**No. 20-1083**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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Anthony Kelly,

Plaintiff-Appellant,

v.

City of Alexandria, et al.,

Defendants-Appellees.

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On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
Case No. 1:19-cv-553, Hon. Liam O'Grady

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# BRIEF FOR APPELLANT ANTHONY KELLY

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June 14, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Anthony Kelly
(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐ YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Brian Wolfman Date: 6/14/2020

Counsel for: Plaintiff-Appelllant Anthony Kelly



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## JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). *See* JA 86 (¶ 14).

The district court's July 30, 2017 decision—which granted a motion to dismiss and denied Plaintiff-Appellant Kelly leave to file a second amended complaint—disposed of all claims of all parties. JA 118-21. The district court did not thereafter enter a separate document under Federal Rule of Civil Procedure 58(a). Therefore, the thirty-day period for filing a notice of appeal began 150 days later, on December 27, 2019, *see* Fed. R. App. P. 4(a)(1)(A), 4(a)(7)(A)(ii) (second bullet), giving Kelly until January 27, 2020 to file a notice of appeal. Kelly filed a notice of appeal on January 23, 2020. JA 122. Defendants-Appellees then moved to dismiss this appeal as untimely. Doc. 7 (Jan. 28, 2020). This Court denied the motion to dismiss on May 15, 2020. Doc. 15. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

Plaintiff-Appellant Anthony Kelly sued Defendant-Appellee City of Alexandria alleging racial discrimination in employment under Title VII of the Civil Rights Act of 1964. The City then moved to dismiss Kelly's amended complaint, arguing that Kelly's Title VII suit was untimely. Kelly opposed that motion. He also moved for leave to file a second amended complaint. Among other things, Kelly's proposed second amended complaint added claims under 42 U.S.C. § 1983 against the City and three City officers in their individual capacities and pleaded facts that would, in Kelly's view, support a

claim of equitable tolling of any time bar on his Title VII claims, which were filed in court no more than two minutes late.

The morning after Kelly moved for leave to amend, the district court held the Title VII claims untimely and denied leave to amend, stating, without explanation, that the proposed amendment would be "futile." JA 121.

The issues presented are whether the district court erred (1) in denying Kelly's motion to amend his complaint as futile, and (2) in holding Kelly's Title VII claims untimely.

## STATEMENT OF THE CASE

Plaintiff Anthony Kelly is a firefighter for the Defendant City of Alexandria. He initially brought this action under Title VII of the Civil Rights Act of 1964, maintaining that the City had discriminated against him in his employment. The City moved to dismiss Kelly's amended complaint on the basis that the Title VII suit was not timely filed and that one of several of Kelly's Title VII claims—a racial-harassment claim—was inadequately pleaded. At a hearing on the motion, the district court took the timeliness issue under advisement. Though the court agreed with the City that the harassment claim was inadequately pleaded, it dismissed that claim without prejudice and advised Kelly that he could seek leave to enhance his pleadings on that claim. JA 80; *see also* JA 67.

Kelly then promptly moved for leave to amend his complaint to add factual allegations in support of the harassment claim as well as allegations relevant to the timeliness of his Title VII claims. Kelly's motion also sought to add claims under

42 U.S.C. § 1983 against the City and three City officers sued in their individual capacities, maintaining that Defendants had violated Kelly's statutory and constitutional rights to be free from racial discrimination and harassment and that Defendants unlawfully subjected Kelly to retaliation for his protected activity. JA 83-84 (¶¶ 1-2).

The district court granted the City's motion to dismiss, holding that Kelly's Title VII claims were untimely and could not be equitably tolled. It then denied Kelly's motion for leave to amend, saying, without any elaboration, that amendment would be futile. JA 118-21.

This section of this brief first summarizes the facts Kelly alleged in support of his discrimination, harassment, retaliation, and equal-protection claims, JA 83-106 (¶¶ 1-142), which Kelly maintains demonstrate that the district court should not have denied him leave to amend his complaint on futility grounds. This Court must take Kelly's factual allegations as true, drawing all reasonable inferences in his favor. *Tobey v. Jones*, 706 F.3d 379, 383 (4th Cir. 2013). This section then describes the procedural history of the case and the decision below.

## I. Factual background

Plaintiff Anthony Kelly, an African-American man, has been a firefighter for the Alexandria Fire Department (AFD) for over seventeen years, consistently earning excellent performance evaluations. JA 87 (¶ 25). In the past, his AFD supervisors recognized him for his commitment to "advancing the interests of" his colleagues as well as for being "fair and professional." JA 88 (¶¶ 27-28). He was promoted to Battalion Chief in 2015. JA 88 (¶ 26).

As noted, the facts below summarize the allegations in Kelly's proposed second amended complaint (which are fully described at JA 83-106 (¶¶ 1-142)).

### A. Kelly's claims against the individual Defendants

Kelly maintains that three AFD officials—Robert Dube, Daniel McMaster, and Lawrence Schultz, the Fire Chief, Deputy Fire Chief, and Assistant Fire Chief, respectively, JA 87 (¶¶ 22-24)—have discriminated against him on the basis of his race, and retaliated against him because he advocated on behalf of AFD's minority employees and submitted complaints to the City and the federal Equal Employment Opportunity Commission (EEOC) regarding AFD's noncompliance with city employment policy and federal law. Kelly also maintains that the discrimination and retaliation against him were severe or pervasive, giving rise to hostile-work-environment claims. Defendants' illegalities caused Kelly immediate monetary harm and undermined his opportunities for advancement. *See* JA 95-97, 99-101 (¶¶ 76-78, 85-88, 112). This section sets out the factual bases for Kelly's disparate-treatment, retaliation, and hostile-work-environment claims, which, Kelly maintains, state Section 1983 claims for violations of both 42 U.S.C. § 1981(a) and the Equal Protection Clause.[1]

**1.** On numerous occasions, AFD subjected Kelly to harsher discipline than his white colleagues for the same or very similar actions. JA 107 (¶ 150).

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[1] As argued below (at 34-37), Kelly maintains that in addition to erring in refusing Kelly leave to add claims under Section 1983, the district court erred in dismissing his Title VII claims as untimely. Kelly's factual allegations summarized in this section of the brief and set forth in his proposed second amended complaint support both Kelly's Section 1983 claims and his Title VII claims. *See infra* note 4 (at 18).

For example, Kelly was disciplined more harshly than two white AFD employees for on-the-job vehicle accidents. JA 97 (¶ 92). Schultz and McMaster ordered Kelly to complete a thirty-day driver-improvement program after he was involved in an accident caused by a drunk driver. JA 96 (¶¶ 82, 85-86). To do so, they invoked a stale policy that had been invalid for over four years. JA 97 (¶ 87). Two white firefighters with similar accident records did not receive such harsh discipline. JA 97 (¶ 92). Participation in the driver-improvement program limited Kelly's ability to earn overtime, adversely affecting his compensation. JA 96 (¶ 86).

McMaster also disciplined Kelly, but not a similarly situated white Battalion Chief, for the same conduct. Kelly and the white Battalion Chief both responded to an emergency call and arrived simultaneously on the scene. JA 98 (¶¶ 99-100). Despite their simultaneous arrival, McMaster disciplined Kelly, but not the white Battalion Chief, for failing to arrive on time. *Id.*

In addition, after speaking up against racial bias in a meeting of Battalion Chiefs, Kelly was disciplined but a white Battalion Chief who spoke out on the same issue was not. At the meeting, Kelly questioned the AFD Chief of Operations about his decision to transfer an African-American firefighter to a different station. JA 88 (¶ 31). Kelly believed the transfer was racially motivated. JA 89 (¶ 32). A white Battalion Chief also objected to the transfer. JA 89 (¶ 34). After the meeting, Kelly received a written reprimand for opposing the transfer and a disciplinary memo was placed in his file stating that he was insubordinate during the meeting. JA 89 (¶¶ 35-36). The white Battalion Chief was not disciplined. JA 89 (¶ 35).

**2.** Defendants' discriminatory and retaliatory actions have limited Kelly's advancement within AFD. After becoming a Battalion Chief, Kelly expressed interest in AFD's Training Battalion Chief position, and the Deputy Chief of Training encouraged him to apply. JA 95 (¶ 76). Kelly then applied, but Schultz did not select him for the position. JA 95 (¶ 77). When Kelly inquired about why he was not selected, Schultz claimed that he did not select Kelly because the Deputy Chief of Training did not want to work with him—a false statement because, as noted, the Deputy Chief of Training had supported Kelly's application. *See* JA 95 (¶¶ 76-77). In fact, Schultz did not select Kelly in retaliation for Kelly's advocacy on behalf of members of the Black Fire Service Professionals of Alexandria (BFSPA)—an organization in which Kelly is an officer. JA 88, 95 (¶¶ 30, 78).

**3.** Kelly's supervisors have undermined his leadership by encouraging his subordinate employees to ignore his orders and by excluding him from key functions of his Battalion Chief position because of his race.

McMaster and Schultz repeatedly have emboldened Kelly's subordinate employees to ignore his orders. After a white subordinate employee posted a sign at AFD that black firefighters found offensive, Kelly informed McMaster that he would ask that employee to take it down. JA 100-01 (¶ 112). The white employee ignored Kelly's instruction to remove the sign, which constituted insubordination under AFD policy. JA 101 (¶ 112). Despite his knowledge of this insubordination, McMaster refused to discipline the white employee. *Id.* AFD also received an outside complaint against the same white employee, and Kelly was initially assigned to investigate the complaint. JA

100 (¶ 112). Despite Kelly following all AFD investigatory procedures, Schultz reassigned the investigation to a different employee. *Id.*

McMaster held a meeting about fire stations and employees under Kelly's command and excluded Kelly but included white, lower-ranked employees. JA 94 (¶¶ 66-67). Kelly also learned that Schultz was sharing information about the employees and stations under Kelly's command with a white Battalion Chief but not with Kelly. JA 94 (¶¶ 65-66).

**4.** McMaster also harassed Kelly by encouraging his subordinate employees to denounce him and by acting aggressively towards him.

McMaster tried to convince Kelly's subordinate employees to denounce him in retaliation for Kelly's protected activities, including filing an EEOC complaint and advocating for BFSPA members. JA 99, 101 (¶¶ 111, 115). During a meeting, and seemingly without reason, McMaster solicited complaints about Kelly from Kelly's subordinates by directing them to "prepare a statement" about the "bull**** with Anthony." JA 99 (¶ 108). A white Captain at the meeting offered to "fix" the statements so that they were uniformly negative. JA 99 (¶ 109).

Later, at a meeting, McMaster and Schultz accused Kelly of advocating only for African-American firefighters (even though that was untrue). *See* JA 92 (¶ 54). McMaster and Schultz told Kelly they were "tired" of him accusing Dube of racism in the workplace. JA 93 (¶ 56). During the meeting, Schultz banged his hands on the table, rolled up his sleeves, and told Kelly to "Google him." JA 102 (¶ 116). When Kelly later did so, he discovered that, in 2010, fifty-one African-American firefighters in the District of Columbia had filed a race-discrimination lawsuit against Schultz. JA 102, 105

(¶¶ 116, 140). (Schultz's suggestion that Kelly "Google him" implied that Schultz wanted Kelly to know that the previous race-discrimination claims against him had not hindered Schultz's career advancement.) After the meeting, Schultz falsely accused Kelly of the same aggression that Schultz himself had displayed. *See* JA 101 (¶ 113).

**5.** McMaster and Schultz implemented a surveillance system to aid in their efforts to undermine Kelly. JA 98 (¶¶ 98-102). They used the system to reprimand Kelly for traveling thirty seconds outside his response zone, even though he did so on AFD business. JA 98 (¶¶ 99, 101). This level of scrutiny, which McMaster and Schultz applied to Kelly but not to white Battalion Chiefs, forced Kelly, out of an abundance of caution, to use leave time to attend events white firefighters were permitted to attend on the clock. JA 98-99 (¶¶ 103-106).

**6.** Kelly experienced retaliation after, acting as a whistleblower, he alerted the City that AFD was not following proper employee-promotion procedures. McMaster then singled out Kelly for exposing AFD's noncompliance and unequal-promotion activity. JA 93 (¶ 64). Kelly's supervisors began to characterize Kelly as a "leaker." JA 94 (¶ 68). Schultz also put a negative memo in Kelly's personnel file describing Kelly as having "lapses in his character and integrity." JA 94 (¶ 69). Kelly alleges that Schultz's issuance of the memo was retaliatory. JA 94 (¶¶ 70-71).

**7.** Kelly was subjected to AFD's disciplinary-hearing process after Schultz placed the negative memo in Kelly's personnel file concerning Kelly's complaint regarding AFD's noncompliance with employee-promotion procedures. JA 94 (¶¶ 69-71). Kelly was granted fewer procedural rights in the disciplinary-hearing process than was a similarly situated white colleague. JA 94 (¶¶ 69, 71). In light of this disparate treatment, Kelly

filed a noncompliance report with the City's Human Resources Department, and the City subsequently removed Schultz's memo from Kelly's file. JA 94 (¶ 71).

**8.** Kelly was passed over for a job opportunity in retaliation for helping another African-American firefighter write an EEO complaint against AFD. *See* JA 90, 103 (¶¶ 44, 126). Kelly and other firefighters were scheduled to attend a training about serving on AFD's hiring panel. JA 102 (¶ 120). AFD cancelled the training at the last minute because some AFD leaders were trying to remove Kelly from the panel. JA 102 (¶¶ 121-23). Kelly later learned that, at an AFD leadership meeting, Schultz asked why Kelly was involved in the hiring panel given "his EEO complaint against the AFD." JA 103 (¶ 126).

### B. Kelly's claims against the City

Kelly has on numerous occasions informed the City of the disparate treatment, retaliation, and harassment he has experienced at AFD. *See, e.g.*, JA 92-94, 102, 105 (¶¶ 50, 63, 68, 71, 119, 136). Despite the City's knowledge of Kelly's adverse treatment, Kelly maintains that the City has not taken any action to remedy the disparate treatment, retaliation, and harassment.

**1.** Kelly filed an EEOC charge against the City before he filed this lawsuit. JA 5 (¶ 6). Before filing with the EEOC, Kelly reported AFD's bullying and harassment to a white employee in the Office of Alexandria's City Manager. JA 102 (¶ 119). Despite the City's "zero tolerance" anti-bullying policy, the City did not provide Kelly any relief from the bullying and harassment he reported. *Id.* And, as noted earlier, when Kelly

realized he was receiving fewer procedural rights than his white colleague, he complained to the City's Human Resources Department. *See* JA 94 (¶ 71).

**2.** BFSPA voted "no confidence" in Dube, McMaster, and Schultz in 2019 based on disparate treatment in promotions, investigations, staffing, and assignments between (favored) white firefighters and (disfavored) African-American firefighters. JA 88, 105 (¶¶ 30, 135). The no-confidence vote was also based on the lack of diversity in fire-recruit school and a general decline in the number of minority AFD firefighters. JA 105 (¶ 135). BFSPA sent a letter to the Mayor of Alexandria after the vote, and BFSPA leaders met with the City Manager to discuss their concerns about Dube, McMaster, and Schultz. JA 105 (¶ 136).[2]

**3.** Despite multiple reports of racial slurs against and discriminatory treatment of AFD's minority firefighters, supervisors consistently took no corrective action, indicating a City custom or policy of indifference toward race-discrimination complaints. *See* JA 92-93, 102 (¶¶ 50-52, 55-60, 119).

**4.** When Kelly made race-discrimination allegations against Dube within AFD, the Department assigned McMaster to investigate the allegations even though Dube was McMaster's second-level superior. JA 102 (¶ 117). This represented a conflict of interest because AFD Deputy Chiefs are not normally allowed to investigate a racial-discrimination claim against a Fire Chief. *Id.* Kelly subsequently lost all confidence in

[2] Shortly after the no-confidence vote, Dube and Schultz left AFD. JA 105 (¶¶ 139, 141).

the integrity of the investigation. *See id.* The City did not provide Kelly any relief from the racial discrimination he reported.

**5.** Dube is an official with final policymaking authority. The Alexandria Municipal Code provides that Dube, in his capacity as Fire Chief, has "direction of the department" and "responsibil[ity] for executing [its] functions and duties." Alexandria, Va., Code of Ordinances 2-3-4 (2020). Consequently, Dube has "ultimate responsibility for personnel actions in the Department." JA 87 (¶ 24).

## II. Procedural background

**A.** In April 2018, Kelly filed a charge with the City of Alexandria's Office of Human Rights alleging that the City had discriminated against him in his employment in violation of Title VII of the Civil Rights Act of 1964. JA 5 (¶ 5). The federal EEOC later adopted the findings of the Office of Human Rights and issued a right-to-sue letter on February 4, 2019, which began the ninety-day period for Kelly to file suit under Title VII. JA 5 (¶ 6), 60; *see* 42 U.S.C. § 2000e-5(f)(1). The suit would have been timely if filed at 11:59 pm on May 6, 2019.

Kelly filed his Title VII suit against the City at 12:01 am on May 7, 2019, alleging disparate treatment on the basis of race, retaliation for engaging in protected activities, and that the City had created a hostile work environment, all based on the events summarized above. JA 4-5 (¶ 1); *see supra* at 4-10. The City then moved to dismiss, arguing, among other things, that because Kelly filed his claim more than ninety days after the EEOC issued its right-to-sue letter, Kelly's claims were time-barred. JA 56. The City also argued, as to Kelly's hostile-work-environment claim, that Kelly had not alleged sufficient facts. *Id.* Kelly opposed both arguments. Opp'n to Mot. to Dismiss at

2-5 (ECF No. 18). The City did not, at any time, argue that Kelly's other claims—disparate treatment and retaliation—were factually insufficient to state a claim.

The district court held oral argument on the City's motion to dismiss on July 26, 2019, after which it took the timeliness of Kelly's Title VII claims under advisement. *See* JA 61-62. At the hearing, the court dismissed, without prejudice, Kelly's hostile-work-environment claim as insufficiently pleaded and gave Kelly the opportunity to amend his complaint to plead more facts and reinstate the claim. JA 67, 79-80. Like the City, at no time did the court suggest that Kelly's other claims were insufficiently pleaded.

**B.** Three days later, on July 29, 2019, Kelly took the opportunity the court had suggested. He moved for leave to file a second amended complaint, which further described his hostile-work-environment allegations to meet the court's concerns about that claim. *See, e.g.*, JA 84-85, 105, 107, 110-11, 114-15, 109-10, 114-15 (¶¶ 4-12, 139, 152-54, 172-77, 200-05). As to the timeliness of his Title VII claims, Kelly's motion also maintained that he was entitled to equitable tolling. *See* Mem. in Support of Mot. for Leave to File Second Am. Complaint at 2-3 (ECF No. 22). The second amended complaint thus explained that Kelly's counsel, when filing the initial complaint, ran into "an unexpected processing delay" in paying the filing fee at the pay.gov website, causing the complaint to be filed at 12:01 am on May 7, 2019. JA 86-87 (¶ 19); *see* JA 117A.

Kelly's proposed second amended complaint also added claims under 42 U.S.C. § 1983 against the City and against Dube, McMaster, and Schultz in their individual capacities. JA 83-84 (¶¶ 1-2). The complaint alleged, consistent with Section 1983's text, that all four defendants, acting under color of law, had violated "the Constitution and

laws" of the United States. 42 U.S.C. § 1983; *see* JA 107-08, 111-15 (¶¶ 153-59, 177-93, 200-08). Specifically, the proposed second amended complaint alleged that the facts set out in the complaint, and summarized above (at 4-10), establish that Defendants had violated 42 U.S.C. § 1981a and the Equal Protection Clause. JA 107, 111, 114-15 (¶¶ 154, 178, 201, 207).[3]

**C.** The morning after Kelly moved for leave to amend, on July 30, 2019, the district court granted Defendants' motion to dismiss, holding Kelly's Title VII claims untimely, JA 121, and rejecting the claim that the processing delay could permit equitable tolling, JA 120. In addition, before receiving an opposition from Defendants to Kelly's motion to amend, the court denied Kelly's motion for leave to file a second amended complaint as "futile" without providing any reasoning. JA 121. The district court issued its decision only hours after Kelly sought leave to file his second amended complaint. The ECF

[3] As explained below (at 17-28), Kelly's allegations make out a violation of 42 U.S.C. § 1981(a). That provision states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

With one exception, *see* JA 105 (¶ 140) (citing Section 1981, without the "a"), the complaint mistakenly refers to Section 1981**a**, which concerns the damages available in certain civil-rights actions. Section 1981**(a)**, on the other hand, confers rights enforceable against municipal actors under Section 1983, as the district court later noted. *See* JA 216 n.3 in No. 19-2377 (4th Cir. filed Feb. 27, 2020). As explained below (at 30-32), Kelly's mistaken reference to Section 1981**a** (and not to Section 1981 or Section 1981**(a)**) is not a pleading error, let alone one that would necessitate dismissal.

notifications in the case indicate that Kelly filed his motion for leave to file a second amended complaint at 11:46 pm on July 29, and the court issued its order at 11:30 am on July 30.

## SUMMARY OF ARGUMENT

Anthony Kelly properly pleaded his Section 1983 claims, and, for that reason, the district court erred in rejecting his second amended complaint on futility grounds. He also pleaded an extraordinary circumstance that warrants equitable tolling of his Title VII claims. For these two independent reasons, this Court should reverse.

**I.A.** Kelly adequately pleaded Section 1983 claims against the individual Defendants and the City. His detailed factual allegations, taken as true, as they must be at this stage, state valid claims. Defendants have never contested the factual sufficiency of Kelly's disparate-treatment and retaliation claims. Kelly's detailed complaint outlines a range of racially discriminatory conduct, including discriminatory discipline, deprivation of rights, and sabotage of Kelly's job functions. When Kelly reported this misconduct, Defendants retaliated against him by failing to promote him, depriving him of overtime opportunities, and levelling baseless reprimands against him. These allegations also more than suffice to state a claim under the Fourteenth Amendment's Equal Protection Clause.

Kelly also easily exceeds the pleading standard required to survive a motion to dismiss with respect to his hostile-work-environment claim. Kelly alleges that Dube, McMaster, and Schultz engaged in a pattern of racial harassment, surveilling Kelly's

movements, encouraging his employees to denounce him, and emboldening them to respond to Kelly's directions with insubordination.

Kelly's claims are adequately pleaded against the City as well. This is true for two separate and independent reasons. First, the City ignored Kelly's repeated complaints of racial discrimination. Second, Dube had final authority on personnel decisions within the Department. He was therefore an official policymaker whose actions impose liability on the City.

Because Defendants cannot successfully contest the factual sufficiency of Kelly's proposed second amended complaint, they may, as they did in another appeal pending before this Court (No. 19-2377), dispute its legal sufficiency on the ground that it mistakenly cites Section 1981a, rather than Section 1981 or 1981(a), as the legal predicate for Kelly's Section 1983 claim. This argument runs headlong into decades of settled law. As this Court has put it: "Legal labels characterizing a claim cannot, standing alone, determine whether it fails to meet [Rule 8(a)(2)'s] extremely modest standard." *Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995); *see generally Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam).

**B.** At a minimum, the district court erred in denying Kelly leave to amend as futile without providing an explanation. Though a district court need not explain a self-evident futility determination, it may not leave the parties and the reviewing court guessing as to its reasoning. Here, the district court's rationale is a complete mystery. None of Kelly's Section 1983 claims were time barred and, at a hearing just days before its decision, the court expressed no concern with the factual sufficiency of Kelly's

disparate-treatment and retaliation claims (and the City had never suggested that those claims were factually deficient).

**II.** The district court erred in dismissing Kelly's Title VII claims as time-barred. The court determined that Kelly filed his complaint two days late and was not entitled to equitable tolling. The district court predicated this decision on three errors. First, it erroneously calculated the date on which the filing period expired; the suit was at most two minutes late, not two days late, as the district court concluded. Second, the court failed to grant equitable tolling even though Kelly missed the deadline only because of an anomalous computer-processing error in the court's own electronic-payment system. The court determined that this processing delay was not an "extraordinary circumstance" because it was "minor." But this purported fact appears nowhere in the record. Third and finally, at a minimum, the court should have permitted further litigation on the tolling issue rather than sustaining the time-bar assertion—an affirmative defense—at the motion-to-dismiss stage.

## ARGUMENT

### Standards of Review

This Court reviews de novo the district court's denial of leave to amend a complaint on the basis of futility and its dismissal for failure to state a claim under Rule 12(b)(6). *See, e.g.*, *Davison v. Randall*, 912 F.3d 666, 690 (4th Cir. 2019) (futility); *Hately v. Watts*, 917 F.3d 770, 781 (4th Cir. 2019) (failure to state a claim). This Court also reviews de novo a district court's denial of equitable tolling, on the facts as pleaded, as a matter of law. *Coleman v. Talbot Cty. Det. Ctr.*, 242 F. App'x 72, 74 (4th Cir. 2007).

As indicated, whether an amendment to a complaint would be futile is determined under the same de novo legal standard as a motion to dismiss for failure to state a claim. *See Davison*, 912 F.3d at 690. "In reviewing a dismissal for failure to state a claim," this Court "accept[s] as true all of the factual allegations contained in the complaint and draw[s] all reasonable inferences in favor of the plaintiff." *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016). This standard does not require "detailed factual allegations." *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 211 (4th Cir. 2019). A plaintiff need only plead sufficient "factual matter, accepted as true" to suggest a plausible cause of action. *Woods v. City of Greensboro*, 855 F.3d 639, 653 (4th Cir. 2017).

As explained in Part I.A. below, Kelly easily satisfies this test. The district court should be reversed on that basis alone and be directed to accept Kelly's proposed second amended complaint. Though it need not reach the question, as Part I.B. demonstrates, the district court also erred in denying Kelly's motion for leave to amend because it provided no explanation for its futility finding. Finally, as Part II shows, Kelly's Title VII claims should be revived because the district court erred in rejecting equitable tolling.

## I. The denial of Kelly's motion for leave to amend as futile should be reversed.

### A. Kelly's proposed second amended complaint alleges plausible violations of Section 1981 and the Equal Protection Clause, each of which would entitle him to relief under Section 1983.

Kelly's proposed second amended complaint is thorough and detailed, dedicating nearly 150 paragraphs to factual allegations. *See* JA 83-106 (¶¶ 1-142). Accepted as true, as they must be at this stage, these allegations state plausible claims of disparate

treatment and retaliation, a racially hostile work environment, and a denial of equal protection under Section 1983 against Dube, McMaster, and Schultz, in their individual capacities. The second amended complaint also alleges plausible Section 1983 claims against the City of Alexandria under the standard for municipal liability articulated in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978).

### 1. Kelly alleged plausible disparate-treatment and retaliation claims.

Section 1981 prohibits race-based discrimination in the workplace, including disparate treatment and retaliation. In their motion to dismiss below, Defendants did not dispute the factual sufficiency of Kelly's disparate-treatment and retaliation claims. Nor could they: Kelly's lengthy complaint is replete with plausible allegations of both disparate treatment and retaliation.[4]

**a.** Kelly alleges disparate treatment in the form of discriminatory discipline. A plaintiff states a claim of discriminatory discipline by alleging that his employer (1) disciplined employees of different races differently for similar conduct and (2) disciplined the plaintiff more harshly than the employee of another race. *See Lightner v.*

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[4] The elements of Kelly's Section 1981 claims are identical to the elements of analogous Title VII claims. *See Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015) (retaliation); *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 424 (4th Cir. 2014) (hostile work environment); *Hooper v. Md. Dep't of Human Res.*, No. 94-1067, 1995 WL 80043, at *3 (4th Cir. Feb. 27, 1995) (disparate treatment). For that reason, to the extent that Kelly has stated Section 1981 claims (using Section 1983 as the vehicle for them), he has also stated Title VII claims.

*City of Wilmington*, 545 F.3d 260, 264-65 (4th Cir. 2008). Kelly's allegations of discriminatory discipline satisfy this standard.

For example, McMaster and Schultz disciplined Kelly for on-the-job vehicle accidents more harshly than white employees. JA 97 (¶ 92). Like many firefighters, Kelly has been involved in minor accidents. *See* JA 96 (¶¶ 79-81). But unlike his white counterparts, Kelly faced severe punishment for them. JA 96-97 (¶¶ 85-87, 91-92). After a drunk driver hit Kelly's emergency-response vehicle, McMaster and Schultz pulled Kelly off the streets for thirty days to complete a "driver improvement program" in lieu of his regular Battalion Chief responsibilities. JA 96 (¶¶ 82-85). To do so, they invoked a disciplinary policy that had been invalid for four years. *See* JA 97 (¶ 87). White employees were reprimanded under current, milder guidelines. *See* JA 97 (¶ 92).

Dube also discriminatorily disciplined Kelly for purported insubordination. One Battalion Chief meeting crystallizes the point. Two Battalion Chiefs rose to speak in opposition to AFD transferring a firefighter away from his home station: Kelly (African-American) and Fair (white). JA 88-89 (¶¶ 31-34). Kelly's comments were received with bullying, intimidation, disparaging comments, and, ultimately, a reprimand for insubordination. JA 88-89 (¶¶ 33-35). Fair's comments were accepted and AFD agreed not to transfer the firefighter. JA 89 (¶ 34). Fair was not reprimanded for his input. JA 89 (¶ 36).

In a third display of discriminatory discipline, McMaster again reprimanded Kelly, but not a similarly situated white Battalion Chief, for identical conduct. Kelly and the white Battalion Chief responded to an emergency call and arrived on the scene simultaneously. JA 98 (¶ 100). Despite their concurrent arrival, McMaster disciplined

Kelly, but not the white Battalion Chief, for failing to arrive punctually. JA 98 (¶¶ 99-100).

Discriminatory discipline is not the only disparate treatment Kelly faced. Dube, McMaster, and Schultz systematically undermined Kelly's job performance while empowering white battalion chiefs to succeed. Kelly's supervisors subjected him to an oppressive level of on-the-job scrutiny not applied to white firefighters. *See* JA 98-99 (¶¶ 98-106). Moreover, Schultz intentionally cut out Kelly, but not his white counterparts, from information channels that were critical to Kelly's ability to perform his job effectively. JA 94 (¶ 65). Kelly walked in on meetings to find his supervisors consulting with his white subordinates on how to operate stations under his command. JA 94 (¶¶ 66-67). And those same supervisors encouraged Kelly's subordinates to circumvent his authority in the chain of command, protecting Kelly's team members for doing so by refusing to reprimand them for insubordination. JA 99-100 (¶ 112). McMaster and Schultz fortified their subversion of Kelly by filing baseless reprimands against him and soliciting complaints "fix[ed]" to frame him in as negative a light as possible. JA 99 (¶ 109); *see also* JA 94 (¶¶ 69-71). Left with nowhere else to turn in the face of discrimination, Kelly followed official protocols to dispute this unlawful behavior. As a result, he faced yet more discrimination and was deprived of procedural rights offered to white firefighters in complaint proceedings. JA 94 (¶ 71).

**b.** As with Kelly's allegations of discriminatory discipline, Defendants have never disputed the factual sufficiency of Kelly's retaliation claims. A plaintiff states a retaliation claim by alleging "(1) he engaged in protected activity, (2) he suffered an adverse employment action at the hands of [his employer]; and (3) [the employer] took

the adverse action because of the protected activity." *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 543 (4th Cir. 2003) (quoting *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001)). Kelly alleges that Dube, McMaster, and Schultz retaliated against him for three activities, each of which is protected: serving as an officer of the Black Fire Service Professionals of Alexandria (BFSPA), filing a complaint with the City of Alexandria, and filing a complaint with the EEOC. *See, e.g.*, JA 94-95, 97, 102 (¶¶ 68, 78, 88, 119); *see also* 42 U.S.C. § 2000e–3(a) (Title VII prohibits retaliation for opposing "an unlawful employment practice"); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015) (Title VII and Section 1981 protect the same activities).

To begin with, Schultz retaliated against Kelly's advocacy by failing to promote him. *See Bryant*, 333 F.3d at 543-44. In *Bryant*, this Court sustained a jury verdict for an employee who was denied a promotion because she lodged a racial discrimination complaint. *Id.* at 543, 549. The plaintiff began experiencing "nitpicky" critiques and a "hostile" atmosphere as soon as she raised the discrimination issue with her supervisor. *Id.* at 542. And her application for a promotion was subsequently denied. *Id.* at 544. The court found it "beyond quarrel" that the employer's denial of the plaintiff's application was actionable. *Id.* It was similarly evident that the employer's sudden mistreatment of the plaintiff following her complaint supported an inference that its employment decision was a response to the complaint as well. *Id.* The employer's lack of a legitimate reason for rejecting the plaintiff's application reinforced this conclusion.

Kelly's failure-to-promote allegation follows in *Bryant*'s footsteps. Like the plaintiff in *Bryant*, Kelly's work environment changed after he filed complaints of racial discrimination. Schultz began harassing him, excluding him from meetings,

characterizing him as a leaker, and placing baseless reprimands in his file. *See, e.g.*, JA 94-95, 97 (¶¶ 68, 78, 88). And Schultz subsequently denied Kelly's job application to become Training Battalion Chief, an adverse employment action. JA 95 (¶¶ 76-78); *see Bryant*, 333 F.3d at 544. Under *Bryant*, Schultz's response to Kelly's advocacy supports an inference that his complaint motivated Schultz to reject his application. Moreover, like the employer in *Bryant*, Schultz failed to provide a bona fide reason for denying Kelly the job. JA 95 (¶ 77).

Kelly also states a retaliation claim on the basis of lost compensation. Lost compensation, including lost overtime, is (of course) actionable. *Ray v. Int'l Paper Co.*, 909 F.3d 661, 668 (4th Cir. 2018). In *Ray*, a supervisor eliminated the plaintiff's overtime hours eligibility shortly after learning she had reported him for sexual harassment. *Id.* at 665. This Court concluded that the temporal proximity between the complaint and the action supported an inference of retaliation. *See id.* at 670-71.

Kelly's experience was similar. After Kelly lodged discrimination complaints with the City and the EEOC, McMaster and Schultz invoked a defunct disciplinary policy to pull him from the street for a minor on-the-job vehicle accident. *See* JA 96-97 (¶¶ 85-87). The punishment prevented Kelly from earning overtime pay. JA 96 (¶ 86). And the causation inference is even stronger here than in *Ray*. McMaster administered the retaliatory punishment along with a retaliatory warning: "Don't act like you didn't help put my name in an EEO complaint." JA 97 (¶ 89).

Kelly has also stated claims for retaliatory reprimands. A reprimand that would dissuade a reasonable worker from reporting discrimination is unlawful retaliation. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Billings v. Town of Grafton*,

515 F.3d 39, 52 (1st Cir. 2008). So too is a reprimand with collateral consequences. *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807, 819 (E.D. Va. 2016). Kelly faced both. Kelly persistently advocated on behalf of minorities within AFD, but other employees feared the repercussions of doing so. *See* JA 92 (¶ 52). These allegations suggest the retaliatory reprimands deter firefighters from reporting discrimination. Further, the Department's baseless reprimands of Kelly—which include white firefighters "fix[ing]" negative complaints against him, JA 99 (¶ 109)—forced Kelly to initiate grievance proceedings, use leave to attend events white firefighters attended on the clock, and stalled his career advancement. *See* JA 94, 98-100, 106 (¶¶ 71, 103-06, 112, 144).

All told, Kelly's complaint recounts numerous instances of disparate treatment and retaliation violating Section 1981.

#### 2. Kelly alleged a plausible hostile-work-environment claim.

Section 1981 prohibits employers from creating a hostile work environment. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183-84 (4th Cir. 2001). A plaintiff states a racially hostile work environment claim by alleging conduct that is: "(1) unwelcome; (2) based on race; and (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere." *Id.* at 183. Kelly's proposed amended complaint states a claim under this test.[5]

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[5] A typical hostile-work-environment claim brought against an entity also includes a fourth element: establishing that the harassing conduct is imputable to the employer. *See, e.g.*, *Boyer-Liberto*, 786 F.3d at 277. This element is irrelevant here, however, because Kelly's hostile-work-environment claim is against Dube, McMaster, and Schultz in their individual capacities. *See Brown v. Bratton*, No. CV ELH-19-1450, 2020 WL 886142, at *12-16 (D. Md. Feb. 21, 2020) (denying motion to dismiss as to individual defendant without analyzing fourth element); *Alexander v. City of Greensboro*, 762 F. Supp. 2d 764,

*First*, Dube's, McMaster's, and Schultz's conduct was unwelcome. A plaintiff who reports mistreatment to a supervisor satisfies this element. *See EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 175 (4th Cir. 2009); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 314 (4th Cir. 2008). In *Central Wholesalers*, the employee satisfied this element by raising a complaint to her supervisor objecting to her coworkers' use of racial slurs. 573 F.3d at 175. Kelly took the same action here: He reported to his supervisors, McMaster and Schultz, that their harassment created a hostile work environment. JA 101 (¶ 115).

*Second*, Kelly was mistreated because of his race. Pleading differential treatment of similarly situated white employees satisfies the causation element. *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). Kelly does this in detailed, specific recitations throughout his complaint. Principally, McMaster's and Schultz's discriminatory discipline of Kelly, discussed above (at 18-20), is disparate treatment creating an inference that Kelly faced a hostile work environment because of his race. Moreover, Defendants coupled this overt discrimination with subtler but equally harassing tactics: excluding Kelly from critical information channels; surveilling him with overbearing scrutiny; and undermining his input on important decisions. JA 88-89, 94, 98 (¶¶ 31-32, 65, 66, 102). And this penchant for prejudice is a frequent badge of AFD brass. One Battalion Chief used terms like "chink" and "Guala man" to degrade Asian and Hispanic subordinates; meanwhile, when asked why AFD hired a law firm to investigate him, Kelly replied

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794 & n.24 (M.D.N.C. 2011) (stating the first three elements and indicating that fourth is not applicable where hostile-work-environment defendants are individuals). As discussed below (at 28-30), Kelly has separately pleaded Section 1983 claims against the City under the *Monell* doctrine).

simply, "Because [I am] black." JA 91-92, 95 (¶¶ 48, 53, 74). Accepted as true, Kelly's allegations establish unwelcome conduct based on Kelly's race.

The second element may also be inferred from the "social context" surrounding an employee's hostile-work-environment claim. *Strothers v. City of Laurel*, 895 F.3d 317, 329 (4th Cir. 2018). In *Strothers*, the plaintiff sufficiently demonstrated that she was mistreated because of her race when colleagues had informed her that her supervisor had a reputation for harassing black employees, and he had singled her out for mistreatment. *Id.* at 330. The same is true here. But rather than discovering Schultz's reputation second-hand, Schultz introduced it into the social context himself, "banging on the table, rolling up his sleeves and [] telling [Kelly] to Google him," a reference to a race-discrimination lawsuit fifty-one black firefighters brought against Schultz. JA 102, 105 (¶¶ 116, 140). Dube, McMaster, and Schultz also singled Kelly out, subjecting him to severe punishment for minor incidents, blocking his career development, and undermining his ability to manage his employees. *See* JA 95-96, 99-100 (¶¶ 76-78, 85, 112).

*Third*, and finally, the mistreatment of Kelly altered the conditions of his employment. A plaintiff satisfies this element by alleging mistreatment that is both subjectively and objectively pervasive. *See Spriggs*, 242 F.3d at 184. Kelly does both.

The subjective prong is satisfied when a plaintiff has complained to a supervisor about a hostile work environment. *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 176 (4th Cir. 2009). Kelly did just that, meeting with his supervisors to raise complaints of workplace mistreatment and specifically characterizing AFD as a hostile work environment. JA 101 (¶ 115).

The objective prong is satisfied if the misconduct is pervasive enough that a reasonable person would believe it changed the plaintiff's conditions of employment. *See Strothers*, 895 F.3d at 331. Conditions of employment is an "expansive concept." *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). Courts determine whether behavior is pervasive by weighing "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Spriggs*, 242 F.3d at 184 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). Work conditions that are "likely to 'detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers'" are particularly suspect. *Strothers*, 895 F.3d at 332 (quoting *Harris*, 510 U.S. at 23).

This Court in *Strothers* concluded that a supervisor's pattern of harassment and subversion of an African-American employee was objectively pervasive, changing the conditions of her employment. 895 F.3d at 331-32. The plaintiff's supervisor required her to arrive at the office ten minutes earlier than her contract's start time; publicly reprimanded her for her clothing; and prohibited her from leaving her desk without approval. *Id.* The supervisor then used slight infractions of these policies as the basis for a negative performance review. *Id.* at 334. The court determined this "humiliat[ing]" treatment, "[h]eightened scrutiny, unfair evaluation[], and arbitrary dress code[]" changed the conditions of her employment by interfering with her job performance. *Id.* at 332.

Dube, McMaster, and Schultz humiliated and undermined Kelly in similar ways. Like the supervisor in *Strothers*, they imposed heightened scrutiny on Kelly, implementing a system of surveillance to penalize him for minor infractions not enforced against white employees. JA 98-99 (¶¶ 98-106). To further detract from Kelly's record, Dube, McMaster, and Schultz systematically and unfairly reprimanded him without cause, going so far as to solicit and "fix" baseless complaints against him. JA 99 (¶ 109). And if that were not enough, McMaster and Schultz excluded Kelly from meetings concerning his command stations and refused to reprimand his employees for insubordination. JA 94, 99-101 (¶¶ 66, 112). Each of these subversions undermined Kelly's job performance and rendered further career progression nearly impossible. *See* JA 106, 109 (¶¶ 144, 169). They therefore altered the terms and conditions of Kelly's employment.

**3. Kelly alleged a plausible Equal Protection Clause violation.**

A plaintiff states a claim under the Equal Protection Clause claim by alleging (1) the defendant treated the plaintiff "differently from others similarly situated" and (2) the differential treatment is not justified under the relevant level of scrutiny. *King v. Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016) (quoting *Willis v. Town of Marshall*, 426 F.3d 251, 263 (4th Cir. 2005)). As discussed above (at 18-20), Kelly's allegations of discriminatory discipline show he was treated differently from others similarly situated. Time and again, Dube, McMaster, and Schultz disciplined Kelly more harshly than similarly situated white Battalion Chiefs. JA 89, 97 (¶¶ 36, 92). Because Kelly is African-American and the alleged discrimination is race-based, this differential treatment is

subject to strict scrutiny. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 343 (4th Cir. 2001) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). And what compelling interest could be served by disciplining black employees more harshly than white employees—which instilled fear in racial minorities throughout the Department, dissuading further complaints of disparate treatment? None.

#### 4. Kelly adequately pleaded Section 1983 claims against the City of Alexandria.

Section 1983 liability attaches to municipalities like the City of Alexandria through various channels. *See Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694 (1978). Municipalities are liable for their official policies, their customs or practices, and for the actions of officials with final policymaking authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 480-83 & n.10 (1986) (plurality opinion); *see also Hunter v. Town of Mocksville*, 897 F.3d 538, 554 (4th Cir. 2018) (official with final policymaking authority); *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 402 (4th Cir. 2014) (custom or practice). Kelly pleaded *Monell* liability here in two separate and independent ways. First, the City condoned a custom of disparate treatment and retaliation. Second, an individual named in the second amended complaint has final policymaking authority.

A city is liable for condoning an unlawful practice if (1) it had actual knowledge of misconduct and (2) "failed to correct it due to [its] 'deliberate indifference.'" *Owens*, 767 F.3d at 402 (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987)). A complaint that alleges "multiple occasions" of unconstitutional behavior is sufficient to establish the plausibility of an "impermissible custom." *Id.* at 403. Failing to address a custom of discriminatory behavior is deliberate indifference. *See id.*

Kelly lodged several complaints with the City, putting it on notice that the Fire Department customarily discriminated against him and other African-American firefighters. *See, e.g.*, JA 93-94, 102, 105 (¶¶ 61, 71, 119, 136). Indeed, Kelly sought administrative relief from the City at every level. He notified his supervisors he was being discriminated against and subjected to a hostile work environment; he reported the Department's failure to follow proper promotion protocols through the City's online portal; he filed a procedural noncompliance report with the City's Chief Human Resources Officer; he submitted a complaint of bullying and harassment to the Alexandria City Manager; he facilitated a meeting between his union and the City Manager; and, finally, his union sent a letter to the mayor. *See, e.g.*, JA 93-94, 101-02, 105 (¶¶ 61, 71, 115, 119, 136). The City's response to Kelly's exhaustive reports was agnostic at best and retaliatory at worst. In one case, the City simply ignored Kelly's complaints, JA 102 (¶ 119); in another, it hired investigators to identify the "leaker" rather than addressing the merits of Kelly's complaint itself, JA 95 (¶¶ 72-75). Both responses to Kelly's complaints of racially discriminatory activity trigger *Monell* liability.

The City is also liable because Dube had final authority to create official policy. A "single decision" by an official with final policymaking authority in the relevant area can impose liability upon a municipality. *Hunter*, 897 F.3d at 554. Identifying policymakers is a question of local law. *Id.* at 555. And the Alexandria Municipal Code gives Dube, in his capacity as Fire Chief, "direction of the department" and "responsibil[ity] for executing [its] functions and duties." Alexandria, Va., Code of Ordinances 2-3-4 (2020). Under this mandate, Dube had "ultimate responsibility for [the] personnel actions" at the heart of Kelly's complaint. JA 87 (¶ 24). Dube's final policymaking authority

therefore provides a second, separate basis for *Monell* liability in addition to the liability the City bears for condoning AFD's discriminatory practices.

#### 5. Kelly's mistaken reference to Section 1981a instead of Section 1981 or 1981(a) does not render his complaint futile.

In a separate suit pending on appeal before this Court, No. 19-2377 (*Kelly II*), Defendants moved to dismiss Kelly's Section 1983 claims because his complaint mistakenly referenced Section 1981a rather than accurately referencing Section 1981 or 1981(a) as a predicate cause of action for Section 1983 relief. *See* Mem. in Support of Mot. to Dismiss in *Kelly v. City of Alexandria, et al.*, No. 1:19-CV-00985-LO-TCB, Dkt. 11, at 14-16 (filed Oct. 4, 2019) (*Kelly II*). Defendants here, as they did in *Kelly II*, may seek to justify the district court's futility finding on that basis (even though the district court itself gave no explanation at all for its futility finding). If Defendants do adopt that same position here, it would be wrong (as it is in *Kelly II*).

To satisfy Federal Rule of Federal Procedure 8(a)(2), a plaintiff need only "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 (1957)). An "imperfect statement of the legal theory supporting the claim asserted" is not, therefore, an adequate ground on which to dismiss a complaint. *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam). Indeed, the federal rules "mak[e] it clear that it is unnecessary to set out a legal theory" at all in a complaint. *Id.* at 12 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (3d ed. 2004)). As this Court has put it, "[l]egal labels characterizing a claim cannot, standing alone, determine whether it fails to meet [Rule 8(a)(2)'s] extremely modest standard."

*Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995); *see also King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) (Plaintiff "was 'not required to use any precise or magical words in [his] pleading.'") (quoting *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 418 (4th Cir. 2014)).

In *Johnson v. City of Shelby*, police officers sued their city employer alleging a due-process violation when they were fired for exposing the city's criminal activity. 574 U.S. at 10. The district court dismissed the complaint because it did not explicitly cite 42 U.S.C. § 1983. *Id.* The Supreme Court summarily reversed, *id.* at 11, a rare disposition employed to "correct[] a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n* (2013). The Court explained that because the officers had made clear their factual allegations, their complaint should have survived the City's motion to dismiss. *Johnson*, 574 U.S. at 12.

Like the officers' complaint in *Johnson*, Kelly's complaint contained ample factual material to support his Section 1981 claims, *see supra* at 17-21, and, as explained above, as to Kelly's disparate-treatment and retaliation claims, Defendants have never contended otherwise. The reference in Kelly's complaint to Section 1981a instead of Section 1981 was a mistake, *see supra* note 3 (at 13), but one that has no bearing on whether Kelly's complaint withstands a motion to dismiss. As noted, *Johnson* made clear that plaintiffs need not include a legal theory in their complaints at all to survive a Rule 12(b)(6) motion. 574 U.S. at 12 (citing 5 Wright & Miller § 1219). Because Kelly's detailed factual allegations are an "adequate statement of [his] claim[s]," the mistaken reference to Section 1981a (instead of 1981 or 1981(a)) cannot serve as the basis for the complaint's purported futility. *See id.*

Lastly, although Kelly's mistaken reference to Section 1981a cannot render his complaint futile, even if it could, his Equal Protection Clause claim would remain. Count VII incorporates by reference the substantial factual allegations throughout Kelly's complaint. JA 115 (¶ 206). Although Count VII mistakenly refers to "Section 1981a" as a "predicate statute," JA 115 (¶ 207), it also correctly references Section 1983. And most importantly, it does exactly what Defendants' misguided theory asserts that Kelly failed to do with his Section 1981-based claims: It accurately names the underlying constitutional provision—the Equal Protection Clause—that is the "predicate" for his Count VII claim. *Id.* Count VII therefore includes everything Defendants (erroneously) contend Kelly's other Section 1983 claims lack.

### B. At a minimum, the district court erred in denying Kelly's motion for leave to amend as futile without explanation.

For the reasons just stated, the district court erred because Kelly's proposed second amended complaint more than adequately pleaded each of his Section 1983 claims. Indeed, as noted, the factual adequacy of two of those claims—disparate treatment and retaliation—was never challenged below. This Court need go no further to reverse and remand with instructions to allow Kelly's second amended complaint. But, as we now explain, the district court also erred in denying Kelly's motion for leave to amend because it provided no explanation for its futility finding.

"[T]he grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S.

178, 182 (1962). A district court need not "articulate [its] reasons for [denying leave to amend]" when they are "apparent." *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 194 (4th Cir. 2009) (quoting *In re PEC Solutions*, 418 F.3d 379, 391 (4th Cir. 2005)). But the district court must base its futility decision on conclusions it draws from the relevant complaint. *Id.*

In *Matrix Capital*, this Court reversed the district court's denial of a plaintiff's motion for leave to amend as futile because the district court based its decision on the plaintiff's first complaint without considering the plaintiff's second, proposed complaint. *Id.* The same error may well have occurred here. Just hours after Kelly sought leave to amend, the district court dismissed his complaint as untimely and deemed the proposed complaint futile without any explanation. *See supra* at 11-14 (describing events leading to district court's denial of leave to amend).

The district court's unexplained futility finding is particularly problematic here for two other reasons. First, none of the Section 1983 claims Kelly raised in the proposed complaint is subject to Title VII's time bar, and the court provided no other basis for refusing leave to amend to add Kelly's Section 1983 claims. Second, at the hearing a few days before it declared any amendment futile, the district court expressed no concern whatsoever about the factual adequacy of Kelly's disparate-treatment and retaliation claims (and, as noted earlier, neither did Defendants). The district court's futility finding is, therefore, a complete mystery.

In sum, the district court's failure to provide any basis for its futility decision was reversible error.

## II. The district court erred in dismissing Kelly's Title VII claims as time-barred.

The district court also erred in dismissing Kelly's Title VII claims as time-barred. The district court made three errors in dismissing Kelly's Title VII complaint. First, it mistakenly determined that the limitations period on Kelly's complaint expired on a Sunday. Second, it refused to grant Kelly equitable tolling although it received Kelly's complaint just two minutes late due to an unexpected processing delay in the court system's own electronic payment software. Third, it summarily ruled on Kelly's equitable-tolling argument, erroneously ruling on an affirmative defense instead of permitting further inquiry at later stages in the litigation. For these reasons, the district court should be reversed.

**A.** The district court erred in concluding that Kelly filed his Title VII complaint two days late. *See* JA 119-20. The court determined that Kelly's complaint, which was filed at 12:01 a.m. on Tuesday, May 7, was submitted two days after the 90-day filing period expired. *See id.* By the court's logic, Kelly's deadline for filing his Title VII claim was Sunday, May 5. But when a limitations period expires on a weekend, the period is extended until the next business day. Fed. R. Civ. P. 6(a)(1)(C); *see, e.g.*, *Mondragon v. Thompson*, 19 F.3d 1078, 1081 (10th Cir. 2008); *Scott v. Hampton City Sch. Bd.*, No. 4:14cv128, 2015 WL 1917012, at *4 n.5 (E.D. Va. Apr. 27, 2015). The 90-day period therefore expired at 11:59:59 p.m. on Monday, May 6, as Defendants themselves repeatedly acknowledged, *see* Mem. in Support of Mot. to Dismiss at 3, 7 (ECF No. 16). Contrary to the district court's conclusion, then, Kelly's complaint was at most two minutes—not two days—late.

**B.** The district court also erred in declining to grant equitable tolling. A plaintiff who does not comply with Title VII's statute of limitations (a nonjurisdictional time bar) may be excused through equitable tolling. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94-95 (1990). To be sure, equitable tolling is a "guarded and infrequent" remedy. *Coleman v. Talbot Cty. Det. Ctr.*, 242 F. App'x 72, 74 (4th Cir. 2007) (quoting *Gayle v. UPS*, 401 F.3d 222, 226 (4th Cir. 2005)). But a plaintiff is nonetheless entitled to tolling when "extraordinary circumstances" outside the plaintiff's control prevent timely filing. *Id.* (quoting *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004)). Kelly alleges just this kind of circumstance. Kelly's counsel encountered an unexpected delay in the court system's own electronic payment software, resulting in the transmission of his complaint no more than two minutes outside the statute of limitations. JA 86-87 (¶¶ 18-19).

And though not a justification for tolling on its own, tolling may be particularly appropriate where the plaintiff's untimely filing does not prejudice the defendant. *See Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 n.5 (2016); *Aikens v. Ingram*, 524 F. App'x 873, 880 (4th Cir. 2013) (applying North Carolina law). Permitting tolling in those circumstances serves this Court's "longstanding policy in favor of merits-based adjudication." *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 n.3 (4th Cir. 2010). Defendants have never asserted they were prejudiced by this momentary delay. Equity therefore compels permitting Kelly's Title VII claims—which could vindicate the violation of Kelly's civil rights after seventeen years of public service—to proceed to the merits rather than perishing at the hands of an uncontrollable software glitch.

**C.** Lastly, the district court erred, at minimum, in failing to at least permit the case to proceed past the motion-to-dismiss stage regarding the timeliness of Kelly's Title VII claims. Whether a complaint is time barred is an affirmative defense. *McMillan v. Jarvis*, 332 F.3d 244, 247 (4th Cir. 2003) (quoting *Hill v. Braxton*, 277 F.3d 701, 706 (4th Cir. 2002)). For this reason, "facts that would justify the application of equitable tolling" are unlikely to appear in the complaint. *Id.* at 249; *accord Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07 (9th Cir. 1995). A complaint can therefore be dismissed on timeliness grounds at the motion-to-dismiss stage only if there are "no circumstances that would cause the petition to be timely." *McMillan*, 332 F.3d at 249 (quoting *Hill*, 277 F.3d at 707); *accord Supermail Cargo, Inc.*, 68 F.3d at 1206-07. Thus, "district courts should conduct a thorough examination of the facts to determine if reasonable grounds exist for an equitable tolling of the filing period." *Woodbury v. Victory Van Lines*, 286 F. Supp. 3d 685, 696 (D. Md. 2017) (quoting *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652, 654 (4th Cir. 1987)) (internal quotation marks omitted). When a tolling question cannot be unequivocally resolved from the pleadings, dismissal is inappropriate. *Supermail Cargo, Inc.*, 68 F.3d at 1207.

At the very least, discovery is warranted to evaluate tolling of Kelly's complaint. Rather than conducting a "thorough examination of the facts," here, the district court's analysis suffered from a lack of them. The court viewed Kelly's claim from a mistaken perspective, observing, based on its incorrect understanding that the time period could expire on the weekend, that "even if [Kelly] were entitled to equitable tolling for the two-minute unexpected processing delay, [his] Complaint would still have been untimely filed one day after the ninety-day limitations period." JA 120.

The court then determined that Kelly was not entitled to tolling because he experienced only a "minor delay" in processing. JA 120. But this conclusion has no basis in the record. Kelly alleges that the anomalous processing delay caused him to miss the deadline by two minutes—but nowhere in his proposed second amended complaint does he estimate how long the delay itself actually was. To be clear, Kelly alleges that the district court received his complaint at most two minutes late—not that the delay itself lasted two minutes. JA 86-87 (¶ 19). The district court therefore could not have appropriately determined that "no circumstances" exist that "would cause the petition to be timely." Concluding otherwise was reversible error.

**CONCLUSION**

The district court's decision should be reversed and remanded for proceedings on the merits with respect to both Kelly's Section 1983 claims and his Title VII claims.

Respectfully submitted,

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June 14, 2020

## REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument, which would significantly aid this Court's decisional process. Oral argument would allow this Court to explore, among other things, the relationship between the federal pleading requirements and a district court's responsibility to explain its reasons for denying leave to amend and the narrow circumstances under which a district court may sustain a time-bar defense on a motion to dismiss.

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,821 words, as calculated by Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced typeface.

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June 14, 2020

**CERTIFICATE OF SERVICE**

I certify that on June 14, 2020, I electronically filed this Brief of Appellant Anthony Kelly using the CM/ECF System, which will send notice of the filing to the following registered CM/ECF users: counsel for Defendants-Appellees' Michelle Gambino (gambinom@gtlaw.com), Laura Metcoff Klaus (klausl@gtlaw.com), and Michael A. Hass (hassm@gtlaw.com).

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