has received all the damages he has asked for, there is no relief for the Court to provide and the claim is moot.[7]

Plaintiff argues that the Court should make an exception to this rule for policy reasons. Specifically, he argues that respecting the limits of federal jurisdiction could lead to defendants "avoid[ing] scrutiny of their misbehavior." (Pl.'s Br. at 22.) But the Supreme Court has "long rejected that kind of argument." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1621 (2020); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). Plaintiff's concerns are more aptly directed at Article III of the Constitution, which limits the "judicial Power" to "Cases" and "Controversies." U.S. Const., Art. III, § 2. Plaintiff may chafe at the fact that Defendants' satisfaction of his damages request deprives him of a "personal stake" in the outcome of the case, but that personal stake is a constitutional prerequisite to federal

[7] This proposition is further supported by a trio of early Supreme Court cases involving defendants who voluntarily paid back taxes sought by the government. *See generally San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885); *Little v. Bowers*, 134 U.S. 547 (1890); *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893). In each case, the Supreme Court found that, because the damages "for which the suit was brought [had] been unconditionally paid and satisfied," *S. Pac. R.R. Co.*, 116 U.S. at 142, there was no longer any "actual controversy, involving real and substantial rights, between the parties," *Little*, 134 U.S. at 557, and the case was thus non-justiciable because "the cause of action . . . ceased to exist," *San Pablo*, 149 U.S. at 313.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

jurisdiction. As the Supreme Court has long warned, the federal courts do not exist to resolve "abstract dispute[s] about the law," *Alvarez v. Smith*, 558 U.S. 87, 93 (2009), and their jurisdiction extends only to the determination of "real, earnest, and vital controversy between individuals." *Chi. & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). When, as here, a plaintiff receives all the relief he requested, then the lawsuit has served its purpose and is moot.[8]

Moreover, even if the Court were to find that Plaintiff's damages claim is not moot, that claim only applies to Defendant stabin and not the University. Neither the Eleventh Amendment nor 42 U.S.C. § 1983 allow a plaintiff to bring a claim for damages against a state or a state official sued in their official capacity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70–71 (1989). This means that Plaintiff's request for nominal damages—if it is not moot—could only provide the Court with jurisdiction over the retrospective damages claim against Defendant stabin. Indeed, a similar situation presented itself in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In that case, the Ninth Circuit had held that adding a claim for nominal damages against the state preserved jurisdiction over a mooted claim for which the plaintiff otherwise lacked "a direct stake in the outcome." 520 U.S. at 64, 68–69 (quotation omitted). The Supreme Court reversed the Ninth Circuit, explaining that, because Section 1983 actions "do not lie against a State," the "claim for relief the Ninth Circuit found sufficient to overcome mootness was nonexistent." *Id.* at 69. The same would be true here with respect to any alleged claim for nominal damages against the University—the alleged damages cannot provide the requisite "personal stake" and redressability required to exercise jurisdiction over a claim concerning the University's past conduct.

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[8] Plaintiff may later try to raise the unpreserved argument that Defendants' act of sending him the $20 did not afford him "any actual relief." *Chen*, 819 F.3d at 1144. The test of whether a damages claim is satisfied, however, focuses on whether the defendant has "unconditionally paid and satisfied" the requested damages—not what the plaintiff chooses to do with that money. *San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138, 142 (1885). As explained by the Ninth Circuit, a plaintiff "actually receives" funds when the defendant "unconditionally relinquishe[s] its entire interest" in the funds and "bids the money an eternal farewell." *Chen*, 819 F.3d at 1145–56. That is precisely what happened here—Defendants have unconditionally relinquished their entire interest in the $20 by mailing it to Plaintiff. What he chooses to do with that money is of no legal relevance.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

Finally, because Plaintiff's claims for damages and injunctive relief are otherwise moot, the Court necessarily lacks jurisdiction over his request for declaratory relief. "[T]he Declaratory Judgments Act is not an independent source of federal jurisdiction; the availability of such relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). In other words, "because the federal courts have no jurisdiction over a case that does not involve an Article III case or controversy, a prayer for declaratory relief is insufficient to save an otherwise moot case." *Flanigan's Enters., Inc. of Ga. v. City of Sand Springs*, 868 F.3d 1248, 1268 (11th Cir. 2017), *abrogated on other grounds by Schultz v. Alabama*, 42 F.4th 1298, 1321 (11th Cir. 2022); *cf. also Alvarez*, 558 U.S. at 90–93 (dismissing case as moot despite request for declaratory relief because government had returned seized property and future harm was unlikely). Here, for the reasons described above, neither Plaintiff's claim for damages nor his claim for injunctive relief presents a live "case" or "controversy," and a declaratory judgment would merely serve as a prohibited "advisory opinion" regarding an "abstract dispute about the law, unlikely to affect [him] any more than it affects" other members of the public. *Alvarez*, 558 U.S. at 93; *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (holding that, "[n]o matter how vehemently the parties continue to dispute the lawfulness" of a defendant's conduct, the case is moot if it is "no longer embedded in any actual controversy about the plaintiffs' particular legal rights").

Plaintiff admits that the purpose of a declaratory judgment would be to "send a powerful message" to the University. (Pl.'s Br. at 20–21.) But there is no "teach the government a lesson" exception to the case or controversy requirement. A "general declaration which does not settle an actual controversy between adverse parties" is beyond federal jurisdiction. *Coal. for a Healthy Cal. v. F.C.C.*, 87 F.3d 383, 386 (9th Cir. 1996); *see also Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("This is as true of declaratory judgments as any other field."). Here, Plaintiff faces no more than a "theoretical possibility" of future blocking, *Brach*, 38 F.4th at 14, and the individual defendant responsible for the isolated instance of past blocking no longer works at the University. (Park Decl. ¶ 8 & Ex. 3.) A declaratory judgment, as such, would send a message only to a retired

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Phone: +1.503.727.2000
Fax: +1.503.727.2222

state employee who can no longer harm Plaintiff. And, to the extent such a retrospective declaration would (functionally) penalize the University, it raises potential issues of sovereign immunity. *See Green v. Mansour*, 474 U.S. 64, 73 & n.2 (1985) (concluding that a retrospective declaratory judgment against a state either had preclusive effect—in which case it was barred by the Eleventh Amendment—or it did not—in which case it was pointless and "unavailable for that reason"). Accordingly, because there is no underlying "case" or "controversy" remaining in this lawsuit, Plaintiff's prayer for declaratory relief cannot save his claims from becoming moot.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion and dismiss this case for lack of subject-matter jurisdiction.

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PERKINS COIE LLP

By: */s/ Misha Isaak*

Stephen F. English, OSB No. 730843
SEnglish@perkinscoie.com
Misha Isaak, OSB No. 086430
MIsaak@perkinscoie.com
Jeremy A. Carp, OSB No. 173164
JCarp@perkinscoie.com
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Telephone: +1.503.727.2000

Attorneys for Defendants tova stabin and the Communications Manager