UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

I.P., a minor, by and through B.P.,

Plaintiff,

v.

TULLAHOMA CITY SCHOOLS, a political subdivision of the State of Tennessee; JASON QUICK, in his individual capacity; and DERRICK CRUTCHFIELD, in his individual capacity,

Defendants.

Case Number: 4:23-cv-26

Hon. Katherine A. Crytzer

PLAINTIFF'S CONSOLIDATED BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS

*****ORAL ARGUMENT REQUESTED*****

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INTRODUCTION

A high school principal's bruised ego does not trump the First Amendment. Defendants Jason Quick, the (former) principal of Tullahoma High School, and Derrick Crutchfield, the Assistant Principal, suspended I.P. for three images on I.P.'s personal Instagram lampooning Quick's overly serious nature. The first image I.P. posted showed Quick holding a box of vegetables. The second depicted Quick as a Japanese cartoon cat in a dress. And the third post showed Quick being hugged by a cartoon bird. I.P. posted the images using his own phone, on his own time, off school property, and the posts did not disrupt school in any way.

The Supreme Court has made clear that unless a student's off-campus expression causes or may reasonably be forecast to cause substantial disruption at school, the job of policing a minor's speech falls to parents, not the government. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2046–47 (2021). I.P.'s off-campus posts did not cause any disruption at Tullahoma High School, much less substantial disruption, and Defendants never asserted they did. Nor did Defendants point to facts supporting a reasonable forecast I.P.'s three tame Instagram images could somehow substantially disrupt a *high school*. So Defendants had no authority to punish I.P. for his speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

The fact I.P.'s off-campus posts lampooned Principal Quick and portrayed him in an unflattering light does not remove First Amendment protection. The en banc Third Circuit unanimously invalidated a high school's suspension of a student who created a parody Myspace profile of his principal which called the principal (among other things) a "big fag," "big whore," and referenced his "not big dick." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216–19 (3d Cir. 2011). The court explained that because the off-campus posts "did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District

stretching its authority" into the student's home to censor even "vulgar," "lewd," or "offensive" expression about the principal. *Id.* at 216, 217.

Consequently, Defendants' requests for qualified immunity should be rejected. *Tinker*, *Mahanoy*, and *Layshock* clearly established a school may not punish off-campus student speech absent a showing of substantial disruption or facts supporting a reasonable forecast of substantial disruption. I.P.'s allegations, presumed true at this stage, assert his Instagram posts did not cause substantial disruption at Tullahoma High School and that the school did not have a factual basis to reasonably forecast his posts would cause disruption. (*See* Doc. 36, Am. Compl. ¶¶ 40–45.)

And the Sixth Circuit has expressly warned that "it is generally inappropriate for a court to grant a 12(c) motion for judgment on the pleadings on the basis of qualified immunity." *Moderwell v. Cuyahoga County*, 997 F.3d 653, 661 (6th Cir. 2021) (cleaned up). Defendants ask this Court to do so anyway and do not explain why this case qualifies as an exception to the rule.

The Supreme Court has been clear that courts must be "skeptical of a school's efforts to regulate off-campus speech, for doing so may mean that the student cannot engage in that kind of speech at all." *Mahanoy*, 141 S. Ct. at 2046. But Defendants attempted to dictate that I.P. could not make fun of Quick "at all," even at home and on his own time. The Constitution bars their censorial overreach. The Court should deny their motions.

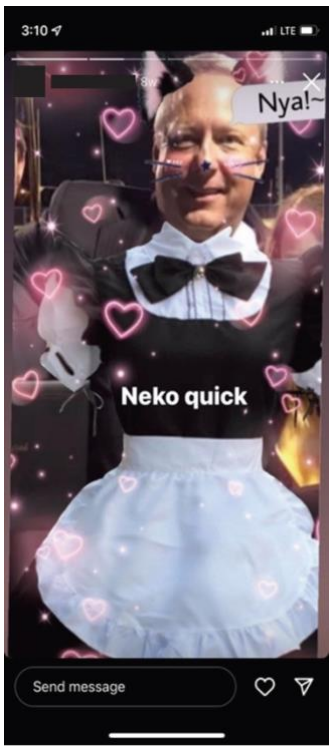
STATEMENT OF FACTS

I.P. uses Instagram for personal expression and satire.

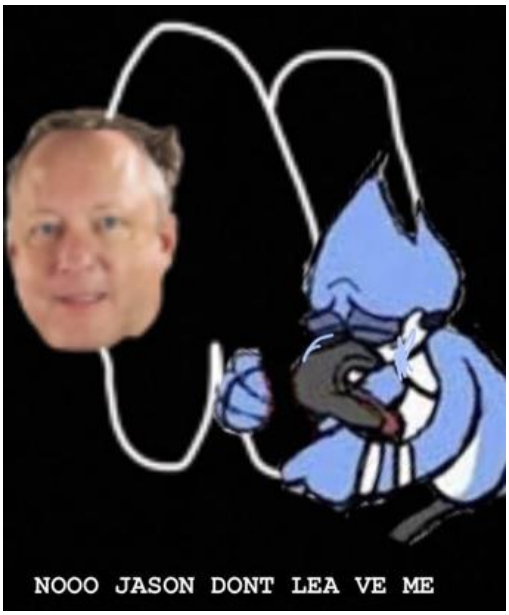
Plaintiff I.P. is a senior at Tullahoma High School. (Doc. 36, Am. Compl. ¶ 9.) He is an accomplished trombonist in the school band and a leader in his local Boy Scouts of America chapter. (*Id.* ¶ 21.) Like millions of high school students, I.P. uses social media to express himself through photos and video. I.P. uses his Instagram account, created when he was 12, to share content with family and friends. (*Id.* ¶ 22.)

During his freshman and sophomore years, I.P. grew to perceive his (now former) Tullahoma High School principal, Jason Quick, as an overly stern and humorless administrator. (*Id.* ¶ 25.) So, on May 22, 2022, from his father's home in Alabama during summer vacation, I.P. reposted an image showing Quick holding a box of fruit and vegetables with the text "🔥My brotha🔥." (*Id.* ¶¶ 27–29.) By reposting the image and adding the text "like a sister but not a sister <33," I.P. intended to suggest, tongue-in-cheek, a friendship between Quick and I.P. and to satirize Quick's excessively serious demeanor toward students. (*Id.*) I.P. also added the text "On god" in the image to signify his firm belief in the message. (*Id.* ¶ 30.)

On June 9, 2022, during a family vacation to Italy, I.P. posted an image showing Quick as an anime (i.e., Japanese cartoon) cat wearing whiskers, cat ears, and a dress. (*Id.* ¶ 31.) The image included the text "Neko quick" and "Nya!" because Neko means "cat" in Japanese and "Nya" is onomatopoeia used in anime for a cat's meow. (*Id.* ¶¶ 32–33.) I.P. posted the image to satirize Quick's desire to be seen by students as a serious and professional academic administrator. (*Id.* ¶ 34.)



On August 2, 2022, while at home following the second day of school, I.P. posted a third image showing Quick's head superimposed on a hand-drawn cartoon meant to resemble a character from the online game *Among Us*. (*Id.* ¶ 35.) The image also shows a cartoon bird named Mordecai, from the Cartoon Network television series *Regular Show*, hugging Quick's leg. (*Id.*) I.P. posted the image to satirize Quick's desire to be seen by students as a serious authority figure by implying Quick had a relationship with a cartoon bird. (*Id.* ¶ 36.)



Quick and Crutchfield suspend I.P. from school for his Instagram posts.

Each school year, Tullahoma High School distributes a Student and Parent/Guardian Handbook containing rules regarding students' social media posts. (*Id.* ¶¶ 46–47.) The Handbook for the 2022–2023 school year provided:

> Any student who records and/or disseminates in any manner an unauthorized or misrepresented photograph, video, or recording for the purpose of embarrassing, demeaning, or discrediting the reputation of any student or staff, or that results in the embarrassment, demeaning, or discrediting of any student or staff, or results in any action or activity disruptive to the educational process shall be subject to disciplinary action up to and including suspension or expulsion at the discretion of the principal.

(*Id.* ¶ 47.) The Handbook provided no guidance to students or parents regarding what constitutes "embarrassing," "demeaning," or "discrediting" content. (*Id.* ¶¶ 48–49.)

The Handbook also provided that "[p]articipation in activities, groups, and teams is a privilege at Tullahoma High School. Using social media by a student 'unbecoming of a Wildcat' [*sic*] may result in discipline, including suspension or removal from the activity, group, leadership

position, or team." (*Id.* ¶ 51.) The Handbook, however, provided no guidance to students or parents as to what makes a social media post "unbecoming of a Wildcat." (*Id.* ¶ 52.)

On August 10, 2022 (just over a week after I.P.'s third post), immediately following band rehearsal after classes had been dismissed for the day, I.P.'s band teacher escorted him to the school's front office, where Quick and Assistant Principal Derrick Crutchfield were waiting. (*Id.* ¶¶ 57–59.) Quick ordered I.P. to read the Social Media Policy aloud to Quick, Crutchfield, and I.P.'s band teacher. (*Id.* ¶¶ 63–64.)

Quick demanded I.P. tell him the meaning of his Instagram posts and why he posted them.[1] (*Id.* ¶ 65.) I.P admitted he posted the images to Instagram because he found the images funny. (*Id.* ¶ 66.) Quick directed I.P. into Crutchfield's office. (*Id.* ¶¶ 70–71.) Quick had ordered Crutchfield to suspend I.P. (*Id.* ¶ 74.) And, once in Crutchfield's office, the Assistant Principal told I.P. he would receive a five-day, out-of-school suspension. (*Id.* ¶ 72.)

On August 12, I.P.'s mother, B.P., met with Crutchfield and Quick. (*Id.* ¶ 99.) When B.P. met Crutchfield, Crutchfield informed her he reduced I.P.'s suspension to three days because he had "reviewed" the situation. (*Id.* ¶ 100.) When B.P. met Quick, he confirmed that I.P. remained suspended. (*Id.* ¶¶ 102.) B.P. handed Quick and Crutchfield a letter demanding they immediately lift I.P.'s suspension under *Mahanoy* and preserve all relevant documents. (*Id.* ¶ 104.) On Monday, August 15, 2022, B.P. emailed Quick regarding their August 12 conversation and asked him to confirm the basis of I.P.'s suspension. (*Id.* ¶¶ 105–06.) Quick, copying Crutchfield, confirmed to

[1] Quick also questioned I.P. about two other images apparently circulating among students, one depicting Quick at a Klan event and another showing him gesturing at Adolf Hitler (the "New Images"). (*Id.* ¶ 67.) As noted in Section III, *infra*, the School District confirms it did not suspend I.P. based on the New Images. The School District's confirmation is consistent with its contemporary correspondence in August 2022 when Quick wrote B.P. (with Crutchfield copied) and explicitly assured her I.P.'s suspension was not based on the New Images. (*Id.* ¶¶ 106–11.)

B.P. that Defendants based I.P.'s suspension solely on I.P.'s three Instagram posts and told B.P. that I.P.'s posts violated the Social Media Policy. (*Id.* ¶¶ 107–11.)

After I.P. sues, the School District abruptly nixes the Social Media and Wildcat Policies.

On July 19, 2023, I.P. filed a Verified Complaint alleging his August 2022 suspension, the Social Media Policy, and the Wildcat Policy violated his First and Fourteenth Amendment rights. (*Id.* ¶ 112.) I.P. also moved for a preliminary injunction asking the Court to lift I.P.'s suspension and halt enforcement of the policies while the case proceeds. (Doc. 4, Pl.'s Mot. Prelim. Inj. at 1.)

That same day, in response to I.P.'s lawsuit and motion, the School District abruptly removed the Social Media Policy and Wildcat Policy from the Student Handbook. (Amend. Compl. ¶ 114.; Doc. 53, School District's Br. Supp. Mot. Dismiss ("SD Br.") at 3, 16, 18; Doc. 53-1, Stephens Decl. ¶ 2.) The School District has not explained why it made the decision or who was involved, noting only it "was at the direction . . . of counsel." (Doc. 53, SD Br. at 3, 16, 18.) Nor has the School District explained what process it undertook to remove the policies.

On August 14, 2023, the School District and I.P. entered into an agreement whereby, in exchange for I.P. withdrawing his motion for preliminary injunction, the School District would remove I.P.'s suspension from his record for the duration of the litigation and confirm that it had removed the Social Media Policy and Wildcat Policy from the Student Handbook in response to I.P.'s litigation. (Doc. 25, Stipulation Regarding Pl.'s Mot. Prelim. Inj.)

After I.P. amended the complaint, Defendants filed answers and affirmative defenses. (Doc. 36, Am. Compl.; Doc. 42, Quick Am. Answer; Doc. 43, Crutchfield Am. Answer; Doc. 44, School District Am. Answer.) Within a week, Defendants moved for judgment on the pleadings under Rule 12(c). (Doc. 51, Quick and Crutchfield Br. Supp. Mot. Dismiss ("Q&C Br."); Doc. 53, SD Br.) Quick and Crutchfield filed a joint motion, while the School District filed its own motion also asserting lack of subject matter jurisdiction over I.P.'s equitable claims.

ARGUMENT

I. Standard of Review

I.P.'s Amended Complaint explains how Defendants violated his First and Fourteenth Amendment rights by suspending him for protected expression and maintaining unconstitutional policies. In reviewing a Rule 12(c) motion for judgment on the pleadings, courts apply the same standard as a Rule 12(b)(6) motion to dismiss. *Moderwell*, 997 F.3d at 659 (denying a Rule 12(c) motion for qualified immunity dismissal on the pleadings). That means this Court must "construe the complaint in the light most favorable to [I.P.], accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of [I.P.]." *Anders v. Cuevas*, 984 F.3d 1166, 1174 (6th Cir. 2021) (cleaned up). The Court may grant the motion only if "no material issue of fact exits and the party making the motion is entitled to judgment as a matter of law." *Id.*

Defendants' Answers, and material included in or appended to their Answers, may not be considered if they "rebut, challenge, or contradict anything in the plaintiffs' complaint." *Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993) (cleaned up). This Court's inquiry remains focused solely on I.P.'s Amended Complaint and the determination of whether it "contains enough facts to make the legal claims facially plausible." *Anders*, 984 F.3d at 1174 (cleaned up).

This Court may, however, consider materials outside the Amended Complaint in confirming that it has subject matter jurisdiction over I.P.'s claims for prospective relief regarding his suspension, the Social Media Policy, and the Wildcat Policy. The School District's assertion that its intervening policy change moots I.P.'s equitable claims represents a "factual" attack on a court's jurisdiction and the Court may consider the evidence the School District contends reflects its changed course. *See Thomas v. City of Memphis*, 996 F.3d 318, 323–24 (6th Cir. 2021) (considering a city's new policy as well as documents regarding the genesis of the new policy in deciding whether the voluntary cessation doctrine mooted equitable claims). While I.P. bears the

burden of establishing subject matter jurisdiction, the "'heavy burden' of demonstrating mootness falls on [the School District]." *Id.* at 324 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Here, I.P.'s equitable claims are not moot and therefore this Court retains subject matter jurisdiction over these claims.

II. The First Amendment Protects I.P.'s Nondisruptive, Private, Off-Campus Speech.

Defendants violated the First Amendment by suspending I.P. for protected First Amendment expression. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. During school, the government may only restrict expression which causes, or may be reasonably forecast to cause, substantial disruption, or which invades the rights of others. *Id.* at 513–14. Once students exit the schoolhouse gates, "the leeway the First Amendment grants to schools" to restrict expression "is diminished" even beyond that. *Mahanoy*, 141 S. Ct. at 2046.

Here, I.P.'s Amended Complaint alleges he posted images to Instagram lampooning Principal Quick on his own time, away from school, from his own device, and the posts did not cause or threaten to cause material disruption, substantial disorder, or an invasion of the rights of others. Therefore, I.P.'s satirical expression, regardless of whether it embarrassed Quick, remained firmly within the First Amendment's protection. The Court must ignore Defendants' alternate version of events because, on a motion for judgment on the pleadings, the Court must treat I.P.'s allegations as true. The Court should also ignore Defendants' new justifications for suspending I.P. because these post hoc rationales do not pass the common sense test and, even if they did, Defendants are prohibited from relying on justifications not provided to I.P. at the time of the suspension. And even if the Court considered Defendants' improper factual protestations or new justifications, Defendants still could not constitutionally punish I.P. for his speech.

A. The First Amendment protects lampooning a high school principal.

The First Amendment protects criticizing and satirizing public officials. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). And the First Amendment's protections extend beyond the spoken word and include symbolism and artistic expression. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). Indeed, "from the early cartoon portraying George Washington as an ass down to the present day . . . satirical cartoons have played a prominent role" in American expression. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 54 (1988).

Students have "fundamental rights which the State must respect," including "freedom of expression." *Tinker*, 393 U.S. at 511. Schools bear the burden of demonstrating that a student's expression "would *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school" before punishing or censoring speech. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc) (quoting *Tinker*, 393 U.S. at 509). I.P. posted the three images giving rise to his suspension away from school and outside school hours, the images did not cause disruption at school, and Defendants lacked information supporting a reasonable forecast that I.P.'s three tame Instagram images could have materially and substantially interfered with the school day at a high school. (Doc. 36, Am. Compl. ¶¶ 40–45.) Defendants therefore cannot meet their high burden to justify punishing I.P.'s expression.

Public schools have leeway to regulate some on-campus student speech because schools stand *in loco parentis*, i.e., in the place of parents. *Mahanoy*, 141 S. Ct. at 2046. For example, schools can limit on-campus speech that causes or can be reasonably forecast to cause material disorder, substantial disruption, or an invasion of the rights of others. *Tinker*, 393 U.S. at 513–14. Schools can also regulate on-campus speech bearing the school's imprimatur, containing gratuitous explicit vulgarity, or promoting illegal drug use. *See Hazelwood Sch. Dist. v. Kuhlmeier*,

484 U.S. 260, 271–73 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Morse v. Frederick*, 551 U.S. 393, 400–01 (2007).

But a student's *off-campus* speech that does not substantially disrupt school or invade the rights of others enjoys full First Amendment protection. *Mahanoy*, 141 S. Ct. at 2045. Indeed, the Court noted that had the student in *Bethel*, who received a suspension for giving an innuendo-laden student council election speech during an assembly, "delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405.

Mahanoy held that schools have "diminished" authority to punish off-campus speech. 141 S. Ct. at 2046. The Court noted that "three features of off-campus speech . . . often, even if not always" distinguish off-campus speech from student expression during the school day. *Id.*

First, away from campus, schools "will rarely stand *in loco parentis*." *Id.* During the school day, administrators "stand[] in the place of students' parents" when parents are not there to "protect, guide, and discipline them." *Id.* But outside school, parents—not the government—are responsible for raising the next generation of Americans. Second, "from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day." *Id.* The Court explained, "that means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." *Id.* And third, "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." *Id.* The Court noted, "America's public schools are the nurseries of democracy" and schools "have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

Mahanoy provides a useful example of a school's restricted ability to punish off-campus speech. There, a high schooler disappointed at only making the junior varsity cheerleading team posted two rants to social media expressing her displeasure. One post read, "Fuck school fuck softball fuck cheer fuck everything." *Id.* at 2043. The second complained that the coach gave preferential treatment to another student. *Id.* In response, the school suspended the student from the junior varsity squad for the upcoming year. *Id.*

The Supreme Court held the suspension violated the First Amendment. The Court explained the student "spoke outside the school on her own time," when her parents, not the school, were responsible for her supervision. *Id.* at 2047. The Court held the suspension violated the First Amendment because the posts had a negligible impact at school. The Court noted that "discussion of the matter took, at most, 5 to 10 minutes of an Algebra class 'for just a couple of days'" and that a few members of the cheer squad were "upset" by the posts. *Id.* at 2047–48. The Court held this minimal disturbance did not satisfy *Tinker*'s "demanding standard" of a substantial disruption to justify punishing a student for expression. *Id.* at 2048. Likewise, here, I.P. alleges he posted the images to social media on his own time, away from school, and the images did not disrupt school. And unlike in *Mahanoy*, I.P. did not even use profanity in his posts.

I.P.'s posts lampooned his high school principal, the head of the "community" of which I.P. "forms a part." *Id.* at 2046. Like B.L.'s posts in *Mahanoy*, I.P.'s images "did not involve features that would place it outside the First Amendment's ordinary protection." *Id*. The posts did not amount to fighting words, nor were they obscene, and Defendants do not assert otherwise. *Id.*; *see Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cohen v. California*, 403 U.S. 15, 19–20 (1971). I.P., like B.L., engaged in pure speech protected by the First Amendment, and Defendants have not satisfied the "demanding standard" necessary to police his off-campus expression.

B. Defendants' motions impermissibly rely on their own version of events, which still do not show substantial disruption.

Defendants' motions inappropriately rely on their own version of events contained in their Answers and a "statement" attached to Quick's Answer. (Doc. 53, SD Br. at 2; Doc. 51, Q&C Br. at 4.) But a defendant cannot rely on their own story in a Rule 12(c) motion for judgment on the pleadings. *Song*, 985 F.2d at 842. "It is axiomatic . . . that for purposes of the court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." Judgment on the Pleadings—Practice Under Rule 12(c), 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1368 (3d ed.); *see also Nat'l Metropolitan Bank v. United States*, 323 U.S. 454, 457 (1945) (on a Rule 12(c) motion for judgment on the pleadings, the court must "treat the case as though" the allegations of the non-moving party are "established").

Even if the Court could consider Defendants' assertions at this stage, Defendants do not identify any disruption (much less substantial disruption) caused by I.P.'s three Instagram posts. Nor do they identify what, if any, interest they have in policing I.P.'s off-campus speech and how that interest overcomes I.P.'s interest in exercising his First Amendment rights. *See Mahanoy*, 141 S. Ct. at 2047 (rejecting, as insufficient to "overcome B.L.'s interest in free expression," the school's supposed interest "in punishing the use of vulgar language aimed at part of the school community" because "B.L. spoke outside the school on her own time" and "there is no reason to believe B.L's parents had delegated to school officials their own control of B.L.'s behavior").

The School District says that "school personnel (the Principal, Assistant Principal, and band director) had to spend time during the school day investigating the sharing of memes." (Doc. 53, SD Br. at 11.) If taking time to investigate and punish student expression were sufficient

"disruption" to satisfy *Tinker*, schools could create their own disruption merely by investigating and then punishing protected speech. The First Amendment does not allow such a result.

The only in-school effect Quick's statement identifies *at all* from social media posts relates to the New Images circulating among students—images the School District concedes were not the basis of I.P.'s suspension (Doc. 53, SD Br. at 24). The School District claims a student came to Quick's office to tell him about the New Images. (*Id.* at 2, 9; Doc. 51, Q&C Br. at 4.)

That's it. Even in their own version of events, Defendants offer only one student reporting the New Images and they allege no effects from I.P.'s three Instagram posts. That is not "substantial disruption." And it is well short of the disruption the Supreme Court found insufficient in *Mahanoy*, which involved "upset" students and in-class discussion for "a couple of days." 141 S. Ct. at 2047–48. Similarly, in *C1.G*, the Tenth Circuit held multiple parents bringing a student's anti-Semitic social media posts to the principal's attention did not constitute a "substantial disruption" because the principal failed to "substantiate his feeling that the learning environment had been impacted." *C1.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270, 1278–79 (10th Cir. 2022)

Even for a "reasonabl[e]" forecast of substantial disruption, the Supreme Court warned that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508, 515. Schools bear the burden to provide specific facts showing an "undifferentiated fear or apprehension" has "transform[ed] into a reasonable forecast that a substantial disruption or material interference will occur." *J.S.*, 650 F.3d at 930.

There, Defendants' well runs dry. I.P.'s Instagram posts satirized Principal Quick's overly serious nature by showing Quick holding a box of vegetables, as an anime cat in a dress, and being hugged by a cartoon bird. I.P.'s posts would not—and, as Quick's extraneous statement reflects, in fact did not—cause substantial disruption at Tullahoma High School. Defendants do not come

close to meeting the "demanding standard" necessary to step into the role of I.P.'s parents and punish him for off-campus expression. *Mahanoy*, 141 S. Ct. at 2048.

C. Defendants' impermissible post hoc justifications for censoring I.P., even if they made sense, must be ignored.

Relying on information and justifications absent from their written explanation in 2022 of why they suspended I.P., Defendants now argue I.P.'s off-campus speech falls outside First Amendment protection because photoshopping Quick into a French maid outfit with cat ears and whiskers with the caption "Neko Quick" "sexualized" the principal. (Doc. 53, SD Br. at 7.)[2]

It did not. From *The Flintstones*[3] to *SpongeBob SquarePants*,[4] placing men in women's clothing (and French maid outfits) for comedic effect has been a staple of American kids' entertainment for generations:[5]

[2] "Neko" means "cat" in Japanese. (Doc. 36, Am. Compl. ¶ 32.)

[3] *The Flintstones*, Season 1, Episode 25 "In the Dough" (1961) (Fred Flintstone and Barney Rubble don dresses and wigs to take their wives' place in a bake-off).

[4] *SpongeBob SquarePants*, Season 3, Episode 47b "Can You Spare a Dime?" (2001) (SpongeBob wears a French maid outfit while caring for his just-fired friend Squidward).

[5] The Court can take judicial notice of the existence of media in the public domain, so long as, like here, it is the existence of the media which is relevant rather than the truth of its contents. *See, e.g., Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 438 (S.D.N.Y. 1985) ("This Court takes judicial notice that members of the New York Police Department are often portrayed as Irish, smokers, drinkers, and third or fourth generation police officers.")

Defendants make much of the fact that the Japanese word for cat, "Neko," apparently has a sexualized slang meaning in Japan.[6] Defendants also point to I.P.'s former Instagram handle, which contained a slang term for homosexuals.[7] Defendants fail to point to anything in the Amended Complaint suggesting I.P. knew of or intended a sexual subtext to his posts, or that any student or staff member interpreted the posts to have such a meaning. Relatedly, Defendants point to nothing suggesting *they* knew of or considered this supposed subtext when suspending I.P.

Defendants' arguments are akin to those rejected in *Sagehorn v. Independent School District No. 728*, 122 F. Supp. 3d 842 (D. Minn. 2015). There, the court denied a school district's Rule 12(c) motion for judgment on the pleadings in an off-campus school speech case involving a social media post joking that a teacher engaged in a physical relationship with a student. *Id.* at 854. The school district asked the court to rely on a "slang" definition of a term used in the student's post, but the court refused, reasoning the term had "varying meanings, including connotations not involving sexual intercourse" and the school could not point to allegations in the complaint suggesting the student intended the term's slang meaning. *Id.* The court explained, "ultimately, this is a question best left to the jury, not decided by the Court on a Rule 12(c) motion." *Id.*

[6] Here, Defendants try to evade Rule 12(c)'s standard, which requires that this Court accept I.P.'s allegations about his Neko Quick meme as true, by requesting judicial notice of a Dictionary.com entry concerning an alternate Japanese slang usage of the word "neko." (Doc. 53, SD Br. at 7–8, nn.1, 2; Doc. 51, Q&C Br. at 14–15 nn.4, 5.) Judicial notice is only appropriate for matters which "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Defendants neglect to mention the online definition they rely upon contains an explicit caveat: it is "not meant to be a formal definition like most terms we define." *Neko*, Dictionary.com, https://www.dictionary.com/e/translations/neko/ (last visited Nov. 9, 2023).

[7] Defendants' argument appears to be that because I.P.'s former Instagram handle contained the word "**g", it painted all his posts with a sexualized meaning. Again, Defendants cite nothing in the Amended Complaint suggesting I.P. intended, or (in August 2022) Defendants interpreted, I.P.'s *username* as having expressive supremacy over the contents of his posts.

The School District's 14-months-too-late justification for punishing I.P. for the cartoon bird image likewise fails. Akin to its claims of "sexualization" with the French maid meme, the School District points to nothing in the Amended Complaint suggesting I.P. intended, or anyone interpreted, a violent meaning from the image simply because it contained a character from a video game which has violent elements.[8] And as with the other image, the School District points to nothing suggesting this interpretation formed a basis for the suspension in August 2022.[9]

The School District then admits that even *it* does not believe its own belated spin by conceding: "The issue is not that Plaintiff was calling for violence against Principal Quick, but that making him a victim character in a violent video game could have humiliated him among the student body." (Doc. 53, SD Br. at 9.) So the School District's argument was really an excuse to use the word "violent" as many times as it could to tar I.P.'s expression, then ultimately disclaim it interpreted the posts to be violent. The School District's resort to such tactics speaks for itself. The First Amendment protects I.P.'s right to nondisruptive off-campus expression, not a high school principal's feelings.

In any event, the government may not attack a First Amendment claim with justifications not considered or conveyed to the speaker at the time of the punishment. So courts reject post hoc explanations like Defendants' for censoring protected speech because of the potential for governmental abuse. Just last year, the Supreme Court refused a school district's explanation for subduing a high school coach's quiet prayer after football games because it "never raised concerns along these lines in its contemporaneous correspondence" with the coach. *Kennedy v. Bremerton*

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[8] Indeed, many video games contain "violent elements." The classic arcade game *Donkey Kong* could be poorly described as "Ape attempts to murder plumber."

[9] The School District also relies on material outside the pleadings to argue *Among Us* is a violent game. *See* Doc. 53, SD Br. at 9 (citing a YouTube video and a fan-written article). These materials are not subject to judicial notice since they are offered for the truth of their contents.

Sch. Dist., 142 S. Ct. 2407, 2432 n.8 (2022). The Supreme Court reiterated that "government justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* (cleaned up); *see also Moore v. City of Kilgore*, 877 F.2d 364, 389 (5th Cir. 1989) (explaining the dangers that standardless "post hoc rationalizations" pose to free expression).

The First Circuit's decision in *Norris ex rel. A.M. v. Cape Elizabeth School District*, is on point. 969 F.3d 12, 25–26 (1st Cir. 2020). *Norris* involved a female high school student anonymously posting a note in the girls' bathroom reading "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS." *Id.* at 14. Believing the notes referred to a specific person, the school suspended the student who posted the message for bullying. *Id.* at 17. After the student sued on First Amendment grounds, the school district pivoted, arguing the note "created an intimidating educational environment" and disrupted the school. *Id.* at 25 (cleaned up).

In refusing to entertain the new, litigation-crafted justifications, the First Circuit held schools "may not rely on post hoc rationalizations" for suspensions. *Id.* The court noted that "[i]n *Tinker* and its progeny, the Supreme Court considered only those justifications offered to the students when they were disciplined in assessing the permissibility of the speech restrictions, not reasons that were articulated only after litigation commenced." *Id.* at 26 (citing *Tinker*, *Morse*, *Hazelwood*, and *Bethel*). The court added, "shifting rationales may provide convenient litigating positions for defending their decision, but they are too easily susceptible to abuse by obfuscating illegitimate reasons for speech restrictions." *Id.* The First Circuit concluded, "a school cannot suppress speech simply because it is unpopular with or critical of the school administrators." *Id.*

Settled law prohibits Defendants from rewriting history with justifications they wish they used and information they wish they knew in 2022. Even if their litigation-created excuses related

to "sexualization" and the *Among Us* video game passed the common sense test, the arguments would be barred. *See Bremerton Sch. Dist.*, 142 S. Ct. at 2432 n.8; *Norris*, 969 F.3d at 25–26.

D. Even if I.P.'s posts carried the meaning Defendants now claim they do, they remain protected First Amendment expression.

Even if I.P.'s posts had the subtext Defendants now claim, the First Amendment still protects them. I.P.'s posts were not obscene, nor did they constitute fighting words. Defendants do not argue otherwise. And courts have consistently held that student social media posts criticizing and making fun of school officials, even with vulgar and lewd terms, constitute protected First Amendment expression. This is because "[s]peech does not lose its protected character . . . simply because it may embarrass others." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Indeed, in *Mahanoy*, the Court explained that although B.L.'s Snapchat posts aimed at the cheerleading coach were "crude, [they] did not amount to fighting words," and while the posts "used vulgarity, her speech was not obscene as this Court has understood that term." *Mahanoy*, 141 S. Ct. at 2046 (citing *Chaplinsky*, 315 U.S. 568; *Cohen*, 403 U.S. at 19–20). In other words, absent substantial disruption, normal First Amendment principles apply when a student speaks on their own time beyond the schoolhouse gates, and the school's interest in punishing off-campus student speech like I.P.'s is "weakened considerably." *Id.* at 2047.

Layshock is squarely on point. There, the en banc Third Circuit unanimously held that a public high school could not discipline a student for creating, on his own time and away from school, a parody Myspace profile of his school principal. 650 F.3d at 207. The parody referred to the principal as a "big steroid freak," a "big whore," and a "big fag"; referenced him smoking a "big blunt" and stealing a "big keg"; and listed his interests as "Transgender, Appreciators of Alcoholic Beverages." *Id.* at 208. The Third Circuit held that the student's parody profile, though abrasive, remained protected by the First Amendment since it "did not disturb the school

environment and was not related to any school sponsored event." *Id.* at 207. Here, I.P.'s posts, even with the subtext Defendants now try to create (in violation of the Rule 12(b)(6) standard), are far tamer than the fully protected epithets and insults in *Layshock*.

Similarly, in *J.S.*, the en banc Third Circuit held that a student engaged in protected First Amendment expression in creating a sexually vulgar parody Myspace profile of her school principal. 650 F.3d at 930–31. The parody described the principal as an "oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL" who loved "children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and . . . my darling wife who looks like a man." *Id.* at 921. The school district argued that the profile disrupted school because teachers overheard students discussing the profile in class and the school counselor had to cancel student appointments to accommodate the principal's meeting with J.S. and her parents about the profile. *Id.* at 922–23. But the Third Circuit held these minor disturbances did not satisfy *Tinker*'s demanding standard of a "substantial disruption." *Id.* at 925.

Here, as discussed in Sections II(A)–(B), *supra*, Defendants point to nothing in the Amended Complaint suggesting I.P.'s Instagram posts caused *any* disruption. Indeed, the Amended Complaint specifically alleges the posts did not cause disruption and the School District lacked supporting facts to forecast a substantial disruption. (*See* Doc. 36, Am. Compl. ¶¶ 40–45.)

At this stage, the Court is required to accept I.P.'s allegations as true. *Moderwell*, 997 F.3d at 659. And I.P.'s allegations of a lack of disruption necessarily carry the day. For example, in *Sagehorn*, the court denied the school district's 12(c) motion to dismiss the student's First Amendment claim, explaining it was "bound to accept the complaint's factual allegations as true" that the social media posts did not cause substantial disruption. *Id*; *see also DeBenedetto v. Lacey Twp. Bd. of Educ.*, 21-8050, 2022 WL 939388, at *4 (D.N.J. Mar. 29, 2022) (denying school

district's 12(b)(6) motion in off-campus student speech case because "whether a likelihood of substantial disruption occurred" is a "factual question[] inappropriate for resolution at this stage").

True, schools may punish off-campus speech in cases of "serious or severe bullying or harassment targeting particular individuals" and "threats aimed at teachers or students," because it substantially disrupts the school environment. *Mahanoy*, 141 S. Ct. at 2045. But there is no First Amendment exception for "ridicul[ing]" or "humiliat[ing]" a principal. (Doc. 53, SD Br. at 9.)

Defendants rely on the Sixth Circuit's decision in *Kutchinski ex rel. H.K. v. Freeland Community School District*, 69 F.4th 350, 359 (6th Cir. 2023). (*See* Doc. 53, SD Br. at 10, 12, 24; Doc. 51, Q&C Br. at 2, 7–10, 14, 17.) But *Kutchinski* supports I.P., not Defendants, because it showcases the high bar for "substantial disruption" Defendants cannot clear. *Kutchinski* involved a student's off-campus social media posts threatening and targeting specific students and teachers. One post read, "I will find and kill [teacher's name] I'm going to strangle him with my barehands [sic] until he is barely conscious then let go. Once he is awake again I'm gonna run him over with my fucking car and crush his skull into a million pieces." 69 F.4th at 354–55.

The Sixth Circuit explained that the student "direct[ing] sexual and violent posts at three Freeland teachers and a student" would "substantially disrupt normal school proceedings." *Id.* at 359. The court noted that a substantial disruption occurred because a targeted teacher "was crying in one of her classes" and instructors reported "several classroom disruptions going on in their rooms." *Id.* at 355; *see also Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 711–13 (9th Cir. 2022) (a "substantial disruption" occurred when social media posts targeted students with violent threats and resulted in students "upset, yelling, or crying" and "too upset to go to class").

The facts alleged in I.P.'s Amended Complaint come nowhere close to the violent threats and pervasive sexual harassment in *Kutchinski* or *Chen*. Indeed, Quick and Crutchfield concede

the posts in *Kutchinski* were "much more blatantly sexual and harassing" than the tame material that resulted in I.P.'s suspension. (Doc. 51, Q&C Br. at 14.) *Mahanoy*, *Layshock* and *J.S.* show off-campus social media posts retain First Amendment protection even if they discuss school administrators or teachers with "mature" themes or language. *See also Sagehorn*, 122 F. Supp. 3d at 854, 862 (denying a school district's 12(c) motion seeking dismissal (and qualified immunity), holding the First Amendment protected a student's off-campus social media post joking a teacher engaged in a sexual relationship with a student since the post did not constitute "obscenity").

I.P.'s Amended Complaint contains no facts suggesting his Instagram posts substantially disrupted the school day. All Quick has is wounded self-pride. But there is no "I was embarrassed" exception to the First Amendment. *See Claiborne Hardware*, 458 U.S. at 910. Indeed, the First Amendment would be of little use if students could only post pictures of their principal looking gallant in a superhero costume. The Constitution guarantees Americans young and old the right to praise, criticize, satirize, or lampoon government officials and rightfully places the highest burden on a government wishing to censor or punish an American for their expression. Defendants do not come close to meeting that burden here. Their motions should be denied.

III. Defendants Violated I.P.'s Due Process Rights by Allowing Quick, the Object of I.P.'s Satire, to Involve Himself in the Suspension Decision.

Defendants violated I.P.'s Fourteenth Amendment rights by suspending him from school without due process of law. U.S. Const. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."). The Supreme Court explained that students have a right to receive a public education where the government provides it, and the government "may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975).

For a suspension of ten days or less, the Due Process Clause requires the government provide students "rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school." *Id.* Critically, the Constitution also requires "school officials responsible for deciding whether to exclude a student from school" to "be impartial." *Heyne v. Metro. Nashville Pub. Schs.*, 655 F.3d 556, 567 (6th Cir. 2011).[10]

Principal Quick, the subject of I.P.'s satire, could not constitutionally sit as I.P.'s adjudicator regarding whether that satire violated the Social Media Policy. Therefore, I.P.'s suspension should be permanently enjoined and declared unconstitutional since it resulted from a violation of I.P.'s right to procedural due process (Claim VIII), and Defendants cannot meet their burden to prove by a preponderance of the evidence that they would have suspended I.P. even absent the procedural due process violation. I.P.'s damages claim for violation of his due process rights (Claim III) should likewise remain in the case because nominal damages are available for procedural due process violations even without proof of injury, and even where a suspension was justified. Finally, Defendants' concession that the New Images were not the basis for I.P.'s suspension bars them from using the New Images to justify I.P.'s suspension.

A. Because I.P.'s posts lampooned Quick, involving Quick in the decision to suspend I.P. violated the Due Process Clause.

Involving Quick—the subject of I.P.'s satirical posts—in the decision to suspend I.P. deprived I.P. of an impartial adjudication and violated his right to procedural due process. And I.P. alleges more than Quick's "involvement;" I.P. alleges Quick *ordered* Crutchfield to suspend him and Crutchfield willingly participated in the suspension. (Doc. 36, Am. Compl. ¶¶ 69–74.)

[10] Far from being "very different legal standards," (Doc. 51, Q&C Br. at 18; Doc. 53, SD Br. at 19), the standards in *Heyne* and *Goss* are the same. *Heyne*, 655 F.3d at 565 ("We require no more process in the context of school suspensions of ten days or fewer than *Goss* demands."). *Goss*, like *Heyne*, applies to suspension of ten days or less.

"[I]t is a hallmark of procedural due process that 'a biased decisionmaker is constitutionally unacceptable.'" *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897 n.8 (6th Cir. 1991) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Supreme Court, through centuries of case law, identified "various situations . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. "Among these cases," the Court held, "are those in which the adjudicator . . . has been the target of personal abuse or criticism from the party before him." *Id.* at 47 & nn.14–15 (collecting authority). In other words: Principal Quick.

It is therefore well settled that when a school seeks to suspend a student for criticizing a school official, involving that official in the decision whether to suspend the student "is such as to preclude [] affording the student an impartial hearing." *Sullivan v. Hous. Indep. Sch. Dist.*, 475 F.2d 1071, 1077 (5th Cir. 1973); *see also Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 927 n.5 (6th Cir. 1988) ("Obviously, if Newsome had shown that the principal and/or superintendent . . . had developed a bias because of their involvement in the incident, they would not have been able to act as decisionmakers . . .").

In *Sullivan*, a high school principal removed a student from campus for distributing an unauthorized newspaper, after which, the court explained, the student "shouted 'the common Anglo-Saxon vulgarism for sexual intercourse'" at the principal. 475 F.2d at 1074. The Fifth Circuit held that because the student's alleged misconduct was a "personal confrontation" with the principal regarding the newspaper, the principal could not be involved in the decision to suspend the student without violating the student's right to an impartial hearing. *Id.* at 1077.

As in *Sullivan*, Quick was the subject of I.P.'s expression and then I.P.'s judge and jury for punishment. Quick decided (1) I.P.'s three Instagram posts violated the Social Media Policy, and

(2) the posts merited a suspension. (Doc. 36, Am. Compl. ¶¶ 73–74, 107, 178.) That's the due process the violation.

The presence of a potentially impartial official (Crutchfield) in the decision-making process does not cure the violation because the biased official's participation alone renders the process unconstitutional. *Heyne* explained that a potentially biased official's "involvement in the decision-making process is sufficient" at the pleading stage "to make out a colorable claim." 655 F.3d at 569. So too here. Applying *Heyne* and *Sullivan* demonstrates that Quick's involvement in the "decision-making process" over I.P.'s suspension violated I.P.'s right to procedural due process. *See also Doe v. Miami Univ.*, 882 F.3d 579, 601, 604 (6th Cir. 2018) (holding a student established a violation of due process rights when one of five administrators responsible for deciding discipline made pre-hearing statements pre-judging the student's guilt).

Defendants' focus on the fact they supposedly offered I.P. the opportunity to "be heard" is misplaced. There is more than one way for a government to deny the accused of due process. The ability to be in front of an impartial decisionmaker is relatively meaningless if the accused cannot present their own witnesses, evidence, and explanation. Conversely, the ability to offer an explanation and evidence is meaningless if the decisionmaker has a preexisting bias. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Heyne*, 655 F.3d at 566 (cleaned up). Having protestations heard by a biased decisionmaker violates a citizen's right to be heard "in a meaningful manner." *Id.*

B. I.P.'s equitable due process claim should not be dismissed because the School District cannot prove at the 12(b)(6) stage it would have suspended I.P. without Quick's involvement.

Claim VIII, seeking injunctive and declaratory relief against I.P.'s suspension because of Quick's involvement, should not be dismissed. The School District fails to prove by a preponderance of the evidence that, absent Quick's actions, it still would have suspended I.P. And

for a procedural due process claim seeking equitable relief, it is a government defendant's burden to "prove, by a preponderance of the evidence" that, even absent a biased proceeding, the student "would have still rightfully been [punished]." *Newsome*, 842 F.2d at 928 (reversing dismissal of procedural due process claim and remanding for an assessment under the proper standard).

At the pleading stage, where I.P.'s allegations are accepted as true, Defendants cannot meet that burden. I.P. alleges Quick was personally involved in, and, indeed, ordered I.P.'s suspension for posting three images satirizing Quick on Instagram. (Doc. 36, Am. Compl. ¶¶ 73–74, 178.) I.P. further alleges that Quick "intended to cause I.P. emotional distress to deter I.P. from satirizing Quick going forward." (*Id.* ¶ 96.) I.P.'s version of events necessarily prevails at this stage.

Defendants' focus on cases finding a "lack of prejudice" when a plaintiff admits to the underlying conduct is a red herring. First, each case involved conduct without an underlying speech component.[11] Second, Defendants' authority stands for the unremarkable proposition that when a plaintiff confesses to violating the law or regulation at issue, they cannot be heard later to complain about a lack of procedural due process because, had the alleged deficiency not occurred, it would not have made a difference.

Here, I.P. does not and has never admitted that he violated the Social Media Policy. That I.P. admitted to posting the three Instagram images is irrelevant. It is Quick's involvement in the subjective decision that I.P.'s posts violated the policy that triggers the due process problem. Defendants' argument would necessarily be the same had I.P. posted an uncaptioned picture of a

[11] *See Keough v. Tate Cnty. Bd. of Educ.*, 748 F.2d 1077, 1083 (5th Cir. 1984) (rejecting student's procedural due process claim because the student admitted being involved in fights and that fighting was "against school rules"); *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001) (rejecting due process claim because the student "admitted . . . that he assaulted his roommate"); *Kowalski v. Berkeley Cnty Schs.*, 652 F.3d 565, 576 (4th Cir. 2011) (lack of due process in fact-finding procedure not actionable because the student "admitted her conduct").

teddy bear on his Instagram and Defendants decided it constituted a violation. I.P. would not forfeit the ability to challenge the bias of the decisionmaker by admitting he posted the bear.

The Social Media Policy necessitates a judgment call by a school administrator regarding whether an image unduly "humiliated," "discredited," or "embarrassed" a student or member of staff. The Social Media Policy is (as I.P.'s Amended Complaint and preliminary injunction brief explain) not only subjective, but unlawfully so to the point it is unconstitutionally void for vagueness. (*See id.* ¶¶ 210–22; Doc. 5, Memo. in Supp. of Pl.'s Mot. For Prelim. Inj. at 17–19.) Indeed, the point of the void-for-vagueness doctrine is to ensure laws regulating speech have "precision and guidance" in their terms so "those enforcing the law do not act in an arbitrary or discriminatory way." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 422 (6th Cir. 2014). Defendants point to nothing in the Amended Complaint suggesting I.P.'s images were of such a nature as to make a violation of the Social Media Policy a foregone conclusion (like an admission of being in a fist-fight would be to a charge of fighting). *See, e.g., Keough*, 748 F.2d at 1083. To be sure, Defendants have not met their burden to establish such a conclusion by a preponderance of the evidence on a Rule 12(b)(6) standard. *Newsome*, 842 F.2d at 928.

Quick, the subject of I.P.'s speech, decided that I.P.'s social media posts lampooning him (1) represented a violation of the vague Social Media Policy and (2) merited a suspension. Under *Withrow* and *Sullivan*, Quick should not have been involved in the decision-making process. I.P. alleged a well-settled violation of procedural due process: participation of a personally involved decisionmaker in a subjective judgment call. Claim VIII should remain.

C. Because procedural due process rights are "absolute," I.P.'s due process damages claim survives even if the School District would have suspended I.P. without Quick's involvement.

Regardless of whether Defendants can show they would have suspended I.P. without Quick's involvement, I.P.'s procedural due process damages claim (Claim III) survives. The

Supreme Court squarely held that a student deprived of their procedural due process rights regarding a suspension is entitled to at least nominal damages regardless of whether the school can demonstrate the suspension was "justified." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The Court explained the right to procedural due process is "absolute," and therefore "because of the importance to organized society that procedural due process be observed," claims for its deprivation are "actionable for nominal damages without proof of actual injury." *Id.*

Therefore, I.P. is entitled to at least nominal damages because, as explained in Section III(B), Defendants deprived I.P. of his "absolute" right to an unbiased decisionmaker. *Id.*; *see also Archbold-Garrett v. New Orleans City*, 893 F.3d 318, 322 (5th Cir. 2018) (vacating dismissal of procedural due process damages claim because "[a] procedural due process violation is actionable and compensable without regard to any other injury").

D. Defendants cannot use post hoc rationales to justify I.P.'s suspension.

The School District cannot constitutionally justify I.P.'s suspension on any rationale other than those it provided I.P. at the time of his suspension—i.e., that his three satirical Instagram posts violated the prohibition on posts that "embarrass[], demean[], or discredit[] any student or staff."

Because the School District now disavows that it based I.P.'s suspension on anything other than I.P.'s Instagram posts (Doc. 53, SD Br. at 24), the Court should hold it to that representation. And based on that representation, I.P. consents to dismissal of Claim IX without prejudice because the School District is estopped from reversing course later in the litigation. *See Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217 (6th Cir. 1990) ("The doctrine of judicial estoppel forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.'") (cleaned up).

Despite the disavowal, Defendants attempt to muddy the waters by repeatedly referencing the New Images in their briefs. (Doc. 53, SD Br. at 2, 3, 9, 10, 11, 19, 21 & n.5, 23, 24, 25; Doc. 51, Q&C Br. at 2, 4, 20 & n.10, 23 n.12.).

No. Defendants suspended I.P. for posting three images to Instagram, and that's what is at issue in this case. (Doc. 53, SD Br. at 24.) I.P.'s suspension must stand or fall based on whether those Instagram posts fall outside of First Amendment protection under *Tinker*, *Mahanoy*, *Layshock*, and *J.S.*. *See, e.g.*, *Bremerton Sch. Dist.*, 142 S. Ct. at 2432 n.8; *Norris*, 969 F.3d at 25–26. As explained in the next section, clearly established First Amendment law protected I.P.'s nondisruptive, off-campus expression. The Court should ignore Defendants' red herring.

IV. Defendants Are Not Entitled to Qualified Immunity.

The Court should deny qualified immunity to Quick and Crutchfield because they violated I.P.'s clearly established constitutional rights to freedom of speech and procedural due process. *See Anders*, 984 F.3d at 1175 (affirming denial of qualified immunity on First Amendment claim); *Heyne*, 655 F.3d at 568 (affirming denial of qualified immunity on procedural due process claim).

Importantly, the Sixth Circuit has been crystal clear that "it is generally inappropriate for a court to grant a 12(c) motion for judgment on the pleadings on the basis of qualified immunity." *Moderwell*, 997 at 661 (cleaned up). So while "qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Id.* at 660 (cleaned up). This is because "absent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is 'obvious' or 'squarely governed' by precedent, which prevents us from determining whether the facts of this case parallel a prior decision." *Id.* (cleaned up). Defendants do not explain why I.P.'s suit should be different.

In any case, the Court should deny qualified immunity to Quick and Crutchfield because, they "(1) violated a constitutional right that (2) was clearly established." *Anders*, 984 F.3d at 1174–

75. *Tinker*, *Mahanoy*, *Layshock*, and *J.S.* clearly established I.P.'s First Amendment right to post off-campus satirical images about his principal on social media. Likewise, *Withrow*, *Heyne*, and *Sullivan* clearly established I.P.'s procedural due process right to an unbiased decisionmaker.

A. I.P.'s allegations, taken in the light most favorable to him, show Quick and Crutchfield violated his constitutional rights.

In the light most favorable to I.P., Quick and Crutchfield violated I.P.'s constitutional rights. In entertaining a motion to dismiss based on qualified immunity, the Court must employ "the ordinary standard used in reviewing motions to dismiss, accepting well-pled factual allegations as true" *Heyne*, 655 F.3d at 562. And the Court first examines whether, "taken in the light most favorable" to the plaintiff, "the facts alleged show the officer's conduct violated a constitutional right." *Leonard v. Robinson*, 477 F.3d 347, 354 (6th Cir. 2007) (cleaned up).

As shown in Section II, I.P.'s Amended Complaint alleges that Quick and Crutchfield violated his First Amendment rights by suspending him for posting three non-threatening, nondisruptive images lampooning Quick away from campus and outside school hours. And as explained in Section III, I.P. alleges Quick and Crutchfield violated his Fourteenth Amendment due process rights by suspending him through a process reliant on a biased, personally involved decisionmaker (Quick). In the light most favorable to I.P., these allegations show Quick and Crutchfield violated I.P.'s constitutional rights.

B. I.P.'s First and Fourteenth Amendment rights were clearly established at the time of Quick's and Crutchfield's conduct.

I.P. also satisfies the second prong of qualified immunity. A constitutional right is clearly established if the contours of constitutional protection are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010) (cleaned up). In the Sixth Circuit, those contours are established by "binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other

circuits that is directly on point." *Id.* Overcoming qualified immunity "do[es] not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "[A] public official c[an] still be on notice that his conduct violates established law even in novel factual circumstances." *Holzemer*, 621 F.3d at 527 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). I.P.'s First Amendment right to engage in off-campus, non-disruptive speech, and Fourteenth Amendment right to an unbiased decisionmaker, were clearly established at the time of the suspension.

1. *Tinker, Mahanoy, Layshock, and J.S. clearly established I.P.'s First Amendment rights.*

I.P.'s First Amendment rights were clearly established at the time of Defendants Quick's and Crutchfield's conduct. At minimum, *Tinker* (1969), *Mahanoy* (2021), *Layshock* (2011), and *J.S.* (2011) clearly established in August 2022 that Defendants could not punish I.P. for off-campus speech which did not substantially disrupt the school day.

Tinker clearly established that schools may not punish student speech absent "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" or actual substantial disruption or material interference. 393 U.S. at 514. The Court explained that speech which "cause[s] discussion outside of the classrooms, but no interference with work and no disorder" remains firmly within the First Amendment's protection. *Id.* And *Tinker* clearly established that uneasy feelings by school officials about a student's expression do not suffice: "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

Tinker made clear that a school may not shut down student expression under a "better safe than sorry" rationale. Student expression "may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence

and vigor of Americans, who grow up and live in this relatively permissive, often disputatious society." *Id.* at 508–09 (citing *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)).

Mahanoy clearly established that schools have a "diminished" ability to police off-campus speech because, away from school, parents, not the government, are responsible for students' upbringing. 141 S. Ct. at 2046–48. That means, at minimum, *Mahanoy* clearly established that the First Amendment protects students' right to engage in speech and expression away from school, so long as the expression does not create material disruption or substantial disorder, invade the rights of others, or cause the school to reasonably forecast the same.

Tinker and *Mahanoy* independently clearly established I.P.'s First Amendment right to post nondisruptive images on his personal Instagram page about his principal. I.P. does not need a case holding the "very action" of punishing a student for making fun of their school principal on social media violates the First Amendment. *Holzemer*, 621 F.3d at 527. Nevertheless, I.P. has two. *Layshock* and *J.S.*, both en banc, clearly established that students' (far more vulgar and lewd) social media posts about their principals retained First Amendment protection because the posts did not substantially disrupt school. *Layshock*, 650 F.3d at 216; *J.S.*, 650 F.3d at 928–30.

Quick and Crutchfield argue that "after *Mahanoy*, and before *Kutchinski*, it was not clearly established that every reasonable school administrator would have known that I.P.'s Three Posts could not be regulated." (Doc. 51, Q&C Br. at 14.) Not so. *Tinker* held that during the school day, when a school's power to police speech is at its zenith, it still may only punish expression if it causes material disruption, substantial disorder, invades the rights of others, or causes the school to reasonably forecast the same. Nothing in *Mahanoy* or *Kutchinski* remotely suggests that students could have *less* First Amendment rights off campus. Indeed, *Mahanoy* held precisely the opposite. Schools have a "diminished" interest in punishing off-campus speech because "off-campus speech

will normally fall within the zone of parental, rather than school-related responsibility." *Mahanoy*, 141 S. Ct. at 2046; *see also Morse*, 551 U.S. at 405 (noting that if a student had delivered his innuendo-laden student council speech off campus "it would have been protected").

Quick and Crutchfield argue "it was unclear whether off-campus speech casting a school administrator in a sexual context was off limits, as far as school regulations go." (Doc. 51, Q&C Br. at 16.) Wrong again. Even impermissibly assuming on a 12(b)(6) standard that I.P.'s posts had a sexual subtext and that Quick and Crutchfield interpreted it that way in 2022, there is no authority suggesting "sexual" satire evades *Tinker*'s and *Mahanoy*'s requirements of demonstrating substantial disruption. The en banc courts in *Layshock* and *J.S.* clearly established at the time of I.P.'s suspension that it does not. *Layshock*, 650 F.3d at 216; *J.S.*, 650 F.3d at 928–30.

As the *Sagehorn* court explained when it held *Tinker* clearly established a school could not punish a student for social media posts suggesting a teacher "made out" with a student absent substantial disruption, "while the internet may pose new challenges, it did not change the law." 122 F. Supp. 3d at 862. *Sagehorn* explained *Tinker* made it "sufficiently clear that on facts such as the complaint alleges in this case—a student using personal property to make non-threatening speech off campus, that in no way impacts or disrupts the school environment—a student would have a clearly established right to free speech." *Id.* at 863. In sum, "[t]he general rule that schools may not regulate merely inappropriate out-of-school speech (as opposed to truly threatening or substantially disruptive speech) has been well-established for decades." *Id.* at 862 (cleaned up).

Tinker and *Mahanoy* placed it "beyond debate" that student speech, on or off campus, cannot be punished absent substantial disorder or facts supporting a reasonable forecast of the same. The facts alleged in I.P.'s Amended Complaint support neither path. The Court should deny Defendants' request for qualified immunity on I.P.'s First Amendment claims.

2. *Withrow, Heyne, and Sullivan clearly established I.P.'s right to an unbiased decisionmaker.*

Defendants do not assert a lack of clearly established law regarding I.P.'s constitutional due process right to an unbiased decisionmaker alleged in Claim III. Defendants' immunity argument on this claim is limited to contesting whether a constitutional violation occurred. (*See* Doc. 51, Q&C Br. at 18–23; Doc. 53, SD Br. at 19–23.) I.P. therefore principally relies on Section III for his response to Quick's and Crutchfield's request for qualified immunity on the claim. But briefly, even though Defendants do not contest that I.P.'s right to an unbiased decisionmaker was clearly established, *Withrow*, *Heyne*, and *Sullivan* clearly established that right. Indeed, in 2011, the Sixth Circuit squarely held that *Goss*, *Newsome*, and *Sullivan* clearly established the right of a student to an unbiased decisionmaker for a suspension. *Heyne*, 655 F.3d at 568.

V. Because I.P.'s Amended Complaint Alleges Quick and Crutchfield Violated His Constitutional Rights, His *Monell* Claim Remains.

Because I.P.'s damages claims against Quick and Crutchfield (Claims I-III) allege facts supporting the violation of his constitutional rights, the School District's request to dismiss Claim IV (*Monell* liability) should be rejected. Critically, the "clearly established" prong of the qualified immunity inquiry is irrelevant to Claim IV because only individuals may claim qualified immunity. *Moldowan v. City of Warren*, 578 F.3d 351, 392–93 (6th Cir. 2009). Thus, so long as the Court finds I.P. stated a claim Quick and Crutchfield violated I.P.'s constitutional rights, which for the reasons in Sections II and III it should, the School District remains liable under *Monell*.

VI. The School District Has Not Permanently Expunged I.P.'s Suspension or Irrevocably Removed the Social Media and Wildcat Policies, so I.P.'s Equitable Claims Remain Live.

This Court has subject matter jurisdiction over I.P.'s claims for injunctive and declaratory relief (Claims V–VIII). I.P.'s equitable claims remain live because the School District has not permanently expunged I.P.'s suspension; it only agreed to a stipulated preliminary injunction

removing it from his record for the duration of the action. (Doc. 25, Stipulation Regarding Pl.'s Mot. Prelim. Inj. ¶ 4.) Preliminary relief, as its name suggests, is temporary and dissolves upon a final judgment. *See, e.g.*, *Burniac v. Wells Fargo Bank, N.A.*, 810 F.3d 429, 435 (6th Cir. 2016).

Therefore, Claim V—which seeks a permanent injunction against I.P.'s suspension and related declaratory relief on the basis that the First Amendment protects I.P.'s Instagram posts—remains live. So too do Claims VI and VII, seeking similar relief on the basis that the Social Media Policy, which the School District suspended I.P. for breaching, violates the First Amendment facially and as applied. And Claim VIII survives, which seeks equitable relief against I.P.'s suspension because Quick's involvement in the discipline process deprived I.P. of due process.

Even had the School District permanently expunged I.P.'s suspension, his challenges to the Social Media Policy and Wildcat Policy would remain live. The School District argues I.P.'s challenges are moot because the School District removed the policies from the Student Handbook after I.P. sued. But "[v]oluntary cessation of the alleged illegal conduct does not, as a general rule, moot a case." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). Otherwise, a defendant could "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

The School District must show both that: "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (cleaned up). The School District has established neither.

A. Because the School District has not permanently expunged I.P.'s suspension, Claims V–VIII remain live.

Claims V through VIII remain live because the because the School District has not permanently expunged I.P.'s August 2022 suspension from his record. Claims V, VI, and VII

request an injunction expunging I.P.'s suspension from his student record and declaratory relief that his suspension violated the First Amendment because (1) he engaged in protected expression and (2) the Social Media Policy violates the First Amendment. (Doc. 36, Am. Compl. ¶¶ 205–06, 220–21, 233–34.) And Claim VIII requests an injunction and declaratory relief against his suspension on the ground the suspension violated the Due Process Clause. (*Id*. ¶ 240). After I.P. filed his Verified Complaint (Doc. 1) and motion for preliminary injunction (Doc. 4), the School District removed the suspension from I.P.'s record for the duration of the litigation in exchange for I.P. withdrawing his motion. (Doc. 36, Am. Compl. ¶¶ 115–16.)

Agreeing to a preliminary injunction, however, does not moot a suit's request for a *permanent* injunction if the defendant refuses to offer permanent relief. For voluntary cessation to moot a case, interim events must have "completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631 (cleaned up).[12] It must be a situation where "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

That is not the case here. The School District has not permanently erased I.P.'s suspension from his record. That means if the Court enters judgment in Defendants' favor on those claims (as they now ask), the suspension returns to I.P.'s record and will have to be disclosed on college applications going forward. (Doc. 36, Am. Compl. ¶ 122.) I.P. will be in the same position as before the case started. The parties therefore have a legally cognizable ongoing interest in the status of I.P.'s suspension, requiring resolution of the legality of I.P.'s suspension and the Social Media

[12] *See also N.C. State Conf. of NAACP v. N. Carolina State Bd. of Elections*, 283 F. Supp. 3d 393, 407 (M.D.N.C. 2017) (rejecting argument that a grant of a preliminary injunction mooted a case seeking a permanent injunction); *United States v. City & County of San Francisco*, 656 F. Supp. 276, 287–88 (N.D. Cal. 1987) (holding that a case was not moot after a defendant ceased its conduct in part because of a preliminary injunction).

Policy underlying his suspension. I.P.'s requests in Claims V through VIII for injunctive and declaratory relief regarding his suspension and the Social Media Policy should not be dismissed.

B. I.P.'s challenges to the Social Media Policy and Wildcat Policy remain live.

Beyond the ongoing dispute over I.P.'s suspension, his challenges to the Social Media Policy and Wildcat Policy remain live. To prove I.P.'s challenges to the policies are moot, the School District bears the "formidable burden" of showing it is "absolutely clear" that the unlawful conduct cannot reasonably be expected to recur. *Already, LLC*, 568 U.S. at 91 (cleaned up).

The School District fails to meet its formidable burden. *Schlissel* is instructive. It involved a First Amendment challenge to definitions in a university disciplinary code governing harassment and bullying. 939 F.3d at 761. During litigation, the University of Michigan revised the definitions and supplied a declaration by a university vice president, made under penalty of perjury, stating that the new "definitions, and no others, now will govern the initiation and conduct of disciplinary proceedings involving harassing or bullying." *Speech First, Inc. v. Schlissel*, 333 F. Supp. 3d 700, 705 (E.D. Mich. 2018), *vacated and remanded*, 939 F.3d 756 (6th Cir. 2019). The Sixth Circuit held that the university's amendment of the definitions did not moot the case given the ad hoc process for changing the definitions and the lack of clarity over who had that authority. *Schlissel*, 939 F.3d at 769. The court explained it was "difficult to understand why [the declaration] should be construed to have any binding or controlling effect as far as mootness goes." *Id.*

Like in *Schlissel*, the School District has not explained why its declaration has a "binding effect." The School District has not explained who or what procedures will control amendment of the Student Handbook going forward. The Superintendent's declaration under "penalty of perjury" promising not to bring the Social Media Policy and Wildcat Policy back this school year is insufficient. Without information about the process required to remove (or add) policies to the Student Handbook, the Court is left in the same inadequate position as in *Schlissel*: a "trust us"

declaration from a school official. What happens if Superintendent Stephens departs? A new superintendent likely would not be bound under penalty of perjury to their predecessor's promises which they did not sign and make. *Cf. Bybees Branch Water Ass'n v. Town of McMinnville*, 333 S.W.2d 815, 816 (Tenn. 1960) (holding that a municipal "officer having authority to contract . . . may not by contract prevent or impair the exercise by successors of . . . government discretionary powers"). The School District provides no evidence suggesting the Superintendent has the final call on Student Handbook policies and could not, for example, be overruled by the school board.

Attempting to evade its formidable burden, the School District suggests that, because it is a government litigant, it is entitled to a presumption of mootness. (*See* Doc. 53, SD Br. at 16–18.) That is incorrect. Only a government litigant that changes its policy via "actual legislation" (such as by repealing a challenged statute) receives a presumption of mootness. *Thomas*, 996 F.3d at 325. In circumstances where the government proves that it changed its policy via a sufficiently formal "legislative-like" procedure, the government's burden is reduced to a lesser extent. *Schlissel*, 939 F.3d at 767–68. But where, as here, discretion to change the challenged policy lies with a single agency or individual, or where no formal processes are required to make a change, the government is "not relieve[d] of much of its burden to show that the case is moot." *Id.* at 769. That is because, unlike a legislative policy alteration, a single actor's decision to change course is "ad hoc, discretionary, and easily reversible." *Thomas*, 996 F.3d at 325 (citation omitted). Nothing stops the government from restarting tomorrow what it stopped today.[13]

[13] In some instances, courts will extend deference to government defendants even in the absence of a legislative-like process. When an "external factor" apart from the litigation motivated a change in conduct, such as a change precipitated by compliance with new binding precedent, courts will extend deference. *See, e.g.*, *Doe v. Univ. of Mich.*, 78 F.4th 929, 947–48 (6th Cir. 2023). But there is no suggestion an external factor, rather than I.P.'s lawsuit, prompted the changes.

The School District provides nothing to suggest its amendment of the Student Handbook was anything more than an ad hoc, informal process. Superintendent Stephens's declaration provides no explanation of what (if any) process exists to amend the Student Handbook, let alone facts establishing a legislative-like process. (*See* Doc. 53-1, Stephens Decl. ¶¶ 3, 4.)

The Superintendent's declaration cryptically states, "the School removed the two policies" and did so "at the direction of the School's legal counsel." (*Id.*) The Superintendent does not explain: (1) who was involved in the decision to remove the policies, (2) the procedure used to remove the policies, or (3) what barriers (if any) exist to the School District bringing them back.

Because the School District has not "pointed to any evidence" showing that it would have to go through a formal process to change its policies, it faces a heavy burden to establish mootness. *Schlissel*, 939 F.3d at 767–69. To meet that burden, the School District must "put forth enough evidence" to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 770 (quoting *Friends of the Earth*, 528 U.S. at 189).

The School District does not come close. All it offers is the Superintendent's declaration promising the School District "will not reinstate either policy during this academic year," that "Plaintiff, a high school senior, will not be covered by or subject to those policies again," and that, "should the School adopt another social media policy, it will be designed to comply with current legal standards on student speech and expression." (Doc. 53-1, Stephens Decl. ¶¶ 4–6.)

Far from making "absolutely clear" the School District will not return to its expression-suppressing ways when this litigation ends, these promises appear to be little more than a gimmick to try to moot I.P.'s challenges to the Social Media Policy and Wildcat Policy. The School District is not saying "we will not return to the challenged practices" or even acknowledging the policies violated the First Amendment. Rather, it is saying "we promise not to enforce them for the next

six months until you graduate and lose standing." Courts reject these kind of litigation tactics where the government tries to carve out the plaintiff to moot a case. *See Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, 21-CV-2298, 2023 WL 4846719, at *13 (D.D.C. July 28, 2023) (rejecting mootness argument based on "little more than a paper promise" that "provided a carve-out for [plaintiff] that can only be reasonably chalked up to an effort to moot the present litigation").

The School District's voluntary cessation has other features cutting against mooting I.P.'s claims. For example, the School District continues to defend the constitutionality of its use of the challenged policies to suspend I.P. *See, e.g.*, Doc. 53, SD Br. at 12–13 (arguing I.P.'s suspension did not violate the First Amendment.) A defendant's continued defense of challenged programs or policies is "important to the mootness inquiry" because it undermines a defendant's assurances it will not reimplement the policies. *Schlissel*, 939 F.3d at 770 (citation omitted).

Furthermore, the School District only rescinded the policies after I.P. sued. (Doc. 36, Am. Compl. ¶ 114.) When a defendant ceases conduct in response to litigation, the timing "raises suspicions that its cessation is not genuine." *Schlissel*, 939 F.3d at 769. The Sixth Circuit explained that "[i]f anything, this increases the [defendant's] burden to prove that its change is genuine." *Id.* (citations omitted). Indeed, the "primary concern" in voluntary cessation cases is that the defendant "altered its conduct solely in response to litigation." *Thomas*, 996 F.3d at 328 (collecting cases).

Thomas, the primary case the School District relies upon, helps I.P. There, unlike here, the defendant city used a legislative-like procedure to voluntarily cease its conduct. *Id.* at 326. The city "was *required* to obtain formal written approval of the new policy from two high-ranking City officers." *Id.* The court explained this constituted a "legislative-like" procedure because "the City went through a formal, organized process, even if self-imposed." *Id.* Here, by contrast, there is no indication the School District's policy changes came about from a formal, legislative-like process.

Rather, it appears someone at the School District saw I.P.'s lawsuit the day he filed it and deleted the policies from the Student Handbook. That is not a "legislative-like" policy change.

As *Schlissel* and *Thomas* teach, keeping the Court in the dark about who and what went into a policy reversal will not cut it. Nor will a promise in a declaration that the government will not bring back the challenged practices. *See Schlissel*, 939 F.3d at 768–69; *see also Matheson v. Farris*, 2:22-CV-00059, 2023 WL 6702781, at *5–6 (M.D. Tenn. Aug. 14, 2023) (after concluding that government defendant's process was ad hoc, holding that its declaration was insufficient to meet its burden), *R&R approved*, 2023 WL 5867249 (M.D. Tenn. Sept. 11, 2023).

The School District has not carried its "formidable burden" for establishing mootness, and this Court retains jurisdiction over I.P.'s challenges to the Social Media Policy and Wildcat Policy.

CONCLUSION

I.P. respectfully requests that the Court deny Defendants' motions.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2023, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing upon all ECF filing Participants.

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