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

REPLY BRIEF OF APPELLANT

J. Scott Ballenger
Gregory Eng (Third Year Law Student)
Jacob Larson (Third Year Law Student)
Benjamin Lerman (Third Year Law Student)

Appellate Litigation Clinic
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

Counsel for Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

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INTRODUCTION

Appellee Williamsburg James City County School Board (the Board) persists in arguing that Starbuck's *pro se* Amended Complaint failed to adequately allege a municipal "custom" or "policy" underlying his claims. The Amended Complaint does allege that the Board has an unconstitutional policy of upholding disciplinary suspensions on grounds that were identified long after the fact and never disclosed to the student. *See* JA 8, ¶ 2. But the Complaint also plainly alleges that the Board *itself* made a decision to unconstitutionally punish Starbuck for his speech, and that the Board denied him due process by changing the rationale for its decision without giving him the opportunity to respond. Under *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978), and its progeny, the Board may be held liable under § 1983 because it exercised its final decisionmaking authority when it upheld Starbuck's suspension. No broader "custom" or "policy" is necessary for municipal liability when the challenged decision is made by the officials with final policymaking authority.

The Board argues that municipalities are liable for decisions of policymaking officials only if that policymaker directly participated in an earlier violation of the plaintiff's rights by subordinate employees. That is not the law, and it makes no sense. The plurality opinion in *City of St. Louis v. Praprotnik* makes clear that municipal liability can be imposed when a subordinate's earlier decision is reviewed and ratified by the municipality's authorized policymakers. 485 U.S. 112, 127

(1988) (plurality op.). The Board cites a handful of cases in which a final policymaker directly participated with subordinate employees in a lengthy pattern of misconduct. But the cases do not say that such participation is *necessary* for municipal liability. They reaffirm the settled law that municipalities are liable for *all* decisions made by the ultimate policymakers, including when the policymaker ratifies and enforces a decision originally made by others.

The Board argues that Starbuck did not identify an "ultimate decisionmaker" theory of municipal liability in his Amended Complaint. But Starbuck alleged that the Board had final authority over suspensions and upheld his suspension, while changing the rationale without giving him an opportunity to respond. Nothing more was necessary to state a claim for municipal liability. Plaintiffs are not required to plead legal arguments—just facts giving rise to a plausible claim for relief.

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

ARGUMENT

I. STARBUCK ALLEGED SUFFICIENT FACTUAL MATTER TO STATE A CLAIM THAT THE BOARD IS LIABLE UNDER § 1983

Starbuck alleged in his Amended Complaint that the Board made a decision to uphold his suspension, and that the Board was a decisionmaker with final authority. He has thus alleged sufficient factual matter to state a claim that the Board may be held liable under § 1983 for the constitutional violations that *it* committed.

The Board's argument that it cannot be held liable unless it also was the "moving force" behind Starbuck's original suspension misunderstands the law. Appellee's Br. at 14. And Starbuck's *pro se* opposition to the Board's motion to dismiss did not waive anything.

A. Municipalities Are Liable For Decisions By Policymakers Even If The Policymaker Did Not Directly Participate In An Earlier Violation

When a constitutional violation is committed directly by "those whose edicts or acts may fairly be said to represent official policy," the plaintiff need not prove any broader custom or policy. *Monell*, 436 U.S. 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 v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (plurality op.). And "when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies," such that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Praprotnik*, 485 U.S. at 127 (plurality op.).

The Board argues that its "independent action does not ratify or otherwise make the School Board liable for the actions and constitutional harms of individual

school employees," and that therefore it cannot be liable under § 1983 unless it was the "moving force" behind Starbuck's original suspension. Appellee's Br. at 13–14. The Board's argument that municipal liability necessarily requires "factual allegations . . . directly connecting the final policymaker to the alleged unconstitutional conduct of others," *id.* at 13, misunderstands the case law and confuses conditions *sufficient* for municipal liability with what is *necessary*.

In *Praprotnik*, Justice O'Connor's plurality opinion extracted four "guiding principles" from *Pembaur*. 485 U.S. at 123. None of these factors requires the decisionmaker to have known of or participated in prior unconstitutional conduct. To the contrary, the plurality specifically explained that when policymakers review and uphold "a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Id.* at 127 (plurality op.). Similarly, in *Jett v. Dallas Independent School District* the Supreme Court applied the *Praprotnik* factors to determine whether a school district was liable for actions of its superintendent or principals. 491 U.S. 701, 736 (1989). 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. Its analysis did not depend upon the principal's or superintendent's roles in any prior unconstitutional conduct.

The Board argues that it was the County Prosecutor's "level of involvement" with his subordinates' actions that created municipal liability in *Pembaur*. Appellee's Br. 13–14. It is true that on the facts of *Pembaur* the two deputy sheriffs consulted with their superiors and ultimately obtained direction from the County Prosecutor before forcibly entering the clinic. But the Supreme Court did not hold that municipal liability under § 1983 necessarily *requires* real-time collaboration between a final decisionmaker and subordinate employees. The Court held that "it is plain that municipal liability may be imposed for a single decision by municipal policymakers" when that decision is made by "officials 'whose acts or edicts may fairly be said to represent official policy.'" 475 U.S. at 480 (quoting *Monell*, 436 U.S. at 694). The Court framed the ultimate question as whether "the County Prosecutor lacked authority to establish municipal policy respecting law enforcement practices." *Id.* at 484. And it based municipal liability on a determination that the County Prosecutor was "acting as the final decisionmaker for the county" when he authorized the intrusion. *Id.* at 484–85. Nothing in the decision suggests that municipalities are liable for the actions of final policymakers *only* when the final policymaker directly and contemporaneously collaborates with a subordinate employee.

Similarly, the Board argues that the school district in *Hall v. Marion School District Number Two* was liable only because the school board was "'completely

aware' of their subordinate's actions as they were happening." Appellee's Br. at 14 (citing *Hall*, 31 F.3d 183, 196 (4th Cir. 1994)). Again, on the facts of *Hall* it is true that the school board "was fully apprised of all of [the superintendent's] retaliatory actions and condoned each of them" as they happened. *Hall,* 31 F.3d at 196. But this Court did not hold that direct participation in subordinates' misconduct was *necessary* to municipal liability. To the contrary, this Court recognized that in *Praprotnik* the plurality "reiterated that a municipality can be held liable for the acts of their employees if such actions are ratified by the final policymakers." *Id.* (citing *Praprotnik*, 485 U.S. at 127). This Court also held that "since 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"—a step that *only* the school board could take. *Id.* This Court ultimately explained that "by dismissing Hall the Board not only ratified [the superintendent's] behavior, but also participated in the violation of Hall's First Amendment rights." *Id.* In other words, the school board was liable for its prior collaboration with the superintendent, for its ratification of the superintendent's conduct, and for its own independent act in firing the teacher.

The Board cites *Jones v. Wellham*, 104 F.3d 620, 627 (4th Cir. 1997), for the proposition that "a final policymaker's ratification of a subordinate's acts" must "be 'the moving force' behind a plaintiff's constitutional violation." Appellee's Br. at 14. But the holding of *Jones* was that a policymaker's decision not to fire an officer

was not "'the moving force' behind the ultimate violation" in the sense that it "could not, as a matter of law, be found the sufficiently direct cause" of a separate crime committed by that officer a decade later. *Jones,* 104 F.3d at 627 (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)). That language cannot be ripped from its context and transformed into a holding that ratification of a subordinate's decision can produce municipal liability only when it *precedes* the ratified decision.

The Board comes closer to the mark in citing *Skeen v. Washington Cty. Sheriff's Off.*, No 1:20-cv-17, 2020 WL 6688550, at *6 (W.D. Va. Nov. 12, 2020), for the proposition that a policymaker's "ratification, entirely subsequent to the alleged violation, does not plausibly illustrate a policy that was the 'moving force' behind the ultimate violation." Appellee's Br. at 15. *Skeen* involved an allegedly unjustified shooting by officers, and the plaintiff attempted to base municipal liability, in part, on a supervisor's alleged "ratification" of the shooting after the fact, and on his failure to discipline the deputies in question. But the district court's point in *Skeen* was that the shooting was an accomplished fact, and any so-called "ratification" by the supervisor did not cause or perpetuate any constitutional injury. *Skeen*, 2020 WL 6688550, at *6. A municipality is not vicariously liable for the fully accomplished and irreversible consequences of a subordinate's past conduct just because a policymaker later expresses approval of that conduct. Municipal liability for "ratification" of subordinate decisions attaches "when a subordinate's decision

is subject to review by the municipality's authorized policymakers" and those policymakers have "retained the authority" to make a "final" decision in a meaningful sense. *Praprotnik*, 485 U.S. at 127 (plurality op.). The *Skeen* court specifically distinguished *Hall* as a case in which the school board "had the ability to review and approve the decision to fire the teacher, so its failure to intervene to stop the teacher's firing, despite knowing the termination was based on improper reasons, caused the violation itself." 2020 WL 6688550 at *5 (citing *Hall*, 31 F.3d at 196).

Starbuck's Amended Complaint does not, as in *Skeen*, seek damages for harms that were already accomplished and that could not possibly have been reviewed or remedied by the Board. Starbuck seeks only nominal damages, and forward-looking declaratory and injunctive relief to clear his name and his academic record and to require the Board to change its practices. JA 17–18, ¶ 44; *see also* JA 7, ¶ 2 (seeking "an order ordering the removal of the discipline from all school records"). Starbuck's suspension clearly was "subject to review" by the Board, and the Board "retained the authority" to make a "final" decision vacating that suspension and removing it from Starbuck's record. *Praprotnik*, 485 U.S. at 127 (plurality op.). The Board's decision not to do so represents a final decision by the body with ultimate policymaking authority, and therefore can be challenged both as a ratification of the school officials' prior actions and as an independent violation of

the Constitution by the Board itself. There is no support for the Board's suggestion that Starbuck *also* must plead or prove that the Board was "aware of the unconstitutional conduct as it was happening and took an active role in it or knowingly did not intervene to stop it." Appellee's Br. at 14.

The Board argues that the Amended Complaint does not allege a ratification theory because "Appellant alleges the School Board entirely changed the rationale underlying that suspension" and "[t]he School Board's action, therefore, was the independent act of a policymaker." Appellee's Br. at 13. That concession essentially confirms the Board's violation of due process, but it does not improve the Board's position under *Monell.* If the Board's actions were entirely independent of what school officials had previously done, then Starbuck does not need a "ratification" theory of liability. The Board is responsible for its own "independent act [as] a policymaker." *Id.*

B. Starbuck's Amended Complaint Adequately Pled Facts Giving Rise To A Plausible Inference Of Liability, And He Did Not Waive The Critical Issues Below

Starbuck's Amended Complaint pled facts more than sufficient to give rise to a reasonable inference of liability under the principles discussed above. The Amended Complaint correctly alleges that the Board "is vested with oversight of all public schools, elementary, middle and secondary, within the City of Williamsburg and County of James City." JA 9, ¶ 5; *see also* Va. Code § 22.1-277.04. It alleges

that the Board considered Starbuck's appeal and "found the suspension was proper," and thereby violated Starbuck's right to free speech. JA 13, ¶ 28, 14 ¶ 34. It alleges that the Board "altered the 'Cause' finding" to "a 'Classroom Disturbance'" without giving Starbuck any opportunity to dispute that new allegation, violating his right to procedural due process. JA 13, ¶ 28, 14 ¶ 35. The Amended Complaint supports those due process allegations by further alleging a "policy of the School Board" that allows them to consider, in their decisional process, evidence that was discovered after the "informal meeting with the offending student" and that was never disclosed to that student. JA 2–3, ¶ 2. Starbuck sued only the Board and sought relief that the Board could have granted, such as the expungement of the suspension and of his resulting absence from school from Starbuck's academic record. JA 17, ¶ 44.

The district court understood that the Amended Complaint "claims that the actions of the School Board . . . violated Plaintiff's rights under the First, Fifth, and Fourteenth Amendments." JA 23. The court just thought, incorrectly, that "a plaintiff's allegations that a school board violated his or her constitutional rights are alone insufficient to impose liability on a school board" and that "[i]nstead, a plaintiff must allege that a school board maintains a policy or practice that resulted in the alleged constitutional violations." JA 26.

The Board contends that Starbuck "did not allege in the Amended Complaint—and, accordingly, cannot allege now in this Court—that any action of

the School Board somehow adopted or ratified the alleged actions of individual employees." Appellee's Br. at 10. But Starbuck clearly alleged, as a fact, that the Board reviewed his suspension and upheld it.

The Board's *legal theory* about what "ratification" liability requires is incorrect for reasons already explained above. Regardless, plaintiffs are not required to plead legal theories. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for 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 the 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. In addition, Starbuck's *pro se* Amended Complaint, "however inartfully pleaded, must be held to less stringent standards than the formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks omitted). The court should not limit the legal issues it considers to only those legal issues explicitly raised in a *pro se* complaint. *See Booker v. South Carolina Dep't of Corrections*, 855 F. 3d 533, 540 (4th Cir. 2017) (finding that the district court erred in considering

"only the free speech right because [the plaintiff] mentioned that clause in his pro se complaint").

The Board objects that Starbuck's arguments on appeal "recast[] the allegations in the Amended Complaint and the premise upon which Appellant sought to hold the School Board liable." Appellee's Br. at 1. But the allegations in the Amended Complaint are straightforwardly factual. What the Board really means is that on appeal Starbuck, now represented by counsel, has presented more clearly formulated legal arguments for why his Amended Complaint satisfies *Monell* than he presented in his *pro se* opposition to the Board's motion to dismiss. That is neither surprising nor inappropriate. Arguments always improve on appeal, even when parties are represented throughout. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 533–35 (1992) (per se Takings argument below was sufficient to preserve a regulatory Takings argument in the Supreme Court).

And despite proceeding *pro se* Starbuck actually did correctly identify the flaw in the Board's legal argument. The Board's motion to dismiss argued, incorrectly, that "[w]ithout identifying a policy that allegedly violated his constitutional rights, Starbuck cannot state a claim upon which relief can be granted." Dkt-26 at 6. Starbuck's response accurately identified the various other possible bases for municipal liability under *Monell*—including liability based on "'the affirmative decisions of policy makers'"—and argued that "[t]he Complaint

makes clear of an affirmation decision of the policy makers." Dkt-38 at 5 (quoting *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999)). Starbuck went on to make the best case he could that the complaint *also* alleged a custom or policy, and obviously that is what the Board prefers to talk about. But Starbuck did not waive the argument counsel has emphasized on appeal, particularly in light of the special solicitude due to *pro se* filings.

II. THE AMENDED COMPLAINT SUFFICIENTLY ALLEGES FREE SPEECH AND DUE PROCESS CLAIMS

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.

A. The Amended Complaint Alleges A First Amendment Violation

In arguing that Starbuck's complaint does not state a plausible First Amendment claim, the Board attempts to portray Starbuck's comments as threatening in nature and as creating a reasonable expectation of disruption. But the Board's arguments improperly ignore the facts actually alleged in the complaint. Taking the allegations of the complaint as true, Starbuck stated a more than plausible claim that his suspension was not justified under the "demanding standard" applied

when school officials contend that speech restrictions are necessary to prevent a potential disturbance. *Mahanoy Area School District v. B.L*, 141 S. Ct. 2038, 2048 (2021). That law requires "'something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'" *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)). The Board cannot punish a student for merely discussing a school shooting that was making national headlines, nor can it assert that any such conversation necessarily threatens to cause a disturbance.

The Board claims that Starbuck's remarks "might reasonably lead school authorities to forecast a substantial disruption of or material interference with school activities, particularly under the specter of a very-recent school shooting." Appellee's Br. at 20. But the Amended Complaint alleges that Starbuck and other students "were engaged in a proactive conversation discussing the prevention and basis of these [school shooting] tragedies," and that Starbuck "made remarks questioning the intent of the shooter" and "stating that the shooter would be capable of more harm had he wanted to" given "his possession of explosives and considering the time the shooter was left alone within the building unchallenged by local law enforcement." JA 10, ¶ 11. The Amended Complaint alleges that "[n]o student within the conversation made any threat," and that they were simply "discussing

observations and real world, practical problems." JA 6–7, ¶ 1. And it alleges that "none of [Starbuck's] remarks created any disturbance." JA 15, ¶ 39.

The Amended Complaint also alleges surrounding facts strongly supporting the credibility of Starbuck's account, and suggesting that the Board's determination that Starbuck's actions created a "classroom disturbance" was pretextual. Starbuck's complaint alleges that school officials did not suggest at the time that there had been any "classroom disturbance," and did not rely on classroom disruption to justify his removal from the classroom. JA 13, ¶ 28. The school officials who removed him from the classroom initially told both Starbuck and his parents that they acted out of concern for Starbuck's "safety." JA 11, ¶ 14; JA 12, ¶ 19. The police officers who investigated the comments at the teacher's behest concluded that no threat was made. JA 11, ¶ 13. And yet, though his remarks were made on February 15, no "classroom disturbance" allegation was made by anyone until the Board invoked that justification in response to Starbuck's appeal on May 18. JA 6–7, ¶ 1; JA 13, ¶ 28.

Only evidence of "substantial disruption," "material interference with school activities," or "invasion of the rights of others" will justify restriction of student speech. *Tinker*, 393 U.S at 513, 514. In *Mahanoy* it actually was undisputed that discussion of the cheerleader's vulgar social media posts had disrupted the learning environment. The school in *Mahanoy* argued that it was acting to "prevent disruption" when it suspended a student for a profane social media post. *Mahanoy*,

141 S. Ct at 2047. The school presented evidence that coaches and students were "visibly upset" about the student's posts, and that discussion of the post took up five to ten minutes of class time over multiple days. *Id.* at 2043, 2047–48. Nonetheless the Supreme Court found "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," and held that "the alleged disturbance here does not meet *Tinker*'s demanding standard" for a substantial disruption. *Id.* at 2047–48. Appropriately crediting the allegations of the Amended Complaint, this case involved significantly *less* classroom disruption than *Mahanoy*.

The Board's argument appears to be that *any* private discussion of the facts of the Parkland shooting, at a time when it was the leading news story in the country, was sufficient for school authorities to forecast a "substantial disruption." Appellee's Br. at 20. But the Board cites no authority that would support such a sweeping proposition. To the contrary, the case law indicates that schools are required to tolerate a great deal of speech they may consider uncomfortable, inconvenient, or unpopular.

Most of the cases the Board cites involved explicit threats of violence, not discussion of current events. For example:

The Board relies on *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013), to argue that "school officials do not have to wait 'for an actual

disruption to materialize before taking action.'" *Id.* In *Wynar*, a student made direct threats on the lives of specific classmates, bragged about the weapons he owned, and suggested he would carry out a school shooting on a particular date. 728 F.3d at 1064–65. In another conversation, he said he was going to rape a specific student, then kill her, then go on a school shooting. *Id.* at 1066. Wynar's friends were so alarmed by these messages that they reported them to the school, which subsequently took action against him. *Id.* at 1065. And even then, the case was decided on summary judgment not a motion to dismiss. *Id.*

Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., involved a student who made his AOL instant messaging icon a drawing titled "Kill Mr. VanderMolen" (a teacher) with a gun firing at a person's head and blood spattering. 494 F.3d 34, 36 (2d Cir. 2007). The student used this icon in messages with many other students, one of whom reported it. *Id*. And the case was decided on summary judgment, after the hearing officer made a specific "factual determination . . . that the icon was a threat." *Id.* at 37.

The student in *J.R. by & Through Redden v. Penns Manor Area Sch. Dist.* had multiple conversations with other students throughout the school day about "who they would shoot if they were to do a school shooting," and was overheard discussing how he would shoot a specific teacher. 373 F. Supp. 3d 550, 553, 562 (W.D. Pa. 2019).

The Board cites *Wofford v. Evans,* 390 F.3d 318 (4th Cir. 2004), to suggest that the school simply could not risk inaction against Starbuck. But in *Wofford*, several students reported that another student had brought a gun to school. *Id.* at 321.

The Board also points to *Hardwick ex rel Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013), which did not involve an explicit threat of violence. *Hardwick* affirmed that school officials in Latta, South Carolina could prohibit, and punish a student for wearing, clothing with a Confederate flag on it. *Id.* at 444. But the district court based that summary judgment decision on a developed factual record containing "ample evidence from which the school officials could reasonably forecast that all of these Confederate flag shirts 'would materially and substantially disrupt the work and discipline of the school.'" *Id.* at 438 (citing *Tinker*, 393 U.S. at 513). This evidence included "multiple occasions" in which the display of the Confederate flag had actually caused disruptions in the school district, including at a prom, in a school parking lot, in the classroom, and in confrontations between students while at school. *Id.* at 432–33, 438. The court also noted that the community was dealing with racial tension stemming from the burning of an African-American church by two high school students. *Id.* at 432. Under these circumstances, this Court affirmed the district court's determination that school officials could reasonably predict a substantial disruption.

There has been no discovery in this case, and the allegations of Starbuck's Amended Complaint bear no resemblance to the facts of *Hardwick.* There was no serious provocation, just an isolated conversation speculating about what happened during a school shooting that was all over the news and dominating the national conversation. There is no evidence or allegation that the Williamsburg and James City County school district has experienced past disturbances in response to student discussions of this nature. The Amended Complaint credibly alleges that there was no disturbance and no threat of any kind. JA 6–7, ¶ 1.

Taking the allegations of the Amended Complaint as true, the facts here are more comparable to *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd*, in which this Court held that the lack of evidence that weapon-related clothing or jewelry had ever caused a disruption indicated that a ban was not necessary to prevent disruption in the school. 354 F.3d 249, 259–60 (4th Cir. 2003).

The Board argues that "violence and shootings are endemic to the experience of students," and that statements "that are effectively suggestions for how the shooter could have been more effective in killing students" could be reasonably expected to cause disruption. Appellee's Br. at 24 n.5. That characterization of Starbuck's comments is unfair and not supported by the Amended Complaint, which indicates instead that Starbuck was questioning whether the Parkland shooter may have deliberately chosen to refrain from additional harm that he might have inflicted. *See*

JA 10 ¶ 11. Noting that the shooter had explosives and "would [have] be[en] capable of more harm had he wanted to" is not making suggestions about how he could have killed more students; it raises "question[s] [about] the intent of the shooter," as the Amended Complaint clarifies. *Id.* The Board's nefarious recasting of Starbuck's comments is not appropriate in a motion to dismiss posture, and it is inconsistent with how the police and school officials handled the situation at the time.

More broadly, the Board is conflating *threats of* school shootings with conversations *about* school shootings. The Board admits that "not every comment regarding a school shooting will be disruptive." Appellee's Br. at 24 n.5. And indeed it would be impossible and undesirable for school officials to try and squelch all discussion of a topic that, tragically, is very present in students' lives. *Tinker* involved the expression of unpopular opinions about an ongoing war. 393 U.S. at 504. While the ideas and observations Starbuck raised in conversation may have been provocative, the Amended Complaint indicates they were not threatening and caused no disturbance or commotion of any kind. The Supreme Court recently held that "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). If the Board can prove, in discovery or at trial, that Starbuck said something that school officials reasonably

could understand as a threat, or something that for other reasons was reasonably likely to create a serious disturbance, then the Board may ultimately be entitled to judgment. But nothing in the Amended Complaint warrants that conclusion at the motion to dismiss stage.

B. Starbuck's Amended Complaint Stated A Plausible Claim of a Procedural Due Process Violation

Starbuck's Amended Complaint also sufficiently alleged facts giving rise to a plausible claim that the Board violated his Fourteenth Amendment right to procedural due process in considering his appeal. By upholding Starbuck's suspension on the basis of factual allegations that had never been disclosed to him, the Board deprived Starbuck of notice and any meaningful opportunity to dispute the allegations.

In *Goss v. Lopez,* 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." 419 U.S. 565, 576, 581 (1975). 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.

Starbuck's Amended Complaint alleges facts that make out a more than plausible claim that he was denied the process that *Goss* demands. Starbuck was not told he was being punished for creating a "classroom disturbance," nor was he given an opportunity to explain his version of the facts in light of that accusation. *Id.* at 582. He and his parents were first told the in-school suspension was for "his own safety." JA 12, ¶ 19. Then he was suspended for two days for "threats." JA 10, ¶ 9. The "classroom disturbance" rationale did not emerge until months later, as the basis of the Board's decision. JA 13, ¶ 28.

The Board argues that Starbuck was not entitled to an appeal to the School Board for a short term suspension at all, and that Starbuck "cannot create a due process right by virtue of his own conduct." Appellee's Br. at 25. But even if it turns out to be true that the Board had no obligation to review Starbuck's case (a proposition not alleged in the Amended Complaint), the Board chose to review it. And, as the Board's brief affirmatively argues, "the School Board entirely changed the rationale underlying that suspension" and its "action, therefore, was the independent act of a policymaker." Appellee's Br. at 13. The Board effectively vacated a decision based on a charge for which Starbuck had notice and an informal

hearing, and substituted a brand new decision that was based on other grounds and that did not comply with what *Goss* requires. Perhaps the Board could have chosen not to wade into this thicket, but having done so it must satisfy due process.

The Board insists that due process requires only an "'informal give-and-take between student and disciplinarian,'" and that Starbuck is improperly seeking "the specificity of a criminal indictment." Appellee's Br. at 27–27 (citations omitted). But Starbuck was denied the bare minimum requirements of due process: notice of what he was charged with doing, and some opportunity to respond. *Goss*, 419 U.S. at 581. The Board argues that Starbuck received the same process as the plaintiff in *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 577 (4th Cir. 2011), but the differences are stark. In *Kowalski*, the student was given clear notice of the specific charges and the evidence against her, and she admitted her conduct. 652 F. 3d at 576. Starbuck was first told action was taken for his own safety, then disciplined for making threats (which he denied), and months later his suspension was affirmed for a "classroom disturbance." The fact that Starbuck participated in an "informal give-and-take" with the disciplinarian does not eliminate the requirement to provide him with notice of the charges and evidence and an opportunity to present his story in light of both.

The Board tellingly has no response to the Opening Brief's discussion of *Newsome v. Batavia Local School District,* which held that a school board did not provide due process to a student when a principal presented new evidence to the

school board reviewing his suspension without disclosing it to the student beforehand. 842 F. 2d 920, 927–28 (6th Cir. 1988). The Sixth Circuit held that presenting new and previously undisclosed evidence to the school board "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. The court of appeals concluded that the case presented 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. Just as in *Newsome*, Starbuck was denied due process as the Board based its decision on a rationale that he had no "opportunity to rebut." *Id.* at 928. All of his prior self-advocacy was directed towards combating allegations of a different nature than what the Board ultimately affirmed.

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,

/s/ J. Scott Ballenger
J. Scott Ballenger
Gregory Eng (Third Year Law Student)
Jacob Larson (Third Year Law Student)
Benjamin Lerman (Third Year Law Student)
Appellate Litigation Clinic
University of Virginia School of Law
580 Massie Rd.,
Charlottesville, VA 22903
(434) 924-7582
sballenger@law.virginia.edu
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,950 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: November 24, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger