CASE NO. 20-2334

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

JONATHAN F. STARBUCK,

Plaintiff - Appellant,

v.

WILLIAMSBURG JAMES CITY COUNTY SCHOOL BOARD,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NEWPORT NEWS

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Appellant Jonathan F. Starbuck filed this action in the Eastern District of Virginia under 42 U.S.C. § 1983, alleging violations of the First, Fifth, and Fourteenth Amendments. The district court had jurisdiction under 28 U.S.C. § 1331. On November 20, 2020, the district court entered final judgment. Mr. Starbuck timely filed a notice of appeal on December 10, 2020. *See* JA 36; Fed. R. App. P. 4(a)(1). This Court has jurisdiction to review under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Is a decision to affirm a student's suspension on the basis of a new charge, made directly by a school board with final decision-making authority under state law, a "policy" for purposes of municipal liability under 42 U.S.C. § 1983?

2. Did Appellant state a claim that the Respondent School Board's decision violated his rights under the First and Fourteenth Amendments?

STATEMENT OF THE CASE

This case is about whether Appellee Williamsburg James City County School Board (the "School Board" or "Board") can be held liable under 42 U.S.C. § 1983 for student discipline decisions that the Board makes directly, when those decisions violate the Constitution. Appellant Jonathan F. Starbuck ("Starbuck") was a high school student who had a private conversation with other students regarding the then-recent Parkland school shooting. He made no threats, and caused no disruption.

Nevertheless, school officials removed Starbuck from class, interrogated him, and then suspended him. Although school officials told him that the suspension was for his own safety, the Board later confirmed the suspension on the basis of a new charge that Starbuck had caused a "classroom disturbance." Starbuck had no opportunity to dispute this new claim.

Starbuck's complaint alleged plausible claims that the Board violated his rights to free speech and procedural due process. But the district court held that he failed to state a municipal liability claim against the Board under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), because he did not allege an "official policy" that was the proximate cause of his suspensions. That holding misunderstood the clearly settled federal law regarding liability for municipal entities. *Monell*'s "official policy" requirement ensures that municipalities can be held liable only for their own official acts, not for the discretionary acts of subordinate employees on the basis of *respondeat superior.* But the Board is the final decision-making authority for the school district under Virginia law. Accordingly, everything the Board itself does is the "official policy" of the school district, even if the Board's decision applies only to a single case. Both the Supreme Court and this Court have held that school districts may be liable under *Monell* for one-off, individual decisions made by the final decision-making authority, without regard to whether that decision reflected

any broader policy or practice. Starbuck's complaint pleads entirely plausible claims under those principles. His case should proceed to discovery.

Statement Of The Facts

Because this case comes to the Court from a decision granting a motion to dismiss, the following summary assumes the truth of the facts alleged in Starbuck's Amended Complaint. *See Rotkiske v. Klemm*, 140 S.Ct. 355, 359 n. 1 (2019).

Starbuck was a student at Jamestown High School, a public high school in Williamsburg, Virginia. JA 6, ¶ 1. On February 15, 2018, Starbuck was talking about the recent school shooting in Parkland, Florida with his fellow classmates. JA 10, ¶ 11. While broadly discussing "the prevention and basis" of high-profile tragedies like Parkland, Starbuck made "remarks questioning the intent of the shooter, stating that the shooter would be capable of more harm if he wanted to, noting his possession of explosives and considering the time the shooter was left alone within the building unchallenged by local law enforcement." *Id.* Starbuck also noted the shooter's "use of the fire alarm to lure students out." *Id.* "No student within the conversation made any threat, but were discussing observations and real world, practical problems." JA 6–7, ¶ 1.

Nevertheless, a teacher overheard the conversation and reported Starbuck to school officials and local police. JA 10, ¶ 12. Although the police investigated and cleared the report as unfounded, school officials removed Starbuck from class and

imposed in-school suspension. JA 11, ¶¶ 13–14. While under in-school suspension, Starbuck was interrogated by a psychologist, counselor, and principal. JA 11, ¶ 15. They failed to provide him with any reason for the suspension until after it had ended. JA 11–12, ¶¶ 14, 19. School officials then gave him a further two day out-of-school suspension. JA 12, ¶ 18.

When Starbuck's principal called his parents to inform them of the out-of-school suspension, the principal told them that the in-school suspension had been for Starbuck's safety. JA 12, ¶ 19. He claimed that school officials had meant to protect Starbuck from retaliation by other students for his comments. *Id.*

After the out-of-school suspension ended, Starbuck and his parents met with school officials. JA 12, ¶¶ 20–23. The officials informed them that Starbuck's comments were not cause to take any further action, and Starbuck told them that he intended to appeal his suspension. JA 12, ¶ 23. Over a week after the suspensions, Starbuck received a Notice of Suspension regarding the out-of-school suspension on February 26, 2018. JA 13, ¶ 24.

Starbuck immediately filed an appeal with the Board. JA 13, ¶ 25. Despite its internal policy of responding to appeals to long-term suspensions within thirty days, the Board did not respond to Starbuck's appeal until May 2018. JA 13, ¶¶ 26–28. The Board found that the suspension was proper because Starbuck's comments

constituted a "classroom disturbance." *Id.* School officials had not previously told Starbuck that his comments had created any "classroom disturbance." *Id.* Starbuck had no further opportunity to dispute his suspensions, or to address the new justification adopted by the Board. *Id.*

Statement Of Procedural History

Starbuck was a minor when these events occurred. On May 30, 2018, Starbuck's brother filed this lawsuit against the Board on Starbuck's behalf in the Eastern District of Virginia. JA 19. The district court dismissed the suit on the ground that Starbuck's brother could not represent him *pro se*. JA 19–20. This Court dismissed the appeal as moot because Starbuck had since turned eighteen, and remanded so that Starbuck could proceed with this action on his own behalf. *Id.* On remand, Starbuck filed an amended complaint alleging that the Board violated his First, Fifth, and Fourteenth Amendment rights. *Id.* The district court granted his additional motion to proceed *in forma pauperis*. JA 20.

The Board filed a Motion to Dismiss under Rule 12(b)(6), which the district court granted. (JA 34). The district court reasoned that because "[i]t is well established that § 1983 liability is personal in nature, and the doctrine of respondeat superior is generally inapplicable," a plaintiff suing a municipality under § 1983 "must plead 'the existence of an official policy or custom that is fairly attributable

to the municipality and that proximately caused the deprivation of their rights.'" JA 25–26. The court held that Starbuck's complaint alleged only two potentially relevant policies: (1) a policy allowing the Board to continue investigating after meeting with a disciplined student, and to "'allow … new evidence found [in that] second … investigation into the decision process for disciplinary actions,'" and (2) a policy that "'grants them thirty days to acknowledge and close all appeals of long term suspensions.'" JA 27 (quoting JA 8, 13). The district court then held that neither of those policies was the proximate cause of any alleged violation of Starbuck's rights.

On the First Amendment claim, the court reasoned the "[t]here is no suggestion in Plaintiff's Amended Complaint that Plaintiff's in-school or out-of-school suspension was the result of a School Board policy or custom that restricts student speech in any manner." JA 28.

Turning to Starbuck's Fourteenth Amendment due process claim, the district court reasoned that any policy about responding to appeals of long term suspensions within 30 days was irrelevant, because Starbuck experienced only a short term suspension. JA 29. The court found that Starbuck's allegations concerning the Board's investigative policy were "conclusory" and "unsupported," but also that any such policy would not be the proximate cause of any due process violation. *Id.* The

district court reasoned that a student facing short-term suspension "need only be given 'oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story,'" which can be satisfied by "'notice and rudimentary hearing'" or an "'informal give-and-take between student and disciplinarian.'" JA 30 (quoting *Goss v. Lopez*, 419 U.S. 565, 581-84 (1975)). The district court held that the alleged policy permitting school officials to base discipline in part on evidence discovered after meeting with the student "would not violate the due process rights of a student, such as Plaintiff, who faced a suspension of less than ten days." JA 31. The district court cited no authority for that conclusion, and it did not further discuss Starbuck's allegation that the Board violated his Fourteenth Amendment rights by failing to let him contest its new claim that he caused a "classroom disturbance." JA 28–32.

Finally, the court dismissed Starbuck's Fifth Amendment claim because the Fifth Amendment's Due Process Clause applies only to the federal government, and because the Self-Incrimination and Double Jeopardy Clauses apply only in criminal cases. JA 32–34.

SUMMARY OF ARGUMENT

The district court failed to correctly apply the *Monell* standard when it held that Starbuck did not allege any "official policy" that caused the violations of his constitutional rights. In fractured opinions in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Supreme Court made clear that the "official policy" required by *Monell* can be satisfied by a one-off decision applicable only to the plaintiff, if the officials making the decision had "final policymaking authority" over that action under the governing state law. A majority of the Court ratified those principles in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), and both the Supreme Court and this Court have applied them in cases involving individual employment decisions by school districts. There is no reason why student discipline decisions should be treated differently. The Board is clearly the ultimate authority and final policymaker for the school district, under Virginia law. Starbuck alleges decisions *by the Board itself* that violated his constitutional rights. That is enough to state a claim under *Monell.*

Moving past the *Monell* issue, Starbuck's complaint states plausible claims that the Board's actions violated his First and Fourteenth Amendment rights. Students do not lose their free speech rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969). And while public schools

may regulate speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," *Tinker*, 393 U.S. at 513, the Supreme Court recently reaffirmed that this is a "demanding standard" that requires "'something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'" *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2047-48 (2021) (quoting *Tinker*, 393 U.S. at 509). Taking the allegations of Starbuck's complaint as true, his speech caused no disruption at all, and certainly far less than the disruption of "5 to 10 minutes of an Algebra class 'for just a couple of days'" that the Supreme Court said was plainly insufficient to justify punishing student speech in *Mahanoy*. *Id.* Indeed, the fact that school officials justified Starbuck's suspensions at the time with concerns *for his own safety* is powerful evidence that the Board's "disruption" concern is a post hoc pretext.

Starbuck also stated a claim, plausible on its face, that the Board's appeals process affirming his suspension violated his Fourteenth Amendment right to due process. A student facing a short-term suspension must have "an opportunity to explain his version of the facts," after first being told "what he is accused of doing and what the basis of the accusation is." *Goss*, 419 U.S. at 581. Starbuck has alleged that school officials failed to give Starbuck accurate and sufficient notice of *why* he was given these in-school and out-of-school suspensions. The stated rationale

changed over time from concern for his safety to the Board's final explanation, offered three months later, that Starbuck had caused a "classroom disturbance." Starbuck was never given an opportunity to dispute that allegation. Due process does not require a formal hearing for short term suspensions, but Starbuck was entitled at least to notice of "what he is accused of doing and what the basis of the accusation is," and an opportunity to respond. *Id.* at 582. His complaint more than plausibly alleges a violation of those principles.

ARGUMENT

I. THE SCHOOL BOARD'S FINAL DECISION SUPPLIES THE "POLICY" NECESSARY TO § 1983 LIABILITY UNDER *MONELL*

The Supreme Court held in *Monell* that municipal liability under § 1983 must be based on an official act of the municipality itself, not merely on *respondeat superior*. *Monell*, 436 U.S. at 690-91. One common way to establish direct municipal liability is to show that a constitutional violation committed by a subordinate employee was the result of an official policy or custom for which the municipality is responsible. But when a constitutional violation is committed directly by "those whose edicts or acts may fairly be said to represent official policy," the plaintiff has no need to prove any broader custom or policy. *Id.* at 694. The municipality is responsible for its own acts, as embodied in even a single decision by whichever "decisionmaker possesses final authority to establish

municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481 (plurality op.).

Starbuck clearly stated a claim for municipal liability under that principle. He alleged that the suspension violating his First Amendment rights was upheld by the School Board itself, and that his due process rights were violated by the Board in its consideration of that issue. JA 7–8. The Board is clearly the final, authoritative policymaker for issues of student discipline under Virginia law.

A. A Final Decision By The Decisionmaker With Ultimate Authority Is A "Policy," Even If It Applies Only In Individual Circumstances

The Supreme Court held in *Monell* that a municipality cannot be vicariously liable under § 1983 "*solely* because it employs a tortfeasor." *Monell*, 436 U.S. at 691. The Court explained that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort," and that § 1983 liability based solely on *respondeat superior* would raise serious constitutional concerns. *Id.* at 691–93. "Local governing bodies, therefore, can be sued directly under § 1983" when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690.

Monell involved a challenge to a formal policy of the New York City Department of Social Services and Board of Education that had required pregnant employees to take unpaid leave before such leave was medically necessary. *Id.* at

660–61. And on the facts of that case, the formal policy made clear that the municipal defendants were being held directly liable for their own acts, rather than vicariously liable for merely employing a tortfeasor. But the Court did not hold that a broadly applicable policy was the *only* way to demonstrate direct municipal liability; to the contrary, it indicated that any "decision officially adopted and promulgated by [the municipality's] officers" would suffice. *Id.* at 690.

The Supreme Court was squarely confronted with that issue eight years later. In *Pembaur*, two deputy sheriffs sought to serve arrest warrants at the plaintiff's medical clinic. 475 U.S. at 472. Pembaur denied the sheriffs' entry and physically blocked their path, prompting the sheriffs to call their supervisor. *Id* at 472–73. The supervisor referred them to the Assistant Prosecutor, who in turn conferred with the County Prosecutor. *Id*. at 473. The County Prosecutor passed down an order for the sheriffs to enter, leading them to forcibly chop down Pembaur's door with an axe. *Id*. The Sixth Circuit recognized that "the Sheriff and the Prosecutor were both county officials authorized to establish 'the official policy of Hamilton County' with respect to matters of law enforcement." *Id.* at 476. Nonetheless, it read *Monell* as holding that a "single, discrete decision is insufficient, by itself, to establish that the [officials] were implementing a governmental policy." *Id*. at 475–77.

The Supreme Court reversed. In passages that commanded a majority of the Court, Justice Brennan explained that "examination of the opinion in *Monell* clearly

demonstrates that the Court of Appeals misunderstood its holding." *Id.* at 478. "*Monell*," the Supreme Court explained, "is about responsibility." *Id. Monell* held that the language and legislative history of § 1983 were inconsistent with imposing *vicarious* liability on municipalities "'solely on the basis of an employer-employee relationship with a tortfeasor.'" *Id.* at 478-79 (quoting *Monell*, 436 U.S. at 692). But "Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts." *Id.* at 479. The Court explained that the "'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible"—*i.e.*, "acts which the municipality has officially sanctioned or ordered." *Id.* at 479–480.

The Supreme Court held that "[w]ith this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances," when that decision is made by "officials 'whose acts or edicts may fairly be said to represent official policy.'" *Id.* at 480 (quoting *Monell*, 436 U.S. at 694). Governments "frequently choos[e] a course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* at 481. Such decisions, if "properly made by that government's authorized decisionmakers, … surely represent[] an act of official government 'policy' as that term is commonly understood" and "the municipality is equally

responsible whether that action is to be taken only once or to be taken repeatedly." *Id*.

At that point, the *Pembaur* Court fractured over the proper standard. Justice Brennan's plurality would have held that the key question is whether "the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered," under the governing state law. *Id.* at 481–83. Justice Stevens would have gone even further, to hold that municipalities can be vicariously liable "for the constitutional deprivations committed by its agents in the course of their duties." *Id.* at 489 (Stevens, J., concurring in part and concurring in the judgment). Justices White and O'Connor believed the case should have been resolved on the narrower ground that an official policy supporting the forced entry could be inferred from all the circumstances. *See id.* at 491 (O'Connor, J., concurring in part and concurring in the judgment). But a majority of the Court agreed that, on the facts of *Pembaur*, the County Prosecutor was "acting as the final decisionmaker for the county," and that the county was responsible for his decision under § 1983. *Id.* at 485.

The Supreme Court returned to this issue two years later in *Praprotnik*, which involved a municipal architect who claimed that he suffered retaliation after successfully appealing a suspension from work. 485 U.S. at 114–16. Justice O'Connor's plurality opinion extracted four "guiding principles" from *Pembaur*: (1)

"First, a majority of the [*Pembaur*] Court agreed that municipalities may be held liable under § 1983 only for acts … 'which the municipality has officially sanctioned or ordered,'" (2) "only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability," (3) whether an official has "final policymaking authority" is a question of state law, and (4) the "challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *Id*. at 123 (quoting *Pembaur*, 475 U.S. at 480, 482–83). Applying those principles, the plurality reasoned that final policymaking authority over the complained-of personnel decisions rested not with Praprotnik's direct supervisors but with the independent Civil Service Commission. *Id.* at 129–30. Praprotnik had not pursued his appeal to that body*, see id.* at 116, and instead sued on the theory that the Commission had effectively delegated its policymaking authority. Justice O'Connor and the plurality concluded that "[s]imply going along with discretionary decisions made by one's subordinate... is not a delegation to them of the authority to make policy." *Id*. at 130. Instead, the City Charter established that the Civil Service Commission retained final policymaking authority. *Id*. at 129–30.

Justice Brennan, joined by Justices Marshall and Blackmun, concurred only in the judgment. They agreed that Praprotnik's supervisor did not possess "authority to establish final employment policy for the city," but thought that the question of

which officials *do* have final policymaking authority cannot be answered solely by reference to state statutes but also must consider real-world practices. *Id.* at 132–47 (Brennan, J., concurring in the judgment). The concurring Justices therefore objected to language in the plurality's opinion suggesting that the question of policymaking authority was purely legal in nature.

Despite the split opinions in *Pembaur* and *Praprotnik*, it was always clear that a majority of the Court agreed on the basic proposition that municipal liability can be based on an individual decision taken by a decisionmaker with final policymaking authority. A year later, a majority of the Court made that agreement explicit in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). Plaintiff Jett was a football coach who clashed repeatedly with a new principal, who suggested to the director of athletics that Jett be removed as coach. *Id*. at 705–06. This recommendation was later affirmed by the superintendent, and Jett was reassigned as a teacher without coaching duties at another school. *Id*. at 706. Jett sued the school board under § 1983, alleging due process, First and Fourteenth Amendment violations. *Id*. at 707.

The district court in *Jett* had instructed the jury that the school district was liable "for the actions of its Board of Trustees and/or its delegated administrative officials (including the Superintendent and school principals)." *Id.* at 736. The Supreme Court held that instruction committed "manifest error" by suggesting that

liability could be vicarious. *Id.* at 736. Instead, "[r]eviewing the relevant legal materials, including state and local positive law, as well as 'custom or usage' having the force of law, the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Id.* at 737 (quoting *Praprotnik*, 485 U.S. at 124, n. 1). The Court concluded that the suit hinged on whether the principal or superintendent "possessed the authority to make final policy decisions concerning the transfer of school district personnel" under the governing Texas law. *Id.* at 738. The Court remanded to the Court of Appeals to determine where "final policymaking authority as to employee transfers lay in light of the principles enunciated by the plurality opinion in *Praprotnik* and outlined above." *Id*.

This Court has applied these principles in a case that, like this one, involved a one-off individual decision made by a school board that was alleged to violate the First Amendment. In *Hall v. Marion School District Number Two*, the plaintiff was a special education teacher who became caught in an escalating series of disputes with the local superintendent and her principal after writing letters to the editor of a local newspaper condemning wasteful travel by members of the school board. 31 F.3d 183, 186–90 (4th Cir. 1994). For several months, the superintendent attempted to contrive an excuse to dismiss Hall, acting with knowledge and financial support

of the board. *Id*. at 189. Eventually, the chairman of the board informed Hall that she would be dismissed due to her "uncooperative and disrespectful attitude." *Id*. at 190. That decision was confirmed by the full board after a formal hearing. *Id.*

Addressing the school board's argument that it could not be held "vicariously liable" for the decisions of the superintendent and principal, this Court discussed *Monell*, *Pembaur* and *Prapotnik* and emphasized that "a single violation is sufficient to invoke municipal liability" so long as the decisionmaker possesses "'final authority to establish municipal policy with respect to the action ordered.'" *Id.* at 195 (quoting *Pembaur*, 475 U.S. at 481). This Court also endorsed the four-part test for such "final authority" articulated by the *Praprotnik* plurality. *Id*. This Court concluded that "[u]nder South Carolina law, the Board is the final policymaker with regard to the employment and discharge of teachers." *Id*. at 196. And it recognized that, although the retaliatory behavior had begun with the superintendent, the district court found and the evidence showed that the board "was fully apprised of all of [the superintendent's] retaliatory actions and condoned each of them." *Id.* In addition, the board "was the only body that could fire Ms. Hall and it chose to do so." *Id*. "Therefore, by dismissing Hall the Board not only ratified Foil's unconstitutional behavior, but also participated in the violation of Hall's First Amendment rights." *Id*. This Court concluded that "[s]ince the Board is the final policymaker in this area of

the District's business, . . . the District may be held liable for the act of the Board in dismissing Hall." *Id*.

In this case, the district court cited several district court decisions for the propositions that "allegations that a school board violated his or her constitutional rights are alone insufficient to impose liability on a school board," and that a plaintiff also "must allege that a school board maintains a policy or practice that resulted in the alleged constitutional violations." JA 26. That notion, urged by the Board, sent the district court searching for allegations that the violation of Starbuck's rights was produced by some broader policy. But the cited authority acknowledges that a municipality also can be held "liable for a single decision or violation" if the decisionmaker "'possess[es] final authority to establish municipal policy with respect to the action ordered.'" *J.S. v. Isle of Wight Cty. Sch. Bd.*, 368 F. Supp. 2d 522, 526 (E.D. Va. 2005) (citations omitted). The claim in *J.S.* failed because the plaintiff there "argue[d] the opposite: that his due process rights were violated, in part, by the individual defendants acting *contrary* to the school board's policy." *Id.* And in *Lucas v. Henrico Cty. Pub. Sch. Bd.*, there were no allegations of wrongdoing by the school board itself; the plaintiff was simply attempting "to hold the School Board liable for the alleged misconduct of" individual police officers, which the district court correctly recognized would be forbidden vicarious liability. No. 3:18-cv-402, 2019 WL 5791343, *4 (E.D.Va. 2019).

In the court below, the Board cited this Court's decisions in *Semple v. City of Moundsville*, 195 F.3d 708 (4th Cir. 1999), and *Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003), for the proposition that municipal customs cannot be inferred from a single event. But both cases simply held that routine exercises of discretion by individual police officers cannot establish municipal liability under § 1983. In *Semple*, the allegation was that police failed to effectively respond to a domestic violence situation that culminated in a triple homicide. *Semple*, 195 F.3d at 711. Because the actual decisions were made by individual police officers, municipal liability could only have been imposed through proof that they were following a policy or custom—which was lacking. *Id*. at 712–14. This Court recognized that a "governmental unit may create an official policy by making a single decision regarding a course of action in response to particular circumstances." *Id*. at 712. It simply noted, correctly, that single-decision liability "attaches only when the decision maker is the municipality's governing body, a municipal agency, or an official possessing final authority to create official policy." *Id.* (citing *Pembaur*, 475 U.S. at 481).

In *Lytle v. Doyle*, protestors were threatened with arrest by police officers under the authority of an anti-loitering statute, without the knowledge of the City Manager, Assistant City Manager overseeing the police department, nor the Chief of Police. *Lytle,* 326 F.3d at 467-68. This Court again acknowledged that the "policy

or custom" necessary to municipal liability under § 1983 can be based on "an express policy," a practice "that is so 'persistent and widespread' as to constitute a 'custom or usage with the force of law,'" *or* "through the decisions of a person with final policymaking authority." *Id.* at 471. This Court simply held that the memo plaintiff relied upon "cannot constitute an official written policy of the City because it was never approved by the City Manager," that the memo could not establish a custom because no one knew about it, and that the City Manager and Chief of Police had not delegated final policymaking authority to the police captain in question. *Id.* at 471–73. Again, this court relied on the *Praprotnik* framework and confirmed that "a local government may be held liable for a decision made by an individual 'whose edicts or acts may fairly be said to represent official policy.'" *Id*. at 472 (quoting *Riddick v. School Bd. of the City of Portsmouth*, 238 F.3d 518, 523 (4th Cir.2000)).

Starbuck was a *pro se* litigant who had barely attained majority, and who cannot reasonably have been expected to recognize the misreading of *Monell* doctrine urged by the Board. But the district court should have recognized that Starbuck's complaint stated a potential claim for municipality liability based on its allegations that his rights were violated by the School Board itself.

B. The School Board Was The Ultimate Decisionmaker And Its Decision To Punish Starbuck Was "Policy"

Applying the principles discussed above, it is clear that the Board's suspension of Starbuck for a "classroom disturbance" was a decision made by a final policymaker and, therefore, official policy for purposes of *Monell*.

The first *Praprotnik* principle is that the municipality must be actually responsible for the actions, such as through sanction or order. *Praprotnik*, 485 U.S. at 123. This inquiry seeks to distinguish official policy from the actions of a rogue employee. For example, a single instance of a lone police officer's excessive force, without an affirmative link between a municipal policy and the constitutional violation, cannot create liability. *Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985). The Board itself found Starbuck's suspension proper and altered the cause to "classroom disturbance." JA 13, ¶ 28. This action is a direct sanction or order of the Board, fulfilling the first inquiry.

The other *Praprotnik* principles require that the acting officials have "final policymaking authority" concerning the action in question, as determined by state law. *Praprotnik*, 485 U.S. at 123. A court may not assume "that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id*. at 126.

Virginia law establishes that the school board is the highest body in which authority to suspend students can rest. Va. Code § 22.1-277.04. In *Flickinger v. Sch.*

Bd. of City of Norfolk, Va., a teacher applied for, and was denied, a leave of absence to act as president of a teachers' union. 799 F. Supp. 586, 589 (E.D. Va. 1992). The superintendent's denial was conditioned on the school board's unanimous agreement. *Id*. The district court held that due to the school board's broad authority to "administer and regulate the entire school system," it was the final policymaker concerning teacher leaves. *Id.* at 592.

Here, final authority for suspensions and disciplinary appeals lay in the Board, making it the final policymaker in that area. Va. Code § 22.1-277.04. Not only did the Board have the final authority to decide Starbuck's appeal, it actively substituted a new rationale for his suspension. JA 13, ¶ 28. And Starbuck's due process claim challenges procedural unfairness in the Board's implementation of its own appeals process—a process, again, in which the Board itself is the final and ultimate policymaker. Va. Code § 22.1-277.04.

Since both of Starbuck's claims challenge the Board's own actions in areas where state law makes the Board the ultimate authority, those actions constitute official policy for which the Board can be liable under § 1983.

II. STARBUCK'S FIRST AMENDMENT AND FOURTEENTH AMENDMENT CLAIMS ARE PLAUSIBLE ON THEIR FACE

The district court did not reach whether Starbuck's amended complaint stated a claim on the merits, as distinct from the issue of municipal liability under § 1983. This Court therefore could leave that issue for the district court on remand. If this

Court chooses to reach the issue, it should hold that Starbuck's complaint states plausible claims that the Board violated his First Amendment right to free speech and his Fourteenth Amendment right to procedural due process.

In considering whether a complaint states a claim, courts must accept as true all of the factual allegations contained in the complaint and must draw all reasonable inferences in favor of the plaintiff. *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible if the plaintiff pleads factual content that permits a court to draw a "reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The plaintiff must make factual allegations that "nudge[] his claims… across the line from conceivable to plausible." *See id*. at 680–81.

A. Starbuck Plausibly Alleged That His Comments Created No Disturbance Or Disruption Sufficient To Justify Punishment For Speech Under *Tinker* and *Mahanoy*

Starbuck's complaint alleges that his comments about the Parkland shooting were not disruptive. "No student within the conversation made any threat, but were discussing observations and real world, practical problems." JA 6–7, ¶ 1. The police officers who investigated the conversation at the behest of a teacher concluded that

no threats were made. JA 11, ¶ 13. And the school officials who removed Starbuck from the classroom, isolated him in confinement for interrogation the rest of the day, and imposed an out-of-school suspension justified their actions as necessary for Starbuck's own protection. JA 12, ¶ 19. Nonetheless, when the Board finally made its ultimate decision confirming these disciplinary actions it invoked, for the first time, an allegation that Starbuck's speech caused a "classroom disturbance." JA 13, ¶ 28. These facts give rise to a more than plausible claim that the Board's action was not justified under the First Amendment, and indeed that the Board's rationale was pretextual.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506. While the "special characteristics of the school environment" must be taken into account, *Mahanoy*, 141 S. Ct. at 2044 (citation omitted), "[i]n the public school setting, the First Amendment protects the nondisruptive expression of ideas," *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd*., 354 F.3d 249, 258 (4th Cir. 2003) (citation omitted). In *Tinker*, the Supreme Court recognized that schools can regulate speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513.[1] But a school must meet a "demanding

[1] In *Mahanoy* the Supreme Court recognized three additional categories of student speech that may merit regulation under the First Amendment: "(1) indecent, lewd, or vulgar speech uttered during a school assembly on school grounds; (2) speech,

standard" to show it was regulating student speech to prevent disturbance. *Mahanoy*, 141 S. Ct. at 2048. Only evidence of "substantial disruption," "material interference with school activities," or "invasion of the rights of others" suffices. *Tinker,* 393 U.S at 513, 514; see also *Mahanoy*, 141 S. Ct. at 2047 ("But we can find no evidence in the record of the sort of 'substantial disruption' of a school activity or a threatened harm to the rights of others that would justify the school's action.").

In *Mahanoy*, a high school student posted photos on her Snapchat story that included vulgar language and gestures aimed at the school and its cheerleading team. *Mahanoy*, 141 S. Ct. at 2042. The images were visible to her approximately 250 friends, many of whom were fellow students. *Id*. at 2043. In response, the school suspended her from the cheerleading team. *Id*. at 2044. In assessing the school's claim that discipline was warranted by disruption of the learning environment, the Supreme Court noted that "[q]uestions about the post persisted during an Algebra class" and discussion of the matter took "at most, 5 to 10 minutes of [class] for 'just a couple of days.'" *Id.* at 2043, 2047–48. Several students also approached the cheerleading coaches "visibly upset" about the posts. *Id.* at

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uttered during a class trip, that promotes illegal drug use; and (3) speech that others may reasonably perceive as bearing the imprimatur of the school, such as that appearing in a school-sponsored newspaper." 141 S. Ct. at 2045 (citations omitted). We see no argument that Starbuck's speech could be punished under any of those principles, and the Board did not invoke them in its decision.

2043. However, the Court ruled there was "no evidence...of the sort of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's action." *Id.* at 2047 (citing *Tinker*, 393 U.S. at 514).

Schools can prohibit speech that creates a reasonable *expectation* of disruption. *Hardwick ex rel Hardwick v. Heyward*, 711 F.3d 426, 439 (4th Cir. 2013). "School officials may regulate such speech even before it occurs, as long as they can point to 'facts which might reasonably have led [them] to forecast' such a disruption." *Hardwick*, 711 F.3d at 434 (quoting *Tinker*, 393 U.S. at 514). But "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

In *Newsom,* a middle school student sought a preliminary injunction to enjoin a provision of the school dress code which prohibited messages on clothing or jewelry related to weapons, arguing that it was unconstitutionally overbroad and vague. 354 F.3d at 252. This Court noted that there was no evidence that weapons-related clothing had ever "substantially disrupted school operations or interfered with the rights of others," and held that the lack of evidence that such clothing "ever caused a commotion or was going to cause one" strongly indicated that the ban "was not necessary to maintain order and discipline." *Id.* at 259. This Court held that the student had shown "a strong likelihood of success on the merits" of his claim, and

instructed the district court to enter the requested preliminary injunction. *Id.* at 252, 260.

Cases in which this Court has upheld school punishment for speech have involved far greater risks of substantial disruption. In *Hardwick*, for example, a middle school student claimed that school officials violated her First Amendment rights by preventing her from wearing clothing that displayed the Confederate flag. 711 F.3d at 431. The town had a long history of racial tension, including numerous incidents of Confederate flag-related disruptions in local schools. *Id.* at 438. This Court held that there was "ample evidence from which the school officials could reasonably forecast" that such clothing would "materially and substantially disrupt the work and discipline of the school." *Id.* (quoting *Tinker*, 393 U.S. at 513).

In another case, this Court upheld the suspension of a student who created a MySpace page dedicated to harassing and bullying another student. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011). The page included doctored photographs of the other student with captions calling her a whore and suggesting she had a sexually transmitted disease. *Id.* at 568. Kowalski invited approximately 100 other students to join the group, view the page, and add additional demeaning content. *Id.* at 567–68. This Court held that the speech "created a reasonably foreseeable substantial disruption," which authorized the school to take disciplinary action. *Id.* at 574.

The facts alleged here, drawing reasonable inferences in Starbuck's favor, come nowhere near the line drawn by the Supreme Court and this Court. The complaint states that "none of [Starbuck's] remarks created any disturbance." JA 15, ¶ 39. Unlike the disruption of class for five or ten minutes over multiple days that the Supreme Court considered plainly insufficient in *Mahanoy*, Starbuck's complaint alleges that no students were upset and that no disruption occurred at all. In fact, the teacher who happened to overhear part of the conversation seems to be the only one who took any notice of it at all. JA 10, ¶ 11. If there was no "substantial disruption" in *Mahonoy*, which included numerous students that were "visibly upset" and class time devoted to addressing the situation caused by the student's actions, then Starbuck's actions cannot meet the *Tinker* standard either. *Mahanoy*, 141 S. Ct. at 2043, 2047–48; *Tinker*, 393 U.S. at 514.

The school's own conduct confirms the plausibility of Starbuck's allegation that there was no meaningful disruption. School officials initially justified disciplinary action against Starbuck as necessary for "his safety" to prevent "retaliation from other students," not because his speech had created a disturbance. JA 11–12, ¶¶ 14, 19. Though his remarks were made on February 15, it was not until May 18, three months later, that the Board first characterized the incident as a "classroom disturbance." JA 7, 16, ¶¶ 1, 43.

In this posture, the Board cannot rely on any significant record of prior incidents as there was in *Hardwick*, in which multiple Confederate flag related disturbances had occurred previously. The conversation Starbuck had also was a far cry from the conduct in *Kowalski*, which involved an organized campaign of bullying and harassment and an invitation to other students to participate in the cruelty. The facts as alleged more closely resemble *Newsom*, as there is no evidence that a disruption occurred, or that similar student conversations had previously led to substantial disruptions.

Starbuck's complaint plausibly alleges that the Board has not met the "demanding standard" necessary to show it was regulating Starbuck's speech to prevent disturbance. *Mahanoy*, 141 S. Ct. at 2048. While the ideas and observations Starbuck raised in conversation may have been provocative, the complaint indicates they caused no disturbance or commotion of any kind. As the Supreme Court recently noted, "to justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Mahanoy*, 141 S. Ct. at 2048 (cleaned up). Starbuck's complaint plausibly suggests the Board cannot make that showing. As such, he has alleged facts sufficient to survive a 12(b)(6) motion on his First Amendment claim.

B. The Board's Failure to Give Starbuck Notice and an Opportunity to Respond to the Ultimate Justification of his Suspension Violated His Fourteenth Amendment Right to Due Process

Starbuck's complaint also sufficiently alleged that the Board violated his Fourteenth Amendment right to due process in considering his appeal. By failing to notify Starbuck of the nature of the charges against him before it meted out punishment, the Board deprived Starbuck of notice and any meaningful opportunity to dispute the allegations.

The Due Process Clause "forbids arbitrary deprivations of liberty." *Goss*, 419 U.S. at 574. "'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." *Id*. (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). In *Goss*, the Supreme Court held that students facing even short-term suspensions have interests protected by the Due Process Clause, including the "property interest in education benefits temporarily denied" and "the liberty interest in reputation." *Id.* at 576, 581. Because this "property deprivation is not de minimis, its gravity is irrelevant to the question whether the account must be taken of the Due Process Clause." *Id*. at 576.

In cases involving a suspension of ten days or less, *Goss* held that due process requires that "the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an

opportunity to present his side of the story." *Id.* at 581. Formal hearings, in which students are able to retain counsel, confront witnesses, and call supporting witnesses, are generally not required. *Id.* at 583. However, a student must still receive "an opportunity to explain his version of the facts" after first being told "what he is accused of doing and what the basis of the accusation is." *Id.* at 582.

While Starbuck was given a chance to describe the nature of the conversation in question, and to refute any notion that he posed a safety risk, he was never put on notice that school officials believed he had disrupted the learning environment or that they would seek to impose punishment on that basis. Initially he was told that the in-school suspension was for "his own safety," JA 12, ¶ 19, or for "Threats," JA 10, ¶ 9. But in affirming his suspension three months after the incident, the Board altered the official explanation for Starbuck's punishment yet again to "classroom disturbance." JA 13, ¶ 28. The Board changed the nature of the charge without giving Starbuck any opportunity to address this new justification for his suspension. *Id*. By changing the rationale for Starbuck's punishment months after he was given an opportunity to contest it, the Board deprived Starbuck of notice of "what [he] was accused of doing and what the basis of the accusation [was]," and deprived him of any meaningful opportunity to respond. *Goss*, 419 U.S. at 582.

The process that Starbuck received falls far short of what this Court has found acceptable in prior suspension cases. In *Kowalski*, the principal brought the student

into his office, provided notice of the specific charges against her, allowed her the opportunity to justify her conduct, and then imposed a short-term suspension. 652 F. 3d at 576. This Court held that by disclosing both the student conduct at issue and the specific charges under school policy, the principal met the *Goss* standard of "oral...notice of the charges" as well as "an explanation of the evidence the authorities have." *Id.* (quoting *Goss*, 419 U.S. at 585). This Court also explained that when a student accepts responsibility for the charges against her, administrators are not required to give the student a "more extensive" opportunity to justify the conduct, but that a student who does not admit to the charges must receive "an opportunity to present [her] side of the story." *Id.* (quoting *Goss*, 419 U.S. at 585).

The Sixth Circuit has held that a school board did not afford the student due process when a principal presented evidence to a school board reviewing a student's suspension without having informed the student of the evidence beforehand. *See Newsome v. Batavia Local School District*, 842 F. 2d 920, 927–28 (6th Cir. 1988). In *Newsome*, the superintendent told the school board, but did not disclose to the student, that a counselor had told him the student had confessed to her. *Id.* The Sixth Circuit held that "[s]uch a tactic completely deprived [the Student] of any opportunity to rebut the evidence and amounted to a clear deprivation of his right to procedural due process of law." *Id.* at 928. It concluded that the case was a "classic

illustration of why procedural due process, at a minimum, requires notice of both the charges and the evidence against an individual." *Id*. at 928, n. 7.

As in *Newsome,* the Board rested its decision to confirm Starbuck's suspension on a rationale (and perhaps evidence?) of which he had no notice, and that he had no "opportunity to rebut." *Id.* at 928. Had Starbuck understood that the focus of the inquiry would be on whether he created a "classroom disturbance," rather than "threats" or a danger to his own safety, he would have sought to provide evidence to counter that claim. JA 13, ¶¶ 26–28. All of his prior self-advocacy had been directed towards combating allegations of a different nature.

"'The fundamental requisite of due process of law is the opportunity to be heard.'" *Goss*, 419 U.S. at 579 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). *Goss* requires that a student subjected to a short term suspension must receive at least "an opportunity to present his side of the story," but that is impossible without a clear understanding of the basis for that disciplinary action. *Goss*, 419 U.S. at 581. Here the Board's actions denied Starbuck his opportunity to respond to the charge that ultimately was the basis for his suspension. As such, his complaint stated a plausible claim that the Board's affirmation of his suspension violated his right to due process required by the Fourteenth Amendment.

CONCLUSION

The district court's dismissal should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 8,299 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in fourteen-point Times New Roman font.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word printout.

Dated: October 6, 2021

Signed,

/s/ J. Scott Ballenger
J. Scott Ballenger