NO. _____

In The
Supreme Court of the United States

JOSEPH COVELL BROWN,
Petitioner,

v.

MARCUS PORTER, in his individual capacity; NORFOLK STATE UNIVERSITY; BOARD OF VISITORS OF NORFOLK STATE UNIVERSITY; COMMONWEALTH OF VIRGINIA; and TRACCI K. JOHNSON, in her individual capacity,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2017, Joseph Brown was expelled from NSU despite being denied the due process afforded by the school's disciplinary policy. His appeal was denied despite glaring errors in his expulsion.

The Questions Presented are:

Whether the right to procedural due process in disciplinary proceedings involving suspension, expulsion or loss of housing in publicly funded institutions of higher education is clearly established by the consensus of circuit court holdings.

Whether the right to procedural due process in disciplinary proceedings involving suspension, expulsion or loss of housing in publicly funded institutions of higher education is clearly established by general constitutional principles.

Whether qualified immunity shields government officials who fail to perform ministerial tasks.

Whether qualified immunity shields government officials who assume discretionary authority that is not vested in them.

Whether qualified immunity shields government officials who fail to follow the published procedures applicable to their tasks.

LIST OF PARTIES TO THE PROCEEDING

The names of all parties to this case appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

Brown v. Porter, No. 21-1035 unpublished (4th Cir. February 4, 2022)

Brown v. Porter, No. 2:19cv376 awaiting publication (E.D. Va. December 8, 2020)

Brown v. Porter, 438 F.Supp.3d 679 (E.D. Va. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1A) is unpublished. The first of the district court's opinions (Pet.App. 16A) is published at 438 F. Supp. 3d 679. The second of the district court's orders (Pet.App. 5A) remains unpublished.

JURISDICTION

The Court of Appeals for the Fourth Circuit entered judgment on February 4, 2022 and denied rehearing on May 2, 2022. Pet.App. 4A. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 42 U.S.C. § 1983 are:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Joseph Covell Brown ("Brown") attended Norfolk State University ("NSU"), which is a state-chartered and operated institution, from August 2014 to June of 2017. Pet.App. 29A. NSU placed Brown on disciplinary probation for the 2016 to 2017 academic year for reasons immaterial to this petition. Pet.App. 30A. In June of 2017, Brown was suffering from sciatica in his hip and could barely walk. Pet.App. 30A. On June 11, 2017, Brown and his roommate were texting each other about dirty dishes in their room. Pet.App. 30A. During this conversation they were either sharing the same room, or in adjoining rooms; a third-party witness was present with them. Pet.App. 81A. The witness reported them as quiet and calm as they texted, and Brown's roommate later described the text conversation as playful. Pet.App. 81A-82A.

At some point in the texting conversation, Brown texted, "Text me again and im breaking your jaw." His roommate immediately texted back and, as everyone expected, nothing happened. Pet.App. 30A. Several days later, Brown's roommate complained to the resident advisor about dirty dishes and food and showed the advisor the texting conversation. The advisor reported the text interaction to Respondent Marcus Porter ("Porter"), a university official authorized to investigate violations of student policy. Pet.App. 82A.

NSU's Student Conduct Policy sets forth procedures designed to ensure a fair outcome whenever a student is accused of violating school policies. Pet.App. 106A-109A. NSU's published disciplinary process requires formal resolution if an alleged

violation could result in "expulsion, suspension and/or removal from housing," as occurred here. Pet.App. 108A.

The process is supposed to begin with the student conduct officer (here, Respondent Porter) interviewing the complainant, the witnesses, and the accused, meanwhile collecting all documentary and physical evidence. Pet.App. 107A. After completing the investigation, the student conduct officer sends notification to the accused, describing any violations, citing any relevant provisions of the Code of Student Conduct, explaining the rights of the accused, and advising of the date, time and location of the conduct conference. Pet.App. 107A. At the conduct conference, the investigator presents findings to the accused, and if "the misconduct could result in expulsion, suspension and/or removal from housing….[t]he student conduct officer will then refer the case to the Student Conduct Board" for formal resolution. Pet.App. 107A.

Once the formal process is initiated, the conduct officer again sends a notification to the accused. This notice is supposed to follow a similar format, describing the conduct, citing the relevant provisions of the Code of Student Conduct, the rights of the accused, and the date time and location of the hearing before the Student Conduct Panel. Pet.App. 108A. The Panel Hearing takes place no more than 10 business days after the conduct conference, and the student may extend the time prior to hearing by request. Pet.App. 108A. The Panel Hearing is before a five-person Student Conduct Panel all of whom have participated in mandatory training regarding the process. Pet.App. 108A. A Chief Justice or designee chairs the panel,

to ensure that hearings are closed to the public; but otherwise tape-recorded and are open to the complainant, accused and the advisors (except for deliberations). Anyone may question witnesses. Pet.App. 108A. Additionally, the chair may allow advisors to address the panel or participate in the hearing; the "panel may only rely on oral or written statements of witnesses and written reports/documents," and afterwards the panel determines by majority vote using a preponderance of the evidence standard before recommending sanctions. Pet.App. 108A. Within two business days, the chair provides a written summary of testimony, findings of fact and a rationale for the decision. The conduct officer then sends the written decision to the accused within two business days. Pet.App. 109A.

NSU's published process also identifies other rights of an accused student, including the right to "a support person or advisor", the right to request the incident report in advance, the right to call witnesses, the right to not appear, the right to remain silent, and the right to a fair and impartial hearing. The accused student must also furnish a list of his witnesses to the Dean of Students at least one day in advance of the board hearing, which necessitates a span of multiple days between receipt of notice of the board hearing and the hearing. Pet.App. 111A.

Returning in our narrative to June 14, 2017, Respondent Porter had just been informed by a resident advisor that a possible infraction had occurred. Nothing suggests that Porter interviewed anybody at that time. Although Porter notified Brown by email that he was under investigation for violating "No. 20 Threatening Behavior" of the Code of Student Conduct, the notice did not explain where, when, to

whom, or crucially, what Brown was accused of doing. Pet.App. 114A. Lacking these basic foundational facts, no accused would have any idea of why he was being investigated or how to respond to the accusations; notice without specifics is not notice.

Porter's initial email stated that Brown had the option of proceeding with the informal proceedings or the formal, an option only available under NSU policy if there is no possibility of suspension, expulsion or loss of housing—and thus inapplicable here. Pet.App. 107A. Porter gave Brown but two hours and two minutes to vacate his dormitory room and find another place to live. Pet.App. 30A. However, as a work study employee, Brown didn't receive the email until he clocked out of his shift, thus forcing him to abandon most of his belongings, including medication for his sciatica. Pet.App. 30A-31A. Without anywhere else to go he sat in a chair at the NSU police station all night. Pet.App. 31A.

The next morning, June 15, 2017, Porter sent notice of the conduct hearing to Brown via email, setting the conference 63 minutes later. Pet.App. 31A. Even then, Porter apparently had not interviewed anyone. The scheduling notice still contained no description of what Brown was accused of doing, where or when he committed misconduct, or who else was involved. Pet.App. 115A. All of these steps violated NSU's stated policy. Pet.App. 107A.

At 10 a.m., at the police station, rather than presenting findings of the investigation, Porter apparently began the investigation he was supposed to have already concluded. He and multiple officers surrounded Brown and bombarded him

with questions, including asking about his status as a Muslim, while Brown, who was still unclear as to why he was being investigated and had spent a sleepless homeless night in pain and worrying about where he might go and how he would recover his belongings, did his best under the circumstances. Pet.App. 31A.

At this stage, Porter had already strayed from the process required of him by NSU, but having concluded the gravely flawed conduct conference, he violated NSU policy again. Rather than choose between the only two options he was authorized (dropping the investigation or initiating formal proceedings before the student conduct board) he unilaterally decided to expel Brown. Pet.App. 31A-32A. At some time on June 15, 2017, Porter transmitted a letter of expulsion to Brown identifying "No. 20-Threatening Behavior (Probation Violation)" as the conduct at issue. Pet.App. 115A. By doing so, Porter improperly assumed the role of the student conduct board. He was at once the investigator and decision maker, an axiomatically biased setup; and had eliminated virtually every procedural safeguard available to Brown under NSU's published procedures. In particular, he denied Brown his prescribed rights to:

1) A meaningful conduct conference following the investigation's conclusion;
2) Reasonable notice of the conduct alleged;
3) Reasonable notice of potential sanctions in the case;
4) A presentation of investigatory findings at the conduct conference (since Porter actually used the conduct conference to conduct the investigation he was supposed to have already concluded);

5) A referral to the Student Conduct Board (as required in expulsion and termination of housing cases, both of which were at issue here);

6) A fair and impartial hearing before a bipartisan panel (students and employees) of the student conduct board;

7) A minimum of several days in which to seek guidance, contact witnesses, and prepare a defense;

8) An extension of time if needed to prepare a defense;

9) Seek counsel and guidance from a support person or advisor;

10) A tape-recorded hearing;

11) A hearing open to the complainant, the accused, and the advisors;

12) Questioning of witnesses;

13) Participation by advisors;

14) Remain silent at the hearing (since he would have been expected to speak at the investigation);

15) Judgment by majority vote;

16) Judgment by preponderance of the evidence;

17) Meaningful time for deliberation and decision;

18) A just rational for the decision and sanction;

19) Uniformity in Code citations (since Porter changed the code provisions from "Threatening Behavior" in the investigation notice to "Threatening Behavior (Probation Violation)" in the expulsion notice); and

20) A just outcome (Porter expelled him for a purported probation violation, although his probation had ended a month prior).

Thus in his unauthorized rush to expel a student, Porter flouted NSU's published procedures.

Brown appealed to Respondent Tracci Johnson ("Johnson"), a school official charged with reviewing disciplinary appeals and the fairness of proceedings, to examine three issues: 1) why he had been denied his rights and procedures, 2) the fact that now that he knew why he was being punished and had some time to formulate a defense, he wished to present evidence in his favor; and 3) whether a disciplinary expulsion was disproportional to a text message that any reasonable recipient aware of the conversation's context would have recognized as meaningless hyperbole. Pet.App. 32A. Johnson summarily denied the appeal. Pet.App. 33A.

As a former student bearing the shame of expulsion, Brown has struggled to continue his education elsewhere and to find and maintain employment. Pet.App. 33A. Additionally, Brown returned to NSU in early 2018 to retrieve a copy of his transcript and to say hello to friends and colleagues; yet despite complying with NSU's requirements for visitation, he was publicly arrested, dragged away in handcuffs, and threatened with trespassing charges. Pet.App. 33A-34A. He was released only after his lawyer alerted NSU police that Brown had checked in with them as a visitor earlier that day. Pet. App. 34A.

Brown filed his original complaint in the Circuit Court for the City of Norfolk on June 14, 2019, claiming breach of contract, Title IX, and violations of due process

and freedom of speech under 42 U.S.C. § 1983. Pet.App. 34A. Respondents removed the complaint to the United States District Court for the Eastern District of Virginia and moved for dismissal under Rules 12(b)(1) and 12(b)(6) Fed. R. Civ. P. Pet.App. 29A. All parties timely filed memoranda in support or opposition, and an order granting the Respondents' motion and granting Brown leave to amend his complaint was filed on February 6, 2020. Pet.App. 16A.

The district court found that the complaint sufficiently stated a claim for a due process deprivation of a liberty interest. Pet.App. 26A. In particular, the district court found that the process Porter and Johnson used was constitutionally inadequate. Pet.App. 25A-26A, 42A-47A. It also found that Brown satisfied the "stigma plus test" used by the Fourth Circuit for procedural due process liberty interest claims. Pet.App. 24A-25A, 39A-42A Nevertheless, the district court dismissed the due process claims against NSU and the Commonwealth of Virginia as barred by Eleventh Amendment immunity, and against Porter and Johnson as barred by qualified immunity. Pet.App. 18A-22A, 26A.

Brown filed his amended complaint on February 20, 2020. Following briefing on Respondents' renewed motion to dismiss the District Judge dismissed the case on December 8, 2020 and entered final judgment on December 8, 2020. Pet.App. 15A. Petitioner timely appealed to the Court of Appels for the Fourth Circuit. It entered judgment affirming the District Court on February 4, 2022, and denied rehearing on May 2, 2022. Pet.App. 1A-4A

REASONS FOR GRANTING THE PETITION

Officials at public educational institutions have now had half a century to come to grips with the precedent that constitutional due process protections apply to student disciplinary decisions. *See Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.) *cert. den'd*, 368 U.S. 930 (1961). Brown satisfied the district court that he had a liberty interest sufficient to trigger constitutional procedural due process, and that Porter and Johnson violated his right to that process. Porter and Johnson did not challenge this finding on appeal. Instead, they relied on and supported the district court's grant of qualified immunity.

In its order affirming the district court, the Fourth Circuit's only discussion of this issue was the terse statement that "the district court correctly determined that the university officials were entitled to qualified immunity on Brown's due process claim." Pet.App. 3A. As explained below, this decision conflicts with decisions rendered in eight of the eleven circuits, with this Court's clearly established constitutional principles, with the clearly established law regarding application of qualified immunity, and with the purpose of qualified immunity. Petitioner asks that this Court reverse the Fourth Circuit's decision and remand to the district court.

A. Circuit Courts Of Appels Have Held That Qualified Immunity Does Not Shield Officials From The Consequences of Their Unlawful Actions.

Qualified immunity shields government officials from civil liability when they perform discretionary functions so long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would

have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). "[T]he focus is on whether the officer had fair notice that her conduct was unlawful" therefore "reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (cleaned up); *see also Wilson v. Layne*, 526 U.S. 603, 615 (1999). "Thus, in determining whether a right is clearly established, a court does not need to find a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Martin v. Duffy*, 858 F.3d 239, 251 (4th Cir. 2017) (internal quotations omitted).

The determination of whether a right has been clearly established is objective, depending "on what a hypothetical, reasonable officer would have thought in those circumstances." *Wilson v. Kittoe*, 337 F.3d 392, 402 (4th Cir. 2003). "[T]he exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established." *Amaechi v. West*, 237 F.3d 356, 362 (4th Cir. 2001). "[T]he burden is on the official claiming immunity to demonstrate his entitlement." *Dennis v. Sparks*, 449 U.S. 24, 29 (1980). After all, "an action for damages against the responsible official can be an important means of vindicating constitutional

guarantees" where abuse of authority "infringe[s] such important personal interests as liberty…" *Butz v. Economou*, 438 U.S. 478, 505-506 (1978).

In the Fourth Circuit, authority is deemed controlling if it is a decision from this Court, the Fourth Circuit itself, or the Supreme Court of the state in which the case arose. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 542-545 (4th Cir. 2017). A right is also considered clearly established if it is "based on general constitutional principles or a consensus of persuasive authority." *Id.* at 543 (holding that the district court erred by examining only binding cases to determine whether the right was clearly established) (citing *Wilson v. Layne*, 526 U.S. at 617). *Booker* was a prisoner grievance case in which the Fourth Circuit noted that previous decisions of this Court had established all the elements necessary for reasonable government officials to understand that prisoners have the right to file grievances free of retaliation, as had been recognized by ten sister circuit courts of appeals. By contrast, in *Feminist Majority Found. v. Hurley*, the Fourth Circuit held that the right to be free of school administrators' deliberate indifference to so-called student-on-student sexual harassment was not yet clearly established because only three circuits had previously held that the right exists. 911 F.3d 674, 705 (4th Cir. 2018).

Therefore, under a qualified immunity analysis, a right is clearly established if it is "based on general constitutional principles or a consensus of persuasive authority." *Booker*, 855 F.3d at 543. The underlying principle is whether the law has given fair warning to the government official. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As stated above, the right at issue in this case, namely "the right to be free from a

state college, university, or post-secondary educational institution expulsion for misconduct without due process" under the Fourteenth Amendment, has gained acceptance for over sixty years since *Dixon*, and its recognition is nearly universal. As shown below, a persuasive consensus of authority" has developed in the circuit courts, and this Court later established in *Goss v. Lopez*, 419 U.S. 565 (1975), all the elements necessary to satisfy the Fourth Circuit's "general constitutional principles" test.

The Dixon Decision

In 1961, Alabama State College expelled six students without hearing, as happened to Brown in this case. *Dixon,* 294 F.2d at 151-155. The Fifth Circuit held that constitutional due process applied to publicly funded university disciplinary proceedings: "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." *Id*. at 155. So long as government action infringes upon an individual's liberty to participate in higher education it is immaterial whether the constitution guarantees access to higher education. "One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." *Id*. at 156 (quoting *Cafeteria and Restaurant Workers Union, Local 473 v. Elroy*, 367 U.S. 886, 894 (1961)).

Dixon set forth certain minimum constitutional due process required in expulsion proceedings. The court required notice containing specific charges and "grounds which, if proven, would justify expulsion"; a hearing, the exact nature of

which could vary depending on the circumstances, but that for an expulsion should be "something more than an informal interview with an administrative authority and where the Board or multiple officials can "hear both sides in considerable detail". *Dixon,* 294 F.2d at 158-159. Also, *Dixon* explained that students should be given the names of witnesses and a report on the facts on which the witnesses will testify; the chance to present a defense, to produce affidavits or witnesses, and access to written results and findings, all of which serve to preserve the elements of an adversarial proceeding without undue burden. *Id*. at 159.

Since *Dixon*, the federal courts have "uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." *Goss*, 419 U.S. at 576 n.8. It has been cited hundreds of times over the decades, often in support of holdings that constitutional due process applies to public university disciplinary or academic proceedings, and often as a model of how much process is due. It has even been cited approvingly by the Fourth Circuit, which stated in 1983 that "[a]lthough Dixon was decided more than twenty years ago, its summary of minimum due process requirements for disciplinary hearings in an academic setting is still accurate today." *Henson v. Honor Committee of U.Va.*, 719 F.2d 69, 74 (4th Cir. 1983).

Goss v. Lopez

This Court held in 1975 that public school students have a liberty interest in their public education, such that fundamentally fair procedures must be followed and

that the Due Process Clause prohibits arbitrary deprivations of such rights. Specifically, *Goss v. Lopez* held that "[t]he Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law," because "'[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him' the minimal requirements of the Clause must be satisfied," in public school discipline cases. 419 U.S. at 572-579 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). *Goss* found that a suspension of less than ten days for a high schooler could damage their reputation with fellow students, teachers, and possibly even future employers. Therefore, even the relatively minor punishment of a week-long suspension in grade school invokes constitutional due process protections; the severity or lack thereof of the punishment does not determine whether the due process is required, but instead acts as a factor in determining how much process is required; the more serious the potential consequences the more protection must be accorded the student.

Goss not only established the minimum due process required for grade schoolers facing discipline, it established the general constitutional principle, that where an official's actions might deprive a student in a publicly-supported school of reputational injury, a level of due process is required. *See Hope v Pelzer,* 536 U.S. at 741 (holding that general constitutional principles previously established serve as fair warning to officials when they apply with clarity to a given situation). And since *Goss*, this Court has consistently assumed that public university students have a liberty interest sufficient to trigger constitutional due process in academic and

disciplinary proceedings. *See, e.g., Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985); *Bd. of Curators v. Horowitz*, 435 U.S. 78, 84-85 (1978); *see* also *Goldberg v. Kelly*, 397 U.S. 254, 262 n.9 (1970) ("Relevant constitutional restraints" apply to the "right to attend a public college") (citing *Dixon*, 294 F.2d 150). It is time to make that determination clear.

The Consensus of Circuit Court Authority

The First, Second, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have clearly held that constitutional due process applies in public university disciplinary hearings.

The First Circuit so held in 1987. *Hennessy v. City of Melrose*, 194 F.3d 237, 249 n.3 (1st Cir. 1999) (citing *Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1987)).

The Second Circuit has long required due process in public university disciplinary proceedings, and noted that at a minimum there is a liberty interest at stake. *Albert v. Carovano*, 824 F.2d 1333, 1338 n.6 (2d Cir. 1987) (cleaned up); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).

As described above, the Fifth Circuit has recognized that right (and corresponding duty on public officials) ever since *Dixon*.

The Sixth Circuit also has "held that the Due Process Clause is implicated by higher education disciplinary decisions." *Flaim v. Medical College of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005) (cleaned up). The *Flaim* court emphasized the "seriousness

and the lifelong impact that expulsion can have on a young person as well as the significant financial costs already incurred." *Id*. at 638.

The Seventh Circuit concluded in *Soglin v. Kauffman* that the Fourteenth Amendment provides due process protections to public university students. 418 F.2d 163, 168 (7th Cir. 1969) [1], *see also John Doe v. Purdue Univ.,* 928 F.3d 652, 663 (7th Cir. 2019) (clarifying that due process in university disciplinary proceedings is based on the liberty interest).

In 1975, the Eighth Circuit held "the dictates of due process, long recognized as applicable to disciplinary expulsions (and suspensions of significant length), may apply in other cases as well," particularly to academic expulsions, such as the situation at issue in that case. *Greenhill v. Bailey*, 519 F.2d 5, 8-9 (8th Cir. 1975) (cleaned up). This principle in the Eighth Circuit predates *Goss*. *See Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir 1970); *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (8th Cir. 1969).

In *Harris v. Blake*, the Tenth Circuit also stated that constitutional due process protections apply to publicly funded higher education. 798 F.2d 419, 422 n2 (10th Cir. 1986). Though *Harris* held that tuition payment created a sufficient property interest, it also stated that the publication of stigmatizing information would have necessitated additional procedural safeguards.

The Eleventh Circuit has also upheld due process as demanded of public university disciplinary proceedings, holding that "no tenet of constitutional law is

[1] *Soglin* was cited by *Goss* as recognizing public university students' right to constitutional due process in expulsion proceedings. *Goss*, 419 U.S. at 576 n.8.

more clearly established than the rule that a property interest in continued enrollment in a state school is … protected by the Due Process clause of the Fourteenth Amendment." *Barnes v. Zaccari*, 669 F.3d 1295, 1305 (11th Cir. 2012).

The Outliers

The Third, Fourth and Ninth Circuits have assumed without deciding that procedural due process applies in public university disciplinary proceedings.

In 1983, the Fourth Circuit stated that "Although Dixon was decided more than twenty years ago, its summary of minimum due process requirements for disciplinary hearings in an academic setting is still accurate today." *Henson v. Honor Committee of U.Va.,* 719 F.2d at 73-74. Although *Henson* ultimately held that the facts at issue satisfied *Dixon's* requirements, it reiterated that "disciplinary proceedings require more stringent protection than academic evaluations." *Id*. at 74 (citing *Horowitz*, 435 U.S. 78, *Goss*, 419 U.S. 565).

Over the years, the Fourth Circuit has repeatedly assumed in several other decisions that a public university student has a right to constitutional due process in both academic and disciplinary proceedings. *Tigrett v Rector and Visitors of the University of Virginia*, 290 F.3d 620, 627 (4th Cir. 2002); *Abott v. Pastides*, 900 F.3d 160, 173 (4th Cir. 2018) (stating that the right of a university student to respond to accusations of campus infractions is a feature of due process as established by *Goss*). However, with only assumptions but no square guidance from this Court, these decisions are all persuasive authority, leaving the Fourth Circuit law less than pristine. Even in this case, the Fourth Circuit avoided setting a precedent by issuing

an unpublished opinion that in the briefest of ways concluded that qualified immunity shields the officials.

As well, the Third Circuit has assumed that public university disciplinary proceedings require procedural due process, and its unpublished decisions require it. *Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46, 49-52 (3d Cir. 1986) (cleaned up).

Like the Fourth Circuit, the Ninth Circuit has consistently assumed but without deciding that a public university student's right to procedural due process in disciplinary proceedings exists. *Austin v. Univ. of Or.*, 925 F.3d 1133, 1139 (9th Cir. 2019), *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002). *Cf.*, *Oyama v. Univ. of Haw.*, 813 F.3d 850, 874-875 (9th Cir. 2015) (holding that an academic dismissal required less stringent due process requirements than a disciplinary dismissal).

A Public University Student's Right To Receive Procedural Due Process Protection In Disciplinary Proceedings Has Been Clearly Established General Constitutional Principles And By A Consensus Of Circuit Authority

For qualified immunity analysis, the Fourth Circuit holds that a right is clearly established if it is "based on general constitutional principles or a consensus of persuasive authority." *Booker*, 855 F.3d at 543. A right is based on general constitutional principles if previous decisions of this Court have already established all of the elements necessary for a reasonable government official to understand the right. A consensus of persuasive authority means that most of the sister circuits have already held for the right. Either of these tests is satisfied regarding procedural due process in public university disciplinary proceedings.

Goss has long since established the elements necessary for a reasonable university official to understand that a degree of procedural due process is necessary in disciplinary proceedings. Logically, *Goss* applies with greater weight to university officials, because the only difference between the relevant factual patterns is that the potential for deprivation is greater in the public university setting. The clarity of these general constitutional principles is evidenced by the consensus of sister circuit authority, and by NSU's publicly available disciplinary procedures that purport to comport with the requirements of *Goss* and *Dixon*. For our purposes, Porter had access to the directives of that process, because he referenced it in his initial email to Mr. Brown. Yet Porter abandoned all reasonable bounds by tossing the published process aside and creating his own unauthorized procedures—which the Circuit Court's opinion baldly cloaked with unwarranted immunity.

Furthermore, eight of the eleven circuit courts of appeals have recognized a public university student's right to receive procedural due process protection in disciplinary proceedings, and the other three (including the Fourth Circuit itself) have consistently assumed that this right applies. Under Fourth Circuit precedent this is the "consensus of persuasive authority" sufficient to have clearly established that the right at issue in this case exists.

Therefore, qualified immunity is unavailable to respondents Porter and Johnson.

B. Qualified Immunity Does Not Shield Officials Who Ignore Published Procedures, Fail To Perform Ministerial Functions, Or Exercise Authority With Which They Have Not Been Granted.

Qualified immunity shields officials for reasonable mistakes when performing discretionary functions only, it does not protect the failure or refusal to perform ministerial functions. *Harlow*, 457 U.S. at 816, 818; *In re Allen*, 106 F.3d 582, 593-594 (4th Cir. 1997). A ministerial function is an act "that involves obedience to instructions or laws instead of discretion, judgment, or skill." *Black's Law Dictionary* 457 (3rd Pocket Ed. 2006).

This case presents an official at a government-funded university who failed or simply refused to perform the following prescribed ministerial duties requiring no discretion or judgment in this case, 1) typing into the initial notice letter the name of the complainant; the date, time and place of the incident at issue, and a brief description of the alleged conduct under investigation; 2) scheduling a conduct conference to occur after the investigation; 3) contacting the student conduct board to schedule a hearing; 4) scheduling a hearing multiple days after the conduct conference; 5) contacting the complainant and witnesses to coordinate their appearance at the hearing for questioning by the board; and 6) typing and dispatching a resolution letter after the student conduct board has deliberated and decided upon resolution. Yet Porter refused to perform them.

Nothing in NSU's conduct policy granted Porter the discretion to expel Brown or any other student immediately and by himself, either, without affording him the other rights guaranteed by the school's Code of Conduct. Although qualified

immunity protects an official for reasonable mistakes when performing discretionary functions, an official who outright refuses to perform his non-discretionary functions has not made a reasonable mistake, he has refused to provide the mandated services of his office. Likewise, an official who unilaterally decides to perform the discretionary functions reserved for someone else has not made a reasonable mistake, he has intentionally superseded his authority. Qualified immunity protects neither.

Applying qualified immunity here, as the Fourth Circuit inexplicably did, outright contradicts its purpose. It protects well-intentioned officials forced to make difficult judgments in an unclear arena. With this protection, public servants can do their jobs knowing that their good faith efforts are protected. That is not what happened here: an investigator tossed the judicial panel aside and became the judge and passed sentence himself. And equally surprising, the appellate court approved of this derailment of process.

C. The Court Of Appeals' Decision In This Case Is Incorrect.

The Fourth Circuit affirmed the district court's grant of qualified immunity to Respondents Porter and Johnson without addressing Brown's arguments against the grant. The logical inference is that the Fourth Circuit agrees that Brown's disciplinary proceeding implicated a liberty interest and that the procedural process was inadequate, but that qualified immunity should apply because there has been no previous Fourth Circuit holding that officials at public universities must provide minimal procedural due process protections announced in Dixon to students in disciplinary proceedings.

That approach conflicts with the consensus of circuit authority and this Court's established general constitutional principles, both of which clearly require officials at public universities to provide due process protections to student disciplinary proceedings involving suspension or expulsion prior to the events in this case.

D. This Case Is A Superior Vehicle For Deciding Whether A Public University Student's Right To Receive Procedural Due Process Protection In Disciplinary Proceedings Is Clearly Established.

Those cases in which the Fourth and Ninth Circuits assumed that procedural due process attaches to public university disciplinary proceedings did so because the fact patterns established that university officials had in fact provided sufficient process to those students. Therefore, nothing more than an assumption of the right was necessary to determine that the claim was insufficient as a matter of law.

This case presents a fact pattern where almost no procedural due process was given in a university disciplinary expulsion. The district court found that procedural due process applied due to Brown's liberty interest, and that university officials provided insufficient procedural due process. The Fourth Circuit did not comment on those findings and instead held only that qualified immunity shielded the officials. Hence, there seems to be little dispute in this case that there was a liberty interest and that there was insufficient due process, making it an ideal case to clarify that public university students have a right to procedural due process when facing disciplinary expulsion.

CONCLUSION

Because the consensus of circuit authority overwhelmingly supports the right of students at publicly funded universities to receive procedural due process protections when facing disciplinary proceedings, officials at publicly funded schools have had fair warning and reasonable notice of their obligations to provide those safeguards when suspension, expulsion or loss of housing are at stake. This Court should grant certiorari and clarify that right unmistakably.

Respectfully submitted,

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APPENDIX

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filed February 20, 2020:

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Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1035

JOSEPH COVELL BROWN,

Plaintiff - Appellant,

v.

MARCUS PORTER, in his individual capacity; NORFOLK STATE UNIVERSITY; BOARD OF VISITORS OF NORFOLK STATE UNIVERSITY; COMMONWEALTH OF VIRGINIA; TRACCI K. JOHNSON, in her individual capacity,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca Beach Smith, Senior District Judge. (2:19-cv-00376-RBS-RJK)

Submitted: December 29, 2021 Decided: February 4, 2022

Before RICHARDSON and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Alastair C. Deans, Chesapeake, Virginia, for Appellant. Mark R. Herring, Attorney General, Samuel T. Towell, Deputy Attorney General, Sandra S. Gregor, Assistant Attorney General, Toby J. Heytens, Solicitor General, Michelle S. Kallen, Deputy Solicitor General, Jessica Merry Samuels, Deputy Solicitor General, Kendall T. Burchard, John Marshall Fellow, OFFICE OF THE ATTORNEY GENERAL OF

VIRGINIA, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Following his expulsion from Norfolk State University, Joseph Covell Brown sued the university and two of its officials, among others, alleging violations of his Fourteenth Amendment right to procedural due process, gender discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 to 1688, and breach of contract under Virginia law. On appeal, Brown challenges the district court's dismissal of his due process claim against the university officials and its dismissal of his gender discrimination and breach of contract claims. We have reviewed the record and conclude that the district court correctly determined that the university officials were entitled to qualified immunity on Brown's due process claim and that Brown failed to plausibly allege gender discrimination or breach of contract. Moreover, Brown's gender discrimination claim was too speculative to warrant discovery. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: May 2, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1035
(2:19-cv-00376-RBS-RJK)

JOSEPH COVELL BROWN

Plaintiff - Appellant

v.

MARCUS PORTER, in his individual capacity; NORFOLK STATE UNIVERSITY; BOARD OF VISITORS OF NORFOLK STATE UNIVERSITY; COMMONWEALTH OF VIRGINIA; TRACCI K. JOHNSON, in her individual capacity

Defendants - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOSEPH COVELL BROWN,

Plaintiff,

v. **CIVIL ACTION NO. 2:19cv376**

MARCUS PORTER,
NORFOLK STATE UNIVERSITY,
THE BOARD OF VISITORS OF
NORFOLK SATE UNIVERSITY,
THE COMMONWEALTH OF VIRGINIA,
and
TRACCI K. JOHNSON,

Defendants.

MEMORANDUM ORDER

This matter comes before the court on the Motion to Dismiss and Memorandum in Support filed on May 13, 2020, by Defendants Marcus Porter, Norfolk State University ("NSU"), the Board of Visitors of Norfolk State University ("the Board"), the Commonwealth of Virginia ("the Commonwealth"), and Tracci K. Johnson (collectively, "the Defendants"). ECF Nos. 36, 37.

I. Procedural History

The Plaintiff filed the original Complaint in the Circuit Court of the City of Norfolk on June 14, 2019. ECF No. 1-2. The Defendants filed a timely Notice of Removal in this court on July 18, 2019. ECF No. 1. The Defendants filed a Motion to

Dismiss and Memorandum in Support on July 25, 2019. ECF Nos. 4, 5.

On August 29, 2019, this court referred the Motion to Dismiss to United States Magistrate Judge Robert J. Krask, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). ECF No. 13. On February 6, 2020, the court issued a Memorandum Order, ECF No. 19, adopting and approving the Magistrate Judge's Report and Recommendation, ECF No. 14. The court granted the Defendants' Motion to Dismiss Count I for lack of subject matter jurisdiction with prejudice, and granted the Defendants' Motion to Dismiss Counts II, III, IV, and V, with leave to amend the Complaint. ECF No. 19 at 11-12.

The Plaintiff filed an Amended Complaint on February 20, 2020, alleging violations of his constitutional right to free speech (Count II), gender discrimination in violation of Title IX (Count III), and breach of contract (Count V), based on events surrounding his expulsion from NSU in June, 2017.[1] ECF No. 20. On May 13, 2020, the Defendants filed a Motion to Dismiss and Memorandum in Support. ECF Nos. 36, 37. The Plaintiff filed his Memorandum in Opposition, ECF No. 38, on May 27, 2020, and the Defendants filed a Reply, ECF No. 44, on June 5, 2020.

[1] The Plaintiff numbered each count in the Amended Complaint to correspond to the original Complaint.

On June 10, 2020, the matter was referred to Judge Krask pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), to conduct necessary hearings and to submit to the undersigned district judge proposed findings and recommendations for the disposition of the Motion to Dismiss. ECF No. 45.

On October 20, 2020, the Magistrate Judge filed his Report and Recommendation ("R&R"), which recommends granting the Motion to Dismiss in its entirety. ECF No. 46. The parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge within fourteen (14) days from the date of the mailing of the R&R to the objecting party. Id. at 26. The Plaintiff filed Objections to the R&R on November 3, 2020, ECF No. 47, to which the Defendants responded on November 17, 2020, ECF No. 48. The Defendants did not file objections.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the R&R to which the Plaintiff has specifically objected. Fed. R. Civ. P. 72(b). The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

II. Objections

A. Qualified Immunity

The Plaintiff objects to the Magistrate Judge's conclusion that the free speech claims in Count II based on the Plaintiff's text messages and appeal letter are barred because Defendants Porter and Johnson are entitled to qualified immunity. See Pl. Objs. at 2–7; R&R at 8-14. The Plaintiff argues that the Defendants' failure to provide adequate process by refusing to hold a disciplinary proceeding, follow disciplinary procedures, or consider his arguments on appeal, are not shielded by qualified immunity because those were "ministerial" functions, and not "discretionary." Pl. Obj. at 2; see Harlow v. Fitzgerald, 457 U.S. 800, 816, 102 S. Ct. 2727, 2737, 73 L. Ed. 2d 396 (1982) (Qualified immunity "is available only to officials performing discretionary functions," as opposed to "'ministerial' tasks.")

The alleged failure of the Defendants' to follow disciplinary procedures are due process claims, which were dismissed by the court with prejudice in the Memorandum Order issued on February 6, 2020. ECF No. 19 at 11. The Plaintiff bases his free speech claims in Count II on the Defendants' decisions to "expel[] him for a text message" and "deny[] his appeal" because of "comments in his appeal letter." Am. Compl. ¶ 110. The court agrees with the Magistrate Judge, and the

Plaintiff concedes, that the Defendants' decision to expel the Plaintiff and deny his appeal constituted discretionary acts. Pl. Objs. at 2.

Therefore, in order to overcome qualified immunity, the Defendants' conduct must "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Wilson v. Layne, 141 F.3d 111, 114 (4th Cir. 1998) (quoting Harlow, 457 U.S. at 818). The Plaintiff objects to the Magistrate Judge's conclusion that "a reasonable school official viewing the text message" at issue[2] "could conclude the message was a true threat." See Pl. Objs. at 6; R&R at 9; see also Doe v. Rector & Visitors of George Mason Univ. ("GMU"), 132 F. Supp. 3d 712, 729 (E.D. Va. 2015) ("[T]rue threats of violence constitute a category of speech falling outside the protections of the First Amendment) (citing Virginia v. Black, 538 U.S. 343, 358 (2003)). The Plaintiff claims that "Defendants would have realized" that the text was not a true threat "if they had performed their mandatory ministerial functions and provided him with a fair hearing and fair appeal." Pl. Objs. at 6. However, such speculation does not undercut the Magistrate Judge's well-reasoned and correct determination that Johnson and Porter are entitled to qualified immunity because the decision to expel

[2] The text message was sent by the Plaintiff to his roommate, and said, "text me again and im breaking your jaw." R&R at 32.

the Plaintiff based in part on the text message did not violate any clearly established First Amendment right.

Similarly, the decision to uphold the Plaintiff's expulsion on appeal, based in part on "frustrated and insulting" language in the Plaintiff's appeal letter, did not violate any clearly established First Amendment right. See R&R at 15-16. The Plaintiff argues that the Defendant Johnson did not address the concerns raised in the Plaintiff's appeal letter "as punishment for his speech in the letter." Pl. Objs. at 7. The court agrees with the Magistrate Judge that "[a] reasonable school official addressing Brown's appeal could consider the language in [his] appeal letter . . . without violating any . . . clearly established free speech rights" because "[s]uch consideration is necessary 'to protect students and to support their educational mission.'" R&R at 15 (quoting GMU, 132 F. Supp. 3d at 729). Moreover, the language in the appeal letter was one consideration among others, including the Plaintiff's text message to his roommate, a previous incident in which the Plaintiff punched another individual, and his volatile behavior. See id.; Am. Compl., Ex. 5.

Therefore, the court **OVERRULES** the Plaintiff's objection on Count II and **ADOPTS** and **APPROVES** the Magistrate Judge's conclusion that the claims in Count II against Johnson and

Porter based on the text messages and the appeal letter are barred by qualified immunity.

B. Gender Discrimination

The Plaintiff objects to the Magistrate Judge's determination that his gender discrimination claim under Title IX fails to state a claim. See Pl. Objs. at 8. The Magistrate Judge determined that the Plaintiff failed to state a gender discrimination claim because the Plaintiff "added no new factual allegations" to his Amended Complaint that "suggest[s] he was expelled due to his gender." R&R at 20-22. The Plaintiff argues that "NSU treats females more favorable in disciplinary proceedings," and bases this belief on "his suspicions . . . as a member of the NSU community." Pl. Objs. at 8. As explained in the R&R, the Amended Complaint fails to allege "particular circumstances suggesting that gender bias was a motivating factor behind" his expulsion, such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." GMU, 132 F. Supp. 3d at 733 (citing Yusuf v. Vassar College, 35 F.3d 709, 715 (2d Cir. 1994)).

The Plaintiff's additional allegations essentially claim that the "defendants deprived him due process because he is a male and would have afforded him due process if he were a female." R&R at 22; see Am. Compl. ¶¶ 188-94. Like the defective

allegations in the original Complaint, the allegations in the Amended Complaint "are . . . conclusory" and "do not meaningfully advance Brown's . . . claim across the line from conceivable to plausible." R&R at 20, 22. The court agrees with the Magistrate Judge that such conclusory allegations, which do not establish "a causal connection between the flawed outcome and gender bias," are not sufficient to survive a motion to dismiss. Yusuf, 35 F.3d at 715; see R&R at 22. Therefore, the court **OVERRULES** this objection and **ADOPTS** and **APPROVES** the Magistrate Judge's conclusion that the claims in Count III against NSU, the Board, and the Commonwealth of Virginia, for gender discrimination fail to state a claim.

C. Breach of Contract

The Plaintiff objects to the Magistrate Judge's conclusion that Virginia law does not recognize binding contracts between a university and a student unless there is "absolute mutuality of engagement." Doe v. Washington & Lee Univ., 439 F.Supp. 3d 784, 790 (W.D. Va. 2020). The Plaintiff argues that "Virginia does not require absolute mutuality of engagement where consideration in the form of money has already been rendered for services." Pl. Objs. at 12. Therefore, according to the Plaintiff, "absolute mutuality of engagement" is not required in this case. Id.

The Plaintiff cites no case or authority from Virginia in which university guidelines and student conduct policies constituted enforceable contracts between schools and students when the terms of those policies expressly reserved for the school the right to unilaterally modify policies. In contrast, the Magistrate Judge cited numerous cases, see R&R at 24, applying Virginia law and holding that Universities' student conduct policies, student handbooks, and course catalogs did not constitute binding contracts because generally applicable conduct policies "serve as 'guidelines' for student rather than reciprocal agreements" since they do not bind the school. Washington & Lee Univ., 439 F. Supp. at 792. Therefore, the court **OVERRULES** this objection and **ADOPTS** and **APPROVES** the Magistrate Judge's conclusion that the claim in Count V for breach of contract is insufficient for failure to state a claim.

III. Conclusion

Having reviewed the record in its entirety and the Objections to the R&R, and having made de novo determinations with respect thereto, the court hereby **OVERRULES** the Plaintiff's Objections to the R&R. The court **ADOPTS AND APPROVES IN FULL** the findings and recommendations set forth in the Magistrate Judge's thorough and well-reasoned R&R, ECF No. 46, filed on October 20, 2020, such that:

The Defendants' Motion to Dismiss is **GRANTED** with respect to the free speech claim against Porter and Johnson premised on the Plaintiff's text message and appeal letter on the grounds of qualified immunity, and this portion of Count II is **DISMISSED WITH PREJUDICE.**

The Defendants' Motion to Dismiss is **GRANTED** with respect to the free speech claim against Porter and Johnson premised on the Plaintiff's articles and conversations for failure to state a claim, and this portion of Count II is **DISMISSED WITHOUT PREJUDICE.**

The Defendants' Motion to Dismiss is **GRANTED** with respect to the Title IX gender discrimination claim against the Commonwealth of Virginia for failure to state a claim, and Count III is **DISMISSED WITH PREJUDICE** as to the Commonwealth of Virginia.

The Defendant's Motion to Dismiss is **GRANTED** with respect to the Title IX gender discrimination claim against NSU and the Board for failure to state a claim, and Count III is **DISMISSED WITHOUT PREJUDICE** as to NSU and the Board.

The Defendants' Motion to Dismiss is **GRANTED** with respect to the breach of contract claim against NSU and the Board for failure to state a claim, and Count V is **DISMISSED WITHOUT PREJUDICE.**

Given that the Plaintiff, through counsel, has already filed an Amended Complaint, and for the reasons stated herein, the Amended Complaint has failed to state a claim for relief, the court **DENIES** further leave to amend. Accordingly, the Clerk is **DIRECTED** to close this case on the court's docket and enter judgment for the Defendants.

The Clerk is further **DIRECTED** to send a copy of this Memorandum Order to counsel for all parties.

IT IS SO ORDERED.

/s/ RBS
Rebecca Beach Smith
Senior United States District Judge

REBECCA BEACH SMITH
SENIOR UNITED STATES DISTRICT JUDGE

December 8, 2020

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOSEPH COVELL BROWN,

Plaintiff,

v. **ACTION NO. 2:19cv376**

MARCUS PORTER, in his individual capacity,
NORFOLK STATE UNIVERSITY,
THE BOARD OF VISITORS OF NORFOLK STATE UNIVERSITY,
THE COMMONWEALTH OF VIRGINIA,
and
TRACCI K. JOHNSON, in her individual capacity,

Defendants.

MEMORANDUM ORDER

This matter comes before the court on the Motion to Dismiss and Memorandum in Support filed by Defendants Marcus Porter, Norfolk State University ("NSU"), the Board of Visitors of Norfolk State University ("the Board"), the Commonwealth of Virginia ("the Commonwealth"), and Tracci K. Johnson (collectively, "the Defendants"). ECF No. 4.

I. Procedural History

The Plaintiff filed his Complaint in the Circuit Court of the City of Norfolk on June 14, 2019. ECF No. 1-2. The Defendants filed a timely Notice of Removal in this court on July 18, 2019. ECF

No. 1. The Defendants filed a Motion to Dismiss and Memorandum in Support on July 25, 2019. ECF Nos. 4, 5. The Plaintiff filed a Memorandum in Opposition on August 12, 2019. ECF No. 9. The Defendants filed a Reply on August 20, 2019. ECF No. 12.

On August 29, 2019, this court referred the Motion to Dismiss to United States Magistrate Judge Robert J. Krask, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), to conduct hearings, including evidentiary hearings, if necessary, and to submit to the undersigned district judge proposed findings of fact, if applicable, and recommendations for the disposition of the Motion to Dismiss. ECF No. 13.

Judge Krask filed the Report and Recommendation ("R&R") on November 26, 2019. ECF No. 14. The R&R recommended that the motion to dismiss for lack of subject matter jurisdiction be granted as to Count I and that Count I be dismissed with prejudice;[1] that the motion to dismiss for failure to state a claim be granted as to Counts II, III, IV, and V, and that Counts II, III, IV, and V be dismissed without prejudice; and that the Plaintiff be provided with leave to amend Counts II, III, IV, and V within fourteen days

[1] Given this recommendation and the court's agreement therewith, see infra Part II, the court does not address the alternative recommendation to deny the motion to dismiss Count I for failure to state a claim. R&R at 50.

of the final order addressing the Motion to Dismiss. Id. at 50-51.

The parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge within fourteen (14) days from the date of the mailing of the R&R to the objecting party. Id. at 51. The Plaintiff filed Objections and the Defendants filed a Partial Objection to the R&R on December 10, 2019. ECF Nos. 15, 16. The Plaintiff and Defendants filed Responses on December 24, 2019. ECF Nos. 17, 18.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the R&R to which the parties have specifically objected. Fed. R. Civ. P. 72(b). The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

II. Plaintiff's Objection on Count I

The Plaintiff first objects to the R&R's conclusion that his claims against the Commonwealth[2] in Count I are barred by the Eleventh Amendment. Pl. Obj. at 2, ECF No. 15. Although the

[2] The Plaintiff does not object to the R&R's conclusion that his claims against NSU and the Board in Count I are barred by sovereign immunity, and the court finds no clear error to such conclusion. Pl. Obj. at 7; R&R at 24 n.11. Therefore, this discussion in Part II only addresses the Commonwealth and no other named defendants.

Defendants had raised both Eleventh Amendment immunity and common law sovereign immunity in their Motion to Dismiss, the R&R did not find it necessary to reach the common law sovereign immunity question. R&R at 24 n.11 This court overrules the Plaintiff's objection on this issue but finds it necessary to supplement the R&R's reasoning by addressing the common law sovereign immunity issue, as explained further below.

Under the Eleventh Amendment of the Constitution of the United States, a state is generally immune from suit in federal court by its own citizens or citizens of another state. U.S. CONST. amend. XI; Hans v. Louisiana, 134 U.S. 1 (1890). A defendant-state waives its Eleventh Amendment immunity, however, if it (1) has waived common law sovereign immunity over the case in its own state courts and (2) removes the case to federal court. Stewart v. North Carolina, 393 F.3d 484, 488 (4th Cir. 2005) (explaining that a state waives Eleventh Amendment immunity if it "removes an action to federal court having already consented to suit in its own courts"); see Lapides, 535 U.S. at 619. One way a state waives common law sovereign immunity over a case is if there is a state statute waiving sovereign immunity over the suit in its own courts. Id. at 616.

In this case, the Defendants removed the case to federal court, and the Plaintiff argues that the Virginia Tort Claims Act ("VTCA") operates as a statutory waiver of common law sovereign

immunity. Pl. Obj. at 2, 4; see VA. CODE ANN. § 8.01-195.1 et seq. Therefore, under the framework set out in Stewart and Lapides, it is necessary for this court to resolve the common law sovereign immunity question in order to resolve the Eleventh Amendment immunity question.[3]

At a threshold level, the VTCA waives Virginia's sovereign immunity from claims only "if a private person[] would be liable to the claimants for such damage." VA. CODE. ANN. § 8.01-195.3. As other courts have recognized, this language does not waive immunity over "constitutional torts," such as the constitutional due process claim at issue in Count I, because those claims are typically not cognizable against a private person. See, e.g., FDIC v. Meyer, 510 U.S. 471, 482 (1994) (interpreting similar language in the Federal Tort Claims Act and stating that "tort liability arising under the Constitution . . . generally does not apply to private entities"). Moreover, the VTCA limits its application to claims resulting from "damage to or loss of property or personal

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[3] The R&R was able to avoid the common law sovereign immunity question because it found that the VTCA does not waive Eleventh Amendment immunity in federal court, and it pointed to cases from the Fourth Circuit and the U.S. District Court for the Western District of Virginia finding the same. R&R at 23 (citing McConnell v. Adams, 829 F.2d 1319, 1329 (4th Cir. 1987); Haley v. Va. Dep't of Health, No. 4:12cv16, 2012 WL 5494306, at *5 (W.D. Va. Nov. 13, 2012)). However, those cases did not involve removal and therefore did not require the court to consider whether the VTCA waived sovereign immunity in state court, as is required in removal cases under Lapides and Stewart.

injury or death." VA. CODE. ANN. § 8.01-195.3. Notably, the R&R concluded that the Plaintiff failed to allege a property interest in Count I. See R&R at 11. The Plaintiff did not object to that conclusion, and the court finds no clear error. As a result, the court finds that the VTCA is not, as argued by the Plaintiff, a statutory waiver of common law sovereign immunity over this suit in federal or state court.[4]

Having found that the Commonwealth had not waived its common law sovereign immunity over this suit when it removed the case to federal court, this court **OVERRULES** the objection and **ADOPTS** and **APPROVES** the R&R's conclusion that the claims against the Commonwealth in Count I are barred by Eleventh Amendment immunity.

III. Plaintiff's Remaining Objections

The Plaintiff next objects to the R&R's conclusion that his claims against Porter and Johnson are barred by qualified immunity, and specifically that his asserted due process right was clearly established by the weight of persuasive authority. Pl. Obj. at 7-14. As the Plaintiff acknowledges, the Fourth Circuit had not

[4] The Plaintiff has also pointed to the due process provision of the Virginia constitution as an alternative waiver of sovereign immunity. ECF No. 9 at 4-5. However, courts have not interpreted that provision to provide a waiver of sovereign immunity with respect to liberty interests, such as the one at issue here. R&R at 11 (finding that the Plaintiff sufficiently alleged a liberty interest, but not a property interest); see Doe v. Rectors and Visitors of George Mason Univ., 132 F. Supp. 3d 712, 728 (E.D. Va. 2015) (Ellis, J.).

explicitly held that procedural due process rights apply to disciplinary hearings at state universities at the time the Plaintiff's expulsion occurred. Id. at 10. To the contrary, as the R&R points out, another case in this district had recently found that such a right was not clearly established under a very similar set of facts as here. See Doe v. Rector and Visitors of George Mason Univ., 132 F. Supp. 3d 712, 724-27 (E.D. Va. 2015) (Ellis, J.). Given the lack of direct and binding precedent in support of the Plaintiff's asserted right to procedural due process in the context of university disciplinary hearings, and for the reasons stated in the R&R, the court **OVERRULES** this objection and **ADOPTS** and **APPROVES** the R&R's conclusion that the claims in Count I against Defendants Porter and Johnson are barred by qualified immunity.

The Plaintiff also objects to the R&R's conclusion that the facts alleged in the Complaint fail to establish that the text message that precipitated the disciplinary actions against him was not a "true threat." Pl. Obj. at 14-15. The text message at issue was sent by the Plaintiff to his roommate, and said, "text me again and im breaking your jaw." R&R at 32. While the Complaint states that "[e]vidence available to NSU officials indicated Smith [i.e., the Plaintiff's roommate] considered the texting conversation to be playful in nature," it did not specify what that evidence was. Compl. at ¶ 28, ECF No. 1-2. Moreover, although the constitutional

test for true threats sometimes considers the subjective interpretation of the threat by the recipient, that is not the only factor. See, e.g., Virginia v. Black, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). In sum, the Complaint clearly states that the Plaintiff made a threat in his text message, but it does not allege sufficient facts to establish that it was not a "true threat." Accordingly, and for the reasons stated in the R&R, the court **OVERRULES** this objection and **ADOPTS** and **APPROVES** the R&R's conclusion that, on the facts alleged, the text message at issue was a true threat that falls outside the protections of the First Amendment.

Finally, the Plaintiff objects to the R&R's conclusion that the facts alleged in the Complaint do not establish that NSU's disciplinary procedures are binding contractual terms. Pl. Obj. at 15-16. The court finds that the Complaint makes only conclusory allegations that the procedures cited by the Plaintiff constitute binding contractual terms. See Compl. at ¶¶ 144-48; Brown v. Rectors & Visitors of Univ. of Va., 361 F. App'x 531, 534 (4th Cir. 2010) (holding there were no factual allegations that the parties understood UVA's student handbook to be an enforceable contract between the University and its students). Accordingly,

and for the reasons stated in the R&R, the court **OVERRULES** this objection and **ADOPTS** and **APPROVES** the R&R's conclusion that the Complaint fails to sufficiently allege that NSU's disciplinary procedures constitute binding contractual terms.

IV. Defendants' Objections

The Defendants object to the R&R's conclusions that the Complaint sufficiently alleged that the Plaintiff was deprived of a liberty interest when NSU expelled him, and that the expulsion involved constitutionally inadequate process. Def. Obj. at 3-8.

The Defendants' Partial Objection makes two points in arguing that the Plaintiff failed to sufficiently allege a liberty interest, neither of which are convincing. First, the Defendants argue that a deprivation of a liberty interest must involve the extinguishment of a statutory right or employment arrangement. Id. at 5. But the Defendants ignore Fourth Circuit case law recognizing liberty interests that do not implicate statutory or even contractual rights,[5] and fail to explain their assertion that employment is the only permissible liberty interest that does not implicate a statutory right. See Paul v. Davis, 424 U.S. 693, 701

[5] See, e.g., Sciolino v. City of Newport News, 480 F.3d 642, 645 (4th Cir. 2007) (information contained in personnel file of a probationary employee); Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 307 & n. 14 (4th Cir. 2006) (information contained in personnel file of an at-will employee); Boston v. Webb, 783 F.2d 1163, 1165-66 (4th Cir. 1986) (reasons for at-will employee's discharge).

(1976) (stating that liberty interests must implicate some sort of "tangible interest[] such as," but not necessarily limited to, "employment"). Second, the Defendants assert that the Complaint failed to allege a "stigmatizing statement" made in conjunction with the expulsion. Def. Obj. at 5. To the contrary, and as discussed in the R&R, the Complaint states that the expulsion "permanently tarnished [the Plaintiff's] academic record" and has caused "significant reputational [and] professional injury," and mentions humiliation resulting from his public arrest. See Compl. at ¶¶ 53, 78, 87, 88, 95; R&R at 14-15.

Finally, the Defendants object to the R&R's conclusion that the Plaintiff's expulsion involved constitutionally inadequate process. Def. Obj. at 5-8. While the objection focuses on evidence that it says contradicts the R&R's conclusion that the Plaintiff "was not given adequate notice of the charges against him," the R&R cited a number of other ways in which the expulsion hearing lacked adequate due process. See R&R at 17-18. Even granting the Defendants' contention that the Plaintiff had notice of the charges against him at some point prior to the hearing, this court finds that the remaining examples mentioned in the R&R resulted in constitutionally insufficient procedural due process.

Accordingly, the court **OVERRULES** the Defendants' objections and **ADOPTS** and **APPROVES** the R&R's conclusion that the Plaintiff was deprived of a liberty interest without constitutionally adequate due process.

V. Conclusion

Having reviewed the record in its entirety and the Objections to the R&R, and having made de novo determinations with respect thereto, the court hereby **OVERRULES** the Plaintiff's Objections to the R&R and the Defendants' Partial Objection to the R&R.

The court **ADOPTS AND APPROVES IN FULL** the findings and recommendations set forth in the Magistrate Judge's thorough and well-reasoned R&R, except that the court supplements the R&R's reasoning for the conclusion that claims against the Commonwealth in Count I of the Complaint are barred by Eleventh Amendment immunity and does not reach the alternative ground of dismissal for failure to state a claim in Count I.[6] Accordingly, the Defendants' Motion to Dismiss Count I for lack of subject matter jurisdiction is **GRANTED**, and Count I is **DISMISSED WITH PREJUDICE**. The Defendants' Motion to Dismiss Counts II, III, IV, and V is **GRANTED**, and Counts II, III, IV, and V are **DISMISSED WITHOUT PREJUDICE**. The Plaintiff is **GRANTED LEAVE TO AMEND**, within fourteen

[6] See supra note 1 and accompanying text.

(14) days of the entry date of this Memorandum Order, with respect to Counts II, III, IV, and V.

The Clerk is **DIRECTED** to send a copy of this Memorandum Order to counsel for all parties.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Senior United States District Judge

REBECCA BEACH SMITH
SENIOR UNITED STATES DISTRICT JUDGE

February 6, 2020

Appendix E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOSEPH COVELL BROWN,

Plaintiff,

v. ACTION NO. 2:19cv376

MARCUS PORTER, in his individual capacity,
NORFOLK STATE UNIVERSITY,
THE BOARD OF VISITORS OF NORFOLK STATE UNIVERSITY,
THE COMMONWEALTH OF VIRGINIA, and
TRACCI K. JOHNSON, in her individual capacity,

Defendants.

UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter comes before the Court on the motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, filed by defendants Marcus Porter, Norfolk State University ("NSU"), the Board of Visitors of Norfolk State University, the Commonwealth of Virginia, and Tracci K. Johnson ("defendants"). ECF No. 4. The motion was referred to the undersigned United States Magistrate Judge on August 29, 2019, pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). ECF No. 13. For the reasons discussed below, the undersigned **RECOMMENDS** that the motion to dismiss count I for lack of subject matter jurisdiction be **GRANTED**, and the motion to dismiss for failure to state a claim be **GRANTED in part** and **DENIED in part**.

I. PROCEDURAL HISTORY

Joseph Covell Brown ("Brown") initially filed an action in the Circuit Court for the City of Norfolk on June 14, 2019, alleging five counts against defendants. *See generally Brown v. Porter et al.*, No. CL19-6091 (Va. Cir. Ct. June 14, 2019); ECF No. 1-3. On July 18, 2019, defendants removed the case to federal court. ECF No. 1. On July 25, 2019, defendants filed a motion to dismiss the complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure with a supporting memorandum. ECF Nos. 4–5. On August 12, 2019, Brown filed a memorandum in opposition to defendants' motion to dismiss. Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss ("Pl.'s Mem."), ECF No. 9. Defendants filed a reply on August 20, 2019. Defs.' Reply, ECF No. 12.

II. FACTUAL BACKGROUND[1]

Brown is a New Jersey resident and member of the Muslim faith. Compl. ¶¶ 6, 8, ECF No. 1-2. From August 2014 through June 2017, Brown attended NSU. *Id.* at ¶ 7. So that he could afford tuition, Brown accepted student loans, for which he remains responsible. *Id.* at ¶ 19. NSU is a public university and receives federal funding. *Id.* at ¶ 11–12. The Board of Visitors of NSU ("Board") is a corporation established pursuant to Virginia law. *Id.* at ¶ 14 (citing Va. Code Ann. §§ 23.1-1900–1902 (2016)). The Board was formed in order to "establish[] and maintain[] the provisions and duties of NSU's teachers, staff and agents," and to "maintain[], operat[e] and direct[] the affairs of NSU." *Id.* NSU published its disciplinary procedures online. *Id.* at ¶ 24.[2]

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[1] The factual history detailed below is based on Brown's complaint, consistent with the standard of review detailed below.

[2] NSU's student conduct policies can be found at the following website: http://www.nsu.edu/student-affairs/student-judicial/student-conduct-process (last visited Nov. 26, 2019).

In 2015, NSU placed Brown on disciplinary probation for the 2016–2017 school year. *Id.* at ¶ 20. Brown's probationary period ended in May 2017. *Id.* at ¶ 21. In June 2017, Brown began finalizing paperwork which would allow him to participate in the study abroad program to which he had been accepted, during his senior year at NSU. *Id.* at ¶ 22. Also in June 2017, Brown was suffering from sciatica in his left hip and had difficulty walking. *Id.* at ¶ 23. On June 11, 2017, Brown and his roommate, Davonte' Smith ("Smith") were texting each other about the food and dirty dishes in their room. *Id.* at ¶¶ 25–26. During their conversation, Brown and Smith were physically present in their shared dorm room, either in the same room or adjoining rooms. *Id.* at ¶ 27. At some point in their conversation, Brown texted Smith, "Text me again and im [sic] breaking your jaw." *Id.* at ¶ 29. After receiving Brown's text, Smith sent another text message, and Brown did not break his roommate's jaw. *Id.* at ¶¶ 30–31. The evidence available to NSU officials indicated that "Smith considered the texting conversation to be playful in nature." *Id.* at ¶ 28.

On June 14, 2017 at 4:58 p.m., Marcus Porter ("Porter"), the Assistant Director of student conduct, emailed Brown notice of an alleged violation of NSU's Code of Student Conduct. *Id.* at ¶¶ 9–10, 32–33; Compl. Ex. 1. In the notice, Brown was instructed to vacate his dorm room within two hours—no later than 7:00 p.m.[3] Compl. ¶ 34. At the time the notice to vacate was sent to Brown's email address, Brown was working in an NSU administrative office and could not access the email. *Id.* at ¶ 36. Brown only received the notice to vacate after he finished working on June 14, 2017, after which he "barely managed to rush to his dormitory room and successfully vacate it within the cursory deadline." *Id.* at ¶ 37. As a result, Brown was forced to abandon many

[3] Brown was given "approximately one hundred and twenty-two minutes to receive the email, read it, pack all of his possessions, find alternative housing, arrange transportation and vacate his dormitory room." Compl. ¶ 35.

of his possessions, including the medication for the pain caused by his sciatica, and was unable to find transportation or alternate housing for the evening. *Id.* at ¶¶ 38–39. Because Brown was unable to arrange housing overnight, he spent the night in the waiting room of the NSU campus police station. *Id.* at ¶ 39.

On June 15, 2017 at 8:57 a.m., Porter emailed Brown a second notice letter "to schedule a meeting to discuss the investigation of a report . . . that [Brown] violate[d] section(s) of the Code of Student Conduct." *Id.* at ¶ 40. The second notice indicated that the meeting would take place at the NSU police station at 10:00 a.m on the same day. *Id.* at ¶ 41. With only sixty-three minutes from the time of the transmission of the email and the conduct conference, Brown did not see or read the notice emailed to him. *Id.* at ¶ 43.

When Porter arrived at the campus police station around 10:00 a.m, he and NSU campus police officers questioned Brown. *Id.* at ¶ 45. Porter acted as the "investigator, fact finder and decision maker." *Id.* at ¶ 61. During the questioning, Porter asked Brown whether he was Muslim, to which Brown affirmed he was. *Id.* at ¶ 46. There were apparently no other witnesses present at the conduct conference; nor were there any "counsel, support person or advisor" present to speak on Brown's behalf during the conference. *Id.* at ¶¶ 47–48. Additionally, Brown did not present any defenses at the conduct conference, and Porter did not explain any of the specific allegations and potential consequences Brown faced before or during the conduct conference. *Id.* at ¶¶ 49–50. Brown did not have a "reasonable opportunity to assess the accusations, formulate a defense, contact counsel, contact witnesses or otherwise prepare for a hearing." *Id.* at ¶ 51.

Following the conduct conference on June 15, 2017, Porter emailed Brown a "Resolution Letter," which informed Brown that he was being held responsible for a "violation of the Code of Student Conduct specifically, No. 20-Threatening Behavior (Probation Violation)." *Id.* at ¶ 52;

Compl. Ex. 3. The Resolution Letter informed Brown that he was being expelled from NSU. *Id.* at ¶ 53. Prior to receiving the Resolution Letter, Brown had not received any written notice that he was being charged with a probation violation, and that expulsion was a "likely" sanction. *Id.* at ¶¶ 54–55. According to NSU's published disciplinary procedures, conduct violations eligible for "expulsion, suspension and/or removal from housing" must be referred by the student conduct officer "to the Student Conduct Board for formal resolution through an administrative hearing." *Id.* at ¶ 56. Brown contends that he did not receive any of the additional procedural safeguards that should have been provided to him as a student accused of conduct punishable by expulsion. *Id.* at ¶ 58. Additionally, monies remaining in his student account were not withdrawn and returned to Brown before NSU shut down his student account. *Id.* at ¶ 96.

On June 22, 2017, Brown filed an "Appeal Form" with NSU. *Id.* at ¶ 64. He requested that the following issues be addressed on appeal: (1) "whether the conduct conference/hearing was conducted fairly and in conformity with prescribed procedures"; (2) whether consideration should be given to "new evidence unavailable during the original conduct conference/hearing"; and (3) "whether the sanctions imposed were disproportionate to the violation." *Id.* at ¶ 65. In his appeal, Brown alleged that a witness had been present during Brown and Smith's texting conversation on June 11, 2017. *Id.* at ¶ 66.

On June 28, 2017, defendant Tracci K. Johnson ("Johnson"), NSU's Dean of Students, replied to Brown with an "Appeal Response," which denied Brown's appeal, and indicated that the denial was "final." *Id.* at ¶¶ 16–17, 67–68. Attached to NSU's response was an "Appeal Response Rationale" in which NSU alleged the following: that on June 15, 2017,[4] NSU held an

[4] Even though Brown alleges he did not file his appeal until June 22, 2017, the appeal response rationale indicates that an appeal conference took place seven days earlier, on June 15, 2017. *See* Compl. ¶ 64; Compl. Ex. 5.

appeal conference; that Johnson was the "Appeal Officer" at the conference; and that Brown "attended the Appeal Conference via email." *Id.* at ¶ 69. Nothing in NSU's Rationale addressed "whether the conduct conference/hearing was conducted fairly and in conformity with prescribed procedures." *Id.* at ¶ 70. Further, NSU's rationale did not address "new evidence unavailable during the original conduct conference/hearing." *Id.* at ¶ 71. NSU's rationale concluded that expulsion was not disproportionate to the conduct at issue after referencing "prior conduct that was not at issue in the Notice sent by . . . Porter on June 15, 2017, as well as references to the language and content of . . . Brown's appeal letter." *Id.* at ¶ 72; *see id.* ¶ 54 (prior conduct involved a probation violation).

As a result of his expulsion, Brown has suffered humiliation and severe emotional distress. *Id.* at ¶ 77, 95 (alleging that, due to his expulsion, Brown suffers from "significant reputational injury, significant professional injury, losses in earnings, substantial losses to future earnings and benefits, significant pain and suffering, medical expenses, embarrassment, anguish and severe emotional distress.").

When he was unable to obtain his transcripts after multiple requests, Brown traveled from New Jersey to NSU to obtain his transcript on February 19, 2018. *Id.* at ¶ 81. Brown only made the trip from New Jersey to NSU because every attempt to obtain his transcript had failed.[5] *Id.* at ¶ 82. Upon Brown's arrival on campus, he first reported to NSU campus police to "announce his presence and purpose of visit." *Id.* at ¶ 84. After checking in, Brown went to the registrar's office to request his transcript. *Id.* at ¶ 85. While in the registrar's office, "multiple NSU Campus Police Officers appeared and publicly arrested" him. *Id.* at ¶ 86. Police officers handcuffed Brown and

[5] Brown does not state whether the alleged prior attempts to obtain his transcript were completed online or over the phone.

escorted him out of the registrar's office "in full view of several of his friends and former colleagues." *Id.* at ¶ 87. Brown alleges he was "humiliated, denigrated and defamed by [his arrest] and suffered severe emotional stress as a result." *Id.* at ¶ 88. NSU campus police transported Brown to the police station, where officers told Brown he was being charged with trespassing and would be "turned over" to the Norfolk Police Department. *Id.* at ¶ 89. Before transport, NSU campus police released Brown "after being made aware" by Brown and Brown's attorney that Brown had reported in at the NSU campus police station and had received permission to obtain his transcript from the registrar. *Id.* at ¶ 92. Because he was shaken up and embarrassed by his public arrest, Brown left campus without obtaining his transcript. *Id.* at ¶ 93.

The complaint contains five counts. Count I alleges that the Commonwealth of Virginia, NSU, the Board, Johnson, and Porter, violated Brown's due process rights under the United States and Virginia Constitutions, by failing to adhere to the published disciplinary procedures in the student handbook. *Id.* at ¶¶ 97–115. Count II alleges that defendants Porter and Johnson violated Brown's right to free speech under the United States and Virginia Constitutions by basing the decision to expel Brown and deny his appeal on his constitutionally-protected speech. *Id.* at ¶¶ 116–23. Count III alleges that the Commonwealth of Virginia, NSU, and the Board discriminated against Brown based on his gender, in violation of Title IX, by expelling him when they had not historically expelled female students for similar conduct. *Id.* at ¶¶ 124–34. Count IV alleges that the Commonwealth of Virginia, NSU, and the Board, by inquiring as to whether Brown practiced the Muslim faith, committed an act of religious discrimination based partially on gender in violation of Title IX. *Id.* at ¶¶ 135–42. Lastly, count V alleges that NSU and the Board breached Brown's contractual rights, established by NSU's published disciplinary procedures, during its investigation and expulsion of Brown. *Id.* at ¶¶ 143–52.

III. ANALYSIS

A. Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction where a party is entitled to immunity.

Defendants moved to dismiss Brown's action on the basis of Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 4. In response to Brown's due process claim (count I), defendants moved for dismissal for lack of subject matter jurisdiction on the grounds of immunity. Defs.' Mem. at 6–7, 9. *See Cunningham v. Gen. Dynamics. Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018); *see also John Doe v. Bd. of Trs. of St. Mary's Coll. of Md.*, No. CBD-19-1760, 2019 WL 6215543, at *6 (D. Md. Nov. 20, 2019) (quoting *Cunningham*, 888 F.3d at 649) ("[S]overeign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject [] matter jurisdiction."); *Drewrey v. Portsmouth City Sch. Bd.*, 264 F. Supp. 3d 724, 727 (E.D. Va. 2017) (nothing the Eleventh Amendment "inhibit[s] the exercise" of a court's subject matter jurisdiction) (citation and internal quotation marks omitted). Therefore, "if the Eleventh Amendment or sovereign immunity applies, this court should grant the Motion to Dismiss for lack of subject matter jurisdiction." *Id.*

B. The standard of review for Rule 12(b)(6) motion to dismiss.

Pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the legal sufficiency of a complaint; it does "not, however, resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While plausibility "is not akin to a 'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

When reviewing a motion to dismiss, the Court must "assume all [well-pled facts] to be true" and "draw all reasonable inferences in favor of the plaintiff," but it "need not accept the legal conclusions drawn from the facts, and [] need not accept as true unwarranted inferences, unreasonable conclusions or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citations and internal quotation marks omitted); *see also Twombly*, 550 U.S. at 555 (noting that the court is "not bound to accept as true a legal conclusion couched as a factual allegation"). Accordingly, the Court may only grant a 12(b)(6) motion if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of [the] claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 677–78. "[N]aked assertion[s] devoid of further factual enhancement" are not sufficient under *Iqbal's* "plausibility" standard. *Id.* at 678; *see also Nemet*, 591 F.3d at 255 (same). Without the "heft" of sufficient facts to support his claims, "plaintiff[] . . . cannot establish a valid entitlement to relief, as facts that are 'merely consistent with a defendant's

liability,' fail to nudge claims 'across the line from conceivable to plausible.'" *Nemet*, 591 F.3d at 256 (internal citations omitted) (quoting *Iqbal*, 556 U.S. at 674, 680).

Additionally, when considering a motion to dismiss for failure to state a claim, a court may only consider the pleadings, which include "documents attached as exhibits or incorporated by reference." *Carrington v. HSBC Bank USA, N.A.*, 760 F. Supp. 2d 589, 592 (E.D. Va. 2010); *see also Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165–66 (4th Cir. 2016) ("[O]ur evaluation is . . . generally limited to a review of the allegations of the complaint itself."). Supporting memoranda are not part of the pleadings. *See Dawson v. Winter*, No. CCB–06–2885, 2007 WL 1610905, at *2 (D. Md. May 21, 2007) (holding that a motion and memorandum are not pleadings).

C. Count I against defendants sufficiently states a claim for a due process deprivation of a liberty interest.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution guarantees that a state will not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause contains both a substantive and procedural component. *Id.* The procedural component of the Due Process Clause prohibits states from taking actions that deprive citizens of "liberty" or "property" interests. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To properly state a procedural due process claim, Brown must show the following: (1) "that he possessed a protected liberty or property interest"; (2) "that the state or its agents deprived him of this interest"; and (3) "that this deprivation was effectuated without constitutionally sufficient process." *Doe v. Rector and Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 719 (E.D. Va. 2015); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The complaint directly alleges the second element, stating that defendants are either "the state or its agents." *See* Compl. ¶¶ 100–102, 104, 109, 113. Accordingly, the Court need only

address the first and third elements of Brown's procedural due process claim.

As discussed below, Brown fails to sufficiently allege a property interest. He does, however, properly allege deprivation of a liberty interest.

1. Brown has failed to sufficiently allege a property interest.

To have a protected property interest, Brown must allege an interest that is "created or defined" by a source independent from the Fourteenth Amendment itself. *GMU*, 132 F. Supp. 3d at 719 (citing *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 109 (4th Cir. 2011)). One independent source stems from state law. *Roth*, 408 U.S. at 577. As the Supreme Court held in *Roth*, "[t]o have a property interest in a benefit, a person clearly must have more than . . . a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*; *see also Tri-County Paving, Inc. v. Ashe Cty.*, 281 F.3d 430, 436 (4th Cir. 2002) (citing *Roth*, 408 U.S. at 577).

As explained in *GMU*, the Supreme Court held in *Goss v. Lopez* that

> a student's enrollment in a public school constituted a property interest based on an Ohio statute[] guaranteeing a free education to all residents between 5 and 21 years of age, which created that entitlement. In other words, the plaintiff in *Goss* was able to locate a state law source of a qualifying property interest, namely a statutory claim of entitlement to continued enrollment in public school.

GMU, 132 F. Supp. 3d at 720 (citing *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975)). Similarly, the Virginia Constitution guarantees a "system of free public elementary and secondary schools for all children of school age throughout the Commonwealth." Va. Const. art. VIII, § 1. However, the Virginia Constitution is silent on the rights of students seeking post-secondary education, and "[n]either the Supreme Court nor the Fourth Circuit has held that such a property interest exists in connection with higher education, either categorically or specifically with regard to Virginia law."

GMU, 132 F. Supp. 3d at 720–21.

Neither the complaint nor the exhibits attached thereto identify the source of any property interest in Brown's education and continued enrollment in NSU. *See, e.g.*, *Goines*, 822 F.3d at 165–66. While Brown includes in his memorandum in opposition to defendants' motion to dismiss a Virginia statute which he contends gives rise to a property interest in his post-secondary education, Brown failed to mention this statute in his complaint.[6]

For the reasons stated above, Brown has not alleged a property interest.

2. Brown has sufficiently alleged a liberty interest.

Even though Brown did not properly allege a property interest, the Court may still find that Brown's due process claim survives defendants' motion to dismiss—but only if "he can allege and prove that his expulsion from [NSU] deprived him of, or injured, a qualifying liberty interest." *GMU*, 132 F. Supp. 3d at 721; *see, e.g.*, *Roth*, 408 U.S. at 569–70.

In the context of due process, a liberty interest "encompasses more than 'mere [] freedom from bodily restraint.'" *GMU*, 132 F. Supp. 3d at 721 (quoting *Roth*, 408 U.S. at 572). Instead,

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[6] Brown cites to Virginia Code § 23.1-600(A) (2016), which provides for participation in and eligibility for state-supported financial aid programs. Under section 23.1-600(A), "[p]articipation in and eligibility for state-supported financial aid or other higher education programs designed to promote greater racial diversity in public institutions of higher education shall not be restricted on the basis of race or ethnic origin. Any individual who is a member of any federally recognized minority is eligible for and may participate in such programs if such individual meets all other qualifications for admission to the relevant institution and the specific program." Va. Code Ann. § 23.1-600(A). Brown argues that, as an African-American at an historically black college, he was entitled to "certain grants and programs pursuant to the Virginia Code and the Higher Education Act of 1965 that are designed to promote greater racial diversity." Pl.'s Mem. at 8 (citing 20 U.S.C. §§ 1001–1019). However, any right to participate in financial aid programs does not create a property right to attend post-secondary education. *See Runge v. Barton*, No. 6:08-0231-GRA, 2009 WL 3245471, at * 7 (D.S.C. Oct. 2, 2009) ("[T]he plaintiff has not established that his children[, students at a South Carolina college,] possessed a protected property right in receiving financial aid."). Accordingly, even if Brown's complaint identified Virginia Code § 23.1-600(A) as a source, the Virginia Code would not entitle him to continued post-secondary education at NSU.

the Supreme Court has held that a liberty interest is implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). As applied in school discipline cases, such as *Goss v. Lopez*, the Supreme Court affirmed that students' liberty interests may be implicated when the students were suspended or expelled due to allegations of misconduct. *Goss*, 419 U.S. at 575. "[C]harges of misconduct," the Court ruled, "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *GMU*, 132 F. Supp. 3d at 721 (citing to *Goss*, 419 U.S. at 575).

But a student must show more than "injury to reputation alone." *Tigrett v. Rector & Visitors of Univ. of Va.*, 290 F.3d 620, 628 (4th Cir. 2002). Therefore, "to state a procedural due process liberty interest claim, a plaintiff claiming due process protection must assert that a state actor has injured his reputation or otherwise imposed a reputational 'stigma' on him and must also have [deprived him] of 'some more tangible interests.'" *GMU*, 132 F. Supp. 3d at 722 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)). The standard in *Davis* has been dubbed the "stigma-plus" test, and it mandates that plaintiffs like Brown, who assert a "reputational liberty interest protected by the Fourteenth Amendment," must show both "(i) the infliction by state officials of a 'stigma' to plaintiff's reputation *and* (ii) the deprivation of a legal right or status." *GMU*, 132 F. Supp. 3d at 722 (quoting *Davis*, 424 U.S. at 710–11).

In *GMU*, this Court applied the stigma-plus test in the context of a plaintiff alleging a protected liberty interest following expulsion from a public university. *Id.* at 724. The Court found that plaintiff met the first factor of the *Davis* stigma-plus test by explicitly alleging that he "'had a constitutionally protected liberty interest in his good name, reputation, honor, and

integrity' and 'in pursuing his education, as well as future educational and employment opportunities.'" *Id.* at 719. In addressing the second *Davis* factor—deprivation of a legal right or status—the *GMU* Court analogized a student's expulsion to cases pertaining to a public employee's discharge, in which the Fourth Circuit has long recognized "that a liberty interest is implicated by the public announcement of reasons for an employee's discharge." *Id.* at 723 (citing *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986)) (explaining that the consequences of publicly announcing an employee's termination are reputational harm to "one's name" and difficulty "pursuing . . . employment" in "one's chosen field"). To that end, the Court held that "expulsion from a public school clearly constitutes the sort of deprivation or change in legal status actionable under the stigma-plus test." *Id.* at 722 (citation and internal quotation marks omitted). The Court in *GMU* reasoned that expulsion from a public school and misconduct "charges could seriously damage . . . students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* (quoting *Goss*, 419 U.S. at 575). Finding that the plaintiff in *GMU* alleged, among other things, that his expulsion would "remain a part of Plaintiff's permanent educational records and [would] substantially limit his ability to transfer . . . , attend graduate school, or secure future employment," the Court ruled that plaintiff had stated a claim and adequately alleged it was likely that "prospective employers or members of the public would see the damaging information." *Id.* at 723.

In this case, Brown has met the second *Davis* factor, in that defendants expelled him from NSU. Compl. ¶ 53, Compl. Ex. 3. Brown has also met the first *Davis* factor. While Brown's due process claim does not explicitly allege deprivation of a liberty interest, the complaint alleges: "NSU's expulsion of Brown has permanently tarnished his academic record, potentially closing the door on numerous career and educational opportunities, and reducing his future earnings

potential. . . . Defendants' expulsion of Brown has caused and continues to cause Brown significant reputational injury, significant professional injury, losses in earnings, substantial losses to future earnings and benefits, significant pain and suffering, medical expenses, embarrassment, anguish and severe emotional distress." Compl. ¶¶ 78, 95, 97–115. Viewing the facts, as the Court must, in the light most favorable to Brown, the Court concludes Brown has sufficiently alleged deprivation of a liberty interest.

3. Brown has alleged a constitutionally-inadequate process.

The Court must next determine whether Brown has alleged a constitutionally inadequate process. *See, e.g.*, *Doe v. Alger*, 175 F. Supp. 3d 646, 656 (W.D. Va. 2016) ("If one or both [property and liberty interests] has been sufficiently alleged, then the court must determine whether the plaintiff has sufficiently alleged that the process he received was constitutionally inadequate.").

In an academic setting, the Supreme Court "has recognized that the requirements of due process may be satisfied by something less than a trial-like proceeding." *Henson v. Honor Comm. of the Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (citing *Goss*, 419 U.S. at 583). Schools are "not a courtroom or administrative hearing room." *Bd. of Curators v. Horowitz*, 435 U.S. 78, 88 (1978). As such, "judicial intrusion into academic decisionmaking should be avoided," because schools need greater "flexibility in fulfilling the dictates of due process." *Henson*, 719 F.2d at 74. Although more flexible in the school context, due process requirements for disciplinary proceedings, as opposed to academic evaluations, "require more stringent procedural protection," but still do not require "complete adherence to the judicial model of decisionmaking." *Id.* (citing *Goss*, 419 U.S. at 582); *see also Brown v. Rectors and Visitors of the Univ. of Va.*, 361 F. App'x 531, 532–33 (4th Cir. 2010) (quoting *Henson*, 719 F.2d at 74) ("Procedural requirements are greatly reduced, however, when a student is dismissed for academic, as opposed to disciplinary,

reasons.").

In determining the due process requirements for school disciplinary hearings, the Fourth Circuit follows the standards established by the Fifth Circuit in *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961). *See Henson*, 719 F.2d at 74. In *Dixon*, the Alabama state board of education expelled nine students for participating in civil rights demonstrations. 294 F.2d at 151–53. The district court upheld the board's decision to expel the students, reasoning it was the college's right "to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution." *Dixon v. Ala. State Bd. of Educ.*, 186 F. Supp. 945, 951 (M.D. Ala. 1960). Finding the college expelled the students without providing them due process—or any "rudimentary elements of fair play"—the Fifth Circuit reversed the district court's decision and established the minimum due process requirements for disciplinary matters in the school context:

> The notice should contain a statement of the *specific* charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. . . . By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. . . . the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses [o]n his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection.

Dixon, 294 F.2d at 158–60 (emphasis added).

In *Henson*, a student of the University of Virginia School of Law was expelled for both academic deficiencies and honor code violations. *Henson*, 719 F.2d at 70–71. Henson contended that the university's honor code procedures denied students due process in two ways: (1) the university deprived the student "the right to have experienced legal counsel conduct his defense and cross-examine witnesses"; and (2) the university denied the student "the right to have [his disciplinary] hearing subject to the traditional rules of evidence." *Id.* at 73. The Fourth Circuit found that the "procedural protections afforded [plaintiff] were sufficient under the fourteenth amendment's due process clause." *Id.* More specifically, the court held that plaintiff had been afforded an "impressive array of procedural protections"—he had a hearing before a committee of his peers, and given "adequate notice of the charges against him and the opportunity to be heard by disinterested parties." *Id.* at 71, 74. His accusers were required to "face the student at the hearing and state the basis of their allegations," and "submit to cross-examination by the student, or his designated student counsel, and by the members of the hearing committee." *Id.* at 73. Plaintiff was also "provided with two student-lawyers who consulted extensively with his personally retained attorney at all critical stages of the proceedings." *Id.* at 74. Lastly, plaintiff had considerable time to prepare for his hearing and appeal; "The time []lapse between notification and hearing was several months, and then several more months before a second hearing, then a little over a year of appeals before the matter was dropped." *Id.* at 71.

In comparison to the process described in *Henson*, the process relating to Brown's disciplinary hearing appears far less thorough. Brown was not tried in front of a committee; instead, he was tried by Porter, who acted as the sole "investigator, fact finder and decision maker." Compl. ¶ 61. Brown alleges he was not given "adequate notice of the charges against him," *Henson*, 719 F.2d at 74; rather, Brown received an email less than 24 hours before his conduct

conference, which vaguely noted that Brown "violated the Code of Student Conduct, specifically, No. 20.[,] [t]hreatening [b]ehavior[,] whether written or verbal, towards any member of the University community that causes an expectation of injury or implies a threat to cause fear." Compl. Ex. 1; *see also* Pl.'s Mem. at 11 ("Of note, the student in *Henson* was notified specifically of what he was accused of doing, and where he was accused of doing it."). Brown alleges that he did not believe the text exchange he had with Smith on June 11, 2017 was "threatening." Compl. ¶ 28. In fact, Brown contends that the "texting conversation . . . [was] playful in nature." *Id.* As such, the notice Brown received from NSU was vague—it did not identify the "*specific*" misconduct for which Brown was being investigated. *See Dixon*, 294 F.2d at 158. Brown also alleges that defendants never gave him notice that expulsion "was a likely sanction." Compl. ¶¶ 53–55.

Additionally, unlike the plaintiff in *Henson*, 719 F.2d at 71, who had "several months" to prepare for his disciplinary hearing, Brown had a "sixty-three[-]minute interval" between defendants' email scheduling a disciplinary hearing, and the actual conduct conference. Compl. ¶ 43. Under such time constraints, Brown contends that he "was not afforded a reasonable opportunity to assess the accusations, formulate a defense, contact counsel, contact witnesses or otherwise prepare for a hearing." *Id.* at ¶ 51; *see* Pl.'s Mem. at 13 (without sufficient time to prepare, Brown was "rendered utterly incapable of investigating, questioning witnesses, scheduling witnesses, or preparing a defense."). Moreover, at the conference, Brown was not able to confront his accuser, Smith, and therefore could not cross-examine him, as the plaintiff did in *Henson*, 719 F.2d at 73. The letter Brown received from defendants merely referenced the online source at which the code of student conduct could be found, which Brown argues did not adequately inform him of his rights at the disciplinary hearing, another requirement established by

the *Dixon* court. *See* Compl. Ex. 1; *see also Dixon*, 294 F.2d at 158.

Dixon indicates that a student accused of misconduct should receive some form of a written or oral report from his accuser, 294 F.2d at 159, but Brown was not presented with any reports to supplement his understanding of the charges against him. Compl. ¶ 73–76 (alleging that NSU did not provide Brown with a "Complainant's statement" or "Investigative Rationale" until Brown's counsel submitted an attorney request for documents almost a year following the incidents at issue in this case). Following the conduct conference, defendants did not provide Brown with an investigation report explaining the charges against him, evidence considered, or rationale for defendants' decision to expel him. *Id.* Brown alleges that, when defendants sent the resolution letter informing Brown he was being expelled, defendants considered conduct outside of and unrelated to the conduct for which he was being investigated. Compl. ¶¶ 52, 54 ("Until receipt of the Resolution Letter, Brown had received no written notice that he was being charged with [a] probation violation."). Finally, when Brown filed his appeal, he contends that defendants failed to respond to each of his grounds for appeal, and based their decision to deny the appeal on "conduct that was not at issue in the Notice sent by Defendant Porter on June 15, 2017, as well as references to the language and content of Plaintiff Brown's appeal letter." *Id.* at ¶ 72.

Brown's allegations indicate that defendants strayed from the code, and from *Dixon's* requirements for due process in the school discipline context, and denied him many of the rights to which he was entitled as a student accused of misconduct.[7] 294 F.2d at 158–59. Accepting

[7] NSU's Student Handbook contains a section titled, "Student Conduct Process," which outlines disciplinary procedures for both a formal and informal investigation, notification, and conference for allegations of misconduct. *See* Compl. Ex. 6, ECF No. 1-2 at 27–35. Under the formal resolution section of the Student Conduct Process, Brown arguably should have received a notice, in writing, which included, "[t]he reported violation(s) citing the *Code of Student Conduct*," "[t]he date, time, and location of the hearing," and "[t]he rights of the respondent [student]." *Id.* After receiving notice, a student will attend a disciplinary hearing which is ordinarily run by a student

Brown's allegations as true, and viewing them in the light most favorable to him, *Nemet*, 591 F.3d at 253, Brown has alleged a constitutionally inadequate process.

For these reasons, Brown has sufficiently pled the elements of his due process claim (count I). However, as discussed below, because defendants are entitled to immunity, count I should be dismissed for lack of subject matter jurisdiction, so the Court **RECOMMENDS** that Brown's due process claim (count I), be **DISMISSED with prejudice.**

D. Count I's due process claims against the Commonwealth, NSU, and the Board are barred by Eleventh Amendment immunity, and count I's due process claims against NSU, and the Board are also barred by sovereign immunity.

Count I alleges all defendants violated Brown's due process rights arising under the United States Constitution and the Virginia Constitution, as described above.[8] Brown alleges that NSU is a government-funded university. Compl. ¶¶ 11–12. As a "public institution of higher education," NSU is an instrumentality of the Commonwealth of Virginia. Va. Code Ann. § 23.1-100; *see also Demuren v. Old Dominion Univ.*, 33 F. Supp. 2d 469, 475 (E.D. Va. 1999) (finding "state colleges and universities are agents of the state, and thus immune from suit under the Eleventh Amendment"). Brown contends that "[s]tate sponsored universities, like NSU, owe a

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conduct panel, but which may not be available during summer sessions. *Id.* In the event a student conduct panel is not possible, a student conduct officer will oversee the hearing. *Id.* at 31. At the hearing, the parties have "the privilege of questioning witnesses," and the officer may only consider "oral and written statements of witnesses and written reports/documents." *Id.* at 30. After the officer renders his or her decision, the student has the right to electronically submit an appeal, which the dean of students must review and "provide a written decision within five (5) business days. . . . [T]he decision is made based on the written information submitted and is final." *Id.* at 31.

[8]"The Due Process Clauses of the United States Constitution are co-extensive with those in the Virginia Constitution." *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 841 n.19 (E.D. Va. 2015); *see also Shivaee v. Commonwealth*, 613 S.E.2d 570, 574 (Va. 2005). Therefore, rather than analyzing them independently, the Court will consider them as part of the same analysis.

duty to students to establish rules and regulations governing disciplinary proceedings in such a way that Constitutional Rights are preserved." *Id.* at ¶ 102.

Brown also alleges that the Commonwealth of Virginia "owes a duty to students to oversee state sponsored universities, like NSU, and ensure that disciplinary procedures provide sufficient due process." Compl. ¶ 104. Where, as here, those procedures allegedly fall below the minimum level required by due process, Brown asserts the Commonwealth of Virginia is "likewise responsible" and liable. *Id.* at ¶ 113.

Defendants NSU, the Commonwealth, and the Board claim that sovereign immunity bars Brown's due process claims against them in count I. Defs.' Mem. at 6–7. As their memorandum seems to conflate sovereign immunity with immunity under the Eleventh Amendment, the Court will address both. *See Stewart v. North Carolina*, 393 F.3d 484, 487 (4th Cir. 2005) (holding that Eleventh Amendment immunity and the state common law doctrine of sovereign immunity are "related but not identical concepts").

In *Alden v. Maine*, the Supreme Court elucidated the difference between Eleventh Amendment immunity and common law sovereign immunity:

> We have . . . sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States).

527 U.S. 706, 713 (1999). "In that sense, state sovereign immunity was not created by the Eleventh Amendment, but rather predated it." *Stewart*, 393 F.3d at 488. As such, Eleventh Amendment

immunity is only one "example of state sovereign immunity as it applies to suits filed in federal court against unconsenting states." *Id.* Therefore, even when a state has waived its Eleventh Amendment immunity, it has not necessarily waived its broader, state sovereign immunity.

The Commonwealth of Virginia, NSU, and the Board contend they are collectively entitled to Eleventh Amendment immunity and that, therefore, Brown's due process claim in count I should be dismissed for lack of subject matter jurisdiction. Defs.' Mem. at 6–7.

The Eleventh Amendment may be analyzed within the context of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See Cunningham v. Gen. Dynamics. Info. Tech., Inc.*, 888 F.3d at 649. In *Will v. Mich. Dept. of State Police*, the Supreme Court held that, while "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against" a state or state agency. 491 U.S. 58, 66 (1989). The Eleventh Amendment bars these kinds of suits against a state or state agency "unless the State has waived its immunity," or "unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity."[9] *Id.* (internal citations omitted); *see also Demuren*, 33 F. Supp. 2d at 475 ("[S]tate colleges and universities are agents of the state, and thus immune from suit under the Eleventh Amendment.").

To overcome the Eleventh Amendment immunity of the Commonwealth of Virginia, NSU, and the Board, Brown contends the following: (1) by removing the case to federal court, the Commonwealth, NSU, and the Board have waived their Eleventh Amendment immunity; and (2) under the Virginia Tort Claims Act ("VTCA"), the Commonwealth of Virginia has waived its common law sovereign immunity in state court, and thereby consented to suit in federal court.

[9] Similarly, under *Will*, for purposes of section 1983, the Commonwealth of Virginia is not a suable "person." *Will*, 491 U.S. at 64 ("[A] State is not a person within the meaning of § 1983.").

Addressing his removal argument, Brown cites to *Lapides v. Board of Regents*, in which the Supreme Court ruled, a "State's action joining the remov[al] of [a] case to federal court waive[s] its Eleventh Amendment immunity." 535 U.S. 613, 624 (2002). In *Stewart*, however, the Fourth Circuit ruled that *Lapides* does not extend as far as Brown contends. *Stewart*, 393 F.3d at 490. The Fourth Circuit ruled that removal from state to federal court only waives Eleventh Amendment immunity when the state or state agency has already waived its immunity in state court. *Id.*; *see also Passaro v. Virginia*, 935 F.3d 243, 247 (4th Cir. 2019) ("a state retains its sovereign immunity from suit in state court, it does not lose that immunity by removing the case to federal court."). A state or its agency may waive its sovereign immunity in state court by "express constitutional or statutory waiver." *Gray v. Va. Sec'y of Trans.*, 662 S.E.2d 66, 71 (Va. 2008).

Brown contends that the VTCA operates as just such a waiver of immunity in state court and that, by removing this case to federal court, the Commonwealth, NSU, and the Board have thereby waived their Eleventh Amendment immunity.[10] *See* Pl.'s Mem. at 3–4. However, decisions from both the Fourth Circuit and district courts in the Fourth Circuit have rejected this argument as it concerns the Commonwealth of Virginia. *See e.g.*, *McConnell v. Adams*, 829 F.2d 1319, 1329 (4th Cir. 1987); *Haley v. Va. Dep't of Health*, No. 4:12cv16, 2012 WL 5494306, at *5 (W.D. Va. Nov. 13, 2012). In *McConnell*, the Fourth Circuit held that, while the VTCA generally "waiv[es] sovereign immunity for tort claims filed in state courts," it "does not waive the state's

[10] *See* Va. Code Ann. § 8.01-195.3 (2007) ("[T]he Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982 . . . on account of damage to or loss of property or personal injury . . . caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under such circumstances where the Commonwealth . . . if a private person, would be liable to the claimant for such damage, loss, injury or death.").

eleventh amendment immunity." *McConnell*, 829 F.2d at 1329 (citing *Reynolds v. Sheriff, City of Richmond*, 574 F. Supp. 90, 91 (E.D. Va. 1983)). More recently in 2012, the *Haley* court reiterated this point, explaining, "it is well settled that the VTCA does not waive Virginia's Eleventh Amendment immunity." 2012 WL 5494306, at *5; *see also Calloway v. Commonwealth*, No. 5:16cv81, 2017 WL 4171393, at * 6 (W.D. Va. Sept. 20, 2017) ("[A]lthough the Commonwealth enacted the Virginia Tort Claims Act . . . and allowed itself to be sued for negligence claims filed in state courts, it has not waived its Eleventh Amendment immunity and has not consented to be sued in *federal* courts.") (internal citations omitted). As the *Haley* court reasoned, the VTCA "does not refer to the Eleventh Amendment, does not mention suits in federal court, and does not appear to even contemplate this type of action." 2012 WL 5494306, at *5.

Therefore, the Commonwealth of Virginia, NSU, and the Board's motion to dismiss count I for lack of subject matter jurisdiction should be **GRANTED** as these three defendants are immune from suit on Brown's due process claim pursuant to the Eleventh Amendment.[11] *See Drewrey*, 264 F. Supp. 3d at 727; *see also St. Mary's*, 2019 WL 6215543, at *6.

[11] Even if the Eleventh Amendment did not apply to NSU and the Board, those two defendants would still be immune from Brown's due process claim in count I based upon the common law doctrine of sovereign immunity. *See Rector and Visitors of the Univ. of Va. v. Carter*, 591 S.E.2d 76, 78 (Va. 2004) (holding that the VTCA's waiver of sovereign immunity as to the Commonwealth "does not disturb the sovereign immunity of the Commonwealth's agencies"); *Michael v. Va. Commonwealth Univ.*, No. 3:18cv125-JAG, 2019 WL 128236, at *5 (E.D. Va. Jan. 8, 2019) ("While the [VTCA] provides a limited waiver of sovereign immunity in suits against the Commonwealth, that waiver does not apply to agencies like VCU."). NSU and the Board's sovereign immunity cannot be waived by the VTCA. Because the Court finds that the Commonwealth of Virginia is shielded by Eleventh Amendment immunity, it need not address whether the Commonwealth is also protected by sovereign immunity.

E. The due process claims against defendants Porter and Johnson in their individual capacities are barred by qualified immunity.[12]

Count I also asserts a due process claim against Porter and Johnson in their individual capacities as school officials. Compl. ¶¶ 109–11. Government officials sued in their individual or personal capacities may be entitled to qualified immunity. *See, e.g.*, *Lane v. Franks*, 573 U.S. 228, 243 (2014). When government officials perform "discretionary functions," they are entitled to qualified immunity from liability for any civil damages—but only to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998). "[Q]ualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Wilson*, 141 F.3d at 114. In this way, if "the contours of the constitutional right asserted are not sufficiently clear, the defending state actor has an absolute defense of qualified immunity." *See Herron v. Va. Com. Univ.*, 366 F. Supp. 2d 355, 361 (E.D. Va. 2004). Furthermore, "even if a clearly-established constitutional right is implicated, a defense of qualified immunity may still apply if it was objectively reasonable for the state actor to believe that the conduct was lawful under the circumstances." *Id.* The burden of establishing entitlement to qualified immunity rests upon a defendant who invokes it. *Henry v. Purnell*, 501 F.3d 374, 377–78 (4th Cir. 2007).

Traditionally, the qualified immunity analysis requires two separate determinations. *See, e.g.*, *GMU*, 132 F. Supp. 3d at 724. First, a court must determine, "whether, viewed in the light most favorable to the plaintiff, the defendant violated the constitutional rights of the plaintiff."

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[12] In the memorandum in support of their motion to dismiss, defendants argue that Porter and Johnson should be immune from suit in their official capacities. *See* Defs.' Mem. at 7–8. But Brown's complaint only names Porter and Johnson in their individual capacities, and Brown reiterates in his memorandum in opposition to defendants' motion to dismiss that he is not asserting a due process claim against Porter and Johnson in their official capacities. *See* Pl.'s Mem. at 5–6.

Wood v. Bd. of Educ. of Charles County, No. GJH-16-00239, 2016 WL 8669913, at *6 (D. Md. Sept. 30, 2016). The second step in the qualified immunity analysis requires a court, if it finds a constitutional right has been violated, to consider "whether that right was clearly established, such that a reasonable official would understand what he [or she] is doing violates that right." *Id.* (quoting *Cole v. Buchanan Cty. Sch. Bd.*, 328 F. App'x 204, 208 (4th Cir. 2009)) (internal citations omitted).[13] For both determinations, the court must "identify[] the right at issue at the appropriate level of generality." *GMU*, 132 F. Supp. 3d at 724.

For a right to be "clearly established," some "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also Brickey v. Hall*, 828 F.3d 298, 303 (4th Cir. 2016). Further, to determine whether the right was "clearly established at the time of the defendant[s'] alleged conduct," the focus is "not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Zepp v. Rehrmann*, 79 F.3d 381, 385 (4th Cir. 1996) (citing *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992)). The right must also be clearly established "at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). If, at the time of the government officials' alleged misconduct, the federal right claimed by the plaintiff was not clearly established, the officials are entitled to qualified immunity. *GMU*, 132 F. Supp. 3d at 724.

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[13] The Supreme Court has since abandoned the "rigid two-tiered approach," *Cole*, 328 F. App'x at 207, finding that "fixed adherence to the two-step inquiry" may result in depleting scarce judicial resources. *Wood*, 2016 WL 8669913, at *6 (citing *Pearson v. Callahan*, 555 U.S. 223, 224 (2009)). Instead, courts may "grant qualified immunity without first deciding whether a [constitutional] violation occurred so long as the right claimed to be violated was not clearly established." *Cole*, 328 F. App'x at 207.

In this case, the "appropriate level of generality" is not "that the government must afford due process when it deprives someone of liberty"—that would be far too general. *Id.* at 724–25. Instead, the "appropriate level of generality" is "the right to be free from a state college, university, or post-secondary educational institution expulsion for misconduct without due process." *Id.* at 725.

Brown argues that defendants Porter and Johnson violated his procedural due process rights when they investigated, expelled, and later denied his appeal, allegedly in violation of NSU's published procedures for disciplinary proceedings and appeal resolutions. Compl. ¶¶ 100–01, 105–08. As explained earlier, based on the facts stated in his complaint, Brown has properly alleged a qualifying liberty interest for his procedural due process claim, thereby satisfying the first step of the qualified immunity analysis. *Id.* at ¶¶ 78–79, 88, 95; *see also GMU*, 132 F. Supp 3d at 724. However, determining whether defendants Porter and Johnson are entitled to qualified immunity requires more than alleging that the disciplinary procedures utilized in this case violated Brown's due process rights and deprived him of a liberty interest. At step two of the qualified immunity test, it must be shown that the right violated was "clearly established." *Cole*, 328 F. App'x at 207; *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (looking at whether it was "sufficiently clear that every reasonable official would have understood that what he [wa]s doing violates that right") (citation and quotation marks omitted). Using the framework from *GMU*, the Court has considered whether Brown's federal due process rights in the context of school disciplinary conferences were clearly established *at the time* of defendants' alleged misconduct, and finds that they were not.

In *GMU*—which was decided only eight months before the events discussed in this case—the plaintiff, accused of sexual misconduct, alleged that the university did not adhere to university

guidelines when it conducted disciplinary hearings, appeals, and imposed sanctions related to plaintiff's misconduct. *GMU*, 132 F. Supp. 3d 725–26. Asserting a procedural due process claim, plaintiff argued he had a protected liberty interest in his "good name, reputation, honor, and integrity" and that, unless his expulsion for sexual misconduct was "overturned," it would "remain a part of Plaintiff's permanent educational records and . . . substantially limit his ability to transfer to another undergraduate institution, attend graduate school, or secure future employment." *Id.* at 723–24. The *GMU* plaintiff analogized his "protected reputational liberty interest" in his education to the liberty interest claimed by public employees terminated for misconduct. *Id.* at 722. The Court reasoned that, under Fourth Circuit jurisprudence, "a liberty interest is implicated by the public announcement of reasons for an employee's discharge," because its publication could affect an individual's "opportunity for other gainful employment." *Id.* at 723–24.

But, while the Court understood the analogy, and agreed that expulsion from college on grounds of misconduct "implicate[d] a protected liberty interest," it reasoned that "it does not necessarily follow that 'every reasonable official' would foresee such an analytical move." *Id.* at 724, 726. Consequently, the Court held "[t]he mere fact that defendants may have known that [certain disciplinary] procedures were necessary does not mean that they knew or should have known that the procedures were protecting a federal constitutional interest in reputational liberty." *Id.* at 726. The fact that certain procedures were in place at the university suggested that the school officials who handled plaintiff's disciplinary hearings "were aware that certain minimum process is necessary," but the source of minimum process could stem from "the state constitution, state statute, state administrative regulation, or, indeed, merely the judgment of responsible officials." *Id.*

The Court concluded, "[i]n light of the law as it existed at the time of the alleged violation

[in 2014], it was not 'beyond debate' that certain minimum procedures were necessary for the protection of a federal constitutional liberty interest in the context of disciplinary hearings for students at a state college or university." *Id.* at 726–27; *see also Herron*, 366 F. Supp. 2d at 361 (finding that the plaintiff could not show that the right to "certain procedure" in the school disciplinary context was a "clearly established" right such that a failure to apply those procedures resulted in an "established constitutional deprivation"). Consequently, "[g]iven the absence of clear and settled authority putting the existence of a protected reputational liberty interest beyond debate in the context of state college and university disciplinary hearings," the defendants in *GMU* were entitled to qualified immunity, to the extent they had been sued in their individual capacities. *Id.* at 727. And, because Brown has not offered any new case law supporting a clearly established right to certain procedures in the school disciplinary context, so too does he fail to negate Porter and Johnson's defense of qualified immunity.

Accordingly, the Court **RECOMMENDS** that count I's due process claims against defendants Porter and Johnson be **DISMISSED with prejudice** on grounds of qualified immunity.

F. Brown's freedom of speech claim (count II) is too vague and fails to state a claim under Rule 12(b)(6).

In count II, Brown brings a freedom of speech claim, alleging that Porter and Johnson, government officials, based their decisions to expel Brown, and to deny his appeal, in part, on his "Constitutionally protected speech." Compl. ¶¶ 119–21. Consequently, Brown contends that Porter and Johnson are liable to him for "these abridgments of his Constitutional right to free speech," pursuant to 42 U.S.C. § 1983. *Id.* at ¶ 122. Defendants Porter and Johnson seek dismissal of count II for failure to state a claim upon which relief can be granted.

The First Amendment of the United States Constitution is made applicable to the states through the Fourteenth Amendment. *Virginia v. Black*, 538 U.S. 343, 358 (2003). The

Constitution of Virginia has also enshrined the right to free speech. Va. Const. art. I, § 12.

To properly state a First Amendment claim under section 1983, Brown must allege that "(1) []he engaged in protected First Amendment activity, (2) the defendant[] took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and the defendant[s'] conduct." *Martin v. Duffy*, 858 F.3d 239, 249 (4th Cir. 2017) (internal quotation marks omitted). Plaintiffs seeking recovery for retaliation must demonstrate that "defendant's conduct resulted in something more than a '*de minimis* inconvenience' to h[is] exercise of First Amendment rights." *Constantine*, 411 F.3d 474, 500. To do this, plaintiff must show that "a person of ordinary firmness" would be deterred from the exercise of First Amendment rights because of defendant's retaliatory conduct. *Id.* (internal quotation marks omitted). To establish a causal connection between his First Amendment activity and "the alleged adverse action," a plaintiff must show, "at the very least, that the defendant was aware of h[is] engaging in protected activity." *Id.* at 501 (citation omitted). Additionally, there "must also be some degree of temporal proximity to suggest a causal connection," such that, "[a] lengthy time lapse between the [official's] becoming aware of the protected activity and the alleged adverse . . . action . . . negates any inference that a causal connection exists between the two." *Id.* (citation and internal quotation marks omitted).

While Brown alleges that defendants have "abridg[ed]" his Constitutional right to freedom of speech, he does not specifically indicate which act or acts of free speech defendants abridged. *See* Compl. ¶¶ 116–23. In the statement of facts in his complaint, Brown identifies two distinct acts of speech that may be at issue in this case: (1) his text message to Smith; and (2) his appeal

letter to defendants following his conduct conference.[14] *Id.* at ¶¶ 29, 64. The Court will evaluate both acts of speech.

First, Brown's text message constitutes a true threat. "[T]rue threats of violence constitute a category of speech falling outside the protections of the First Amendment." *GMU*, 132 F. Supp. 3d at 729 (citing *Black*, 538 U.S. at 359). A true threat is a statement "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* As the Fourth Circuit noted in *United States v. White*, the true threats exception is justified by the need to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." 670 F.3d 498, 507 (4th Cir. 2012) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)) (internal quotation marks omitted). To determine whether a statement is a true threat, the Fourth Circuit uses an objective test—a "statement is a true threat 'if an ordinary reasonable recipient who is familiar with the context . . . would interpret [the statement] as a threat of injury.'" *GMU*, 132 F. Supp. 3d at 729 (quoting *White*, 670 F.3d at 507). Because the standard of review is objective, "the context of the communication is essential to determine whether it is protected by the First Amendment." *In re White*, No. 2:07cv342, 2013 WL 5295652, at *44 (E.D. Va. Sept. 13, 2013) (citing *Watts v. United States.*, 394 U.S. 705, 707–08 (1969)). Courts in the Fourth Circuit have "identified certain contextual factors relevant to the analysis of allegedly threatening remarks." *Id.* These factors include the language itself, and "the context in which [the threat] was made, including not only the forum in which the statement was communicated, but also the reaction of the audience upon its utterance." *Id.* at *45.

[14] Neither Brown's text message nor his appeal letter is attached to the complaint as exhibits, but Brown includes the language of his text message in his statement of facts. *See* Compl. ¶ 29.

In this case, Brown's text message communicated a threat: "text me again and im [sic] breaking your jaw." *Id.* at ¶ 29. However, the text message needs to be considered in its proper context. *See In re White*, 2013 WL 5295652, at *44. Here, Brown alleges that he and Smith were texting each other from within their dorm room, either from the same room, or from adjoining rooms. Compl. ¶ 27. Further, Brown alleges that their texting conversation related to "food and dirty dishes in their room," and that "[e]vidence available to NSU officials indicated that Smith considered the texting conversation to be playful in nature." *Id.* at ¶¶ 26, 28, 59. Brown contends that a third individual was present during their texting conversation and could have testified as to the nature of the text message, but that defendants Porter and Johnson declined to consider this evidence. *Id.* at ¶¶ 66, 71. Lastly, Brown alleges that, following his text message, Smith sent a responding text message, and Brown did not break Smith's jaw. *Id.* at ¶¶ 30–31.

Even viewed in the light most favorable to him, Brown's text message constitutes a true threat. While Brown's memorandum provides the context through which he may have otherwise proven his text message was not a true threat, that context is absent from his complaint. Instead, all that Brown alleges regarding the text message is the following: (1) the text of the message itself, which, without context, communicates a threat; (2) that the texting conversation occurred while Brown and Smith were in their dorm room; (3) that there may have been a witness present when he sent the message; (4) that evidence available to NSU indicated Smith considered the texting conversation with Brown to be playful; and (5) that Smith responded to the text and Brown did not break his jaw. Compl. ¶¶ 28–31, 66.

That Smith responded to Brown's text, from within the same dorm room, where a witness may have been present, and that Brown did not break Smith's jaw, has no bearing on whether Brown's message was threatening. Brown's other contention, that "[e]vidence available to NSU

officials indicated that Smith considered the texting conversation to be playful in nature," *id.* at ¶ 28, is too conclusory. *See, e.g.*, *Iqbal*, 556 U.S. at 678 (holding that "naked assertion[s] devoid of further factual enhancement" are not sufficient under *Iqbal's* "plausibility" standard); *Nemet*, 591 F.3d at 256 (deciding that, without the "heft" of sufficient facts to support his claims, "plaintiff[] . . . cannot establish a valid entitlement to relief, as facts that are 'merely consistent with a defendant's liability,' fail to nudge claims 'across the line from conceivable to plausible'") (internal citations omitted) (quoting *Iqbal*, 556 U.S. at 674, 680).

Brown's allegations do not indicate how Smith perceived the conversation. Nor do they expound on the "evidence available" to NSU concerning Smith's interpretation of the text message. On these facts alone, Brown's allegations do not carry the "heft" of "sufficient facts" to support his free speech claim. *Nemet*, 591 F.3d at 256. Consequently, the Court cannot determine that Brown's text was anything other than what it appeared to be out of context—a threat. Brown has not alleged facts sufficient to establish that his text message to Smith was not a true threat. Accordingly, his text message is excepted from the First Amendment free speech protection.

Brown also alleges that, after NSU sent Brown a resolution letter informing him he was being expelled from the school, Brown filed an appeal, as was his entitlement under NSU's code of student conduct. *Id.* at ¶¶ 53, 64; Compl. Ex. 6 at 31. Brown further alleges, based in part on the language and content of his appeal letter to NSU, Porter and Johnson denied Brown's appeal of his expulsion. Compl. ¶¶ 64, 72. From this, Brown contends that Johnson denied his appeal based upon constitutionally-protected speech. *Id.* at ¶ 121. In essence, Brown is asserting that, based on the content of the appeal letter submitted to Johnson, Johnson denied his appeal and thereby affirmed Brown's expulsion. Brown does not provide additional information to identify

in what way Johnson's action in denying Brown's appeal violated his right to free speech.[15] The Court cannot make assumptions as to Brown's claims and legal arguments—as such, without more, Brown's allegation that Johnson's decision to deny his appeal based on his constitutionally-protected speech is vague and conclusory.

For the reasons stated above, Brown has not sufficiently alleged a free speech claim for his two acts of speech, his text message and appeal letter. Accordingly, the Court **RECOMMENDS** that defendants' motion to dismiss count II be **GRANTED**.

G. Count III's claim of gender discrimination under Title IX fails to state a claim upon which relief can be granted.

In count III, Brown asserts a gender discrimination claim under Title IX against the Commonwealth of Virginia, NSU and the Board, alleging he was improperly expelled from NSU based on his gender.[16]

As a starting point, Brown notes, because NSU receives federal funding, it is subject to the requirements of Title IX. Compl. ¶ 11–12, 125–26; *see also* 20 U.S.C. § 1681 (1986). Brown next alleges he, "a male, was investigated and expelled from NSU following a student complaint that Brown violated the student conduct policy with threatening behavior." Compl. ¶ 127. To contrast the actions NSU took to investigate and expel him, Brown alleges that, "[o]ver a year prior to [his] expulsion, Brown complained to NSU officials that a female student had violated the student conduct policy with threatening behavior." *Id.* at ¶ 128. Additionally, Brown alleges that

[15] The Court recognizes Brown's assertions may be the beginning of First Amendment retaliation claim, but Brown says nothing more to substantiate this claim.

[16] Brown's claim against the Commonwealth of Virginia is barred because Title IX does not provide a cause of action against the Commonwealth; it only applies to "education[al] program[s] or activit[ies] receiving Federal financial assistance." 20 U.S.C. § 1681 (1986). To the extent that Brown brings his claim against NSU, he has clarified that defendant "NSU" is both the university and the Board of Visitors. Compl. ¶ 14.

NSU did not conduct any investigation or impose any disciplinary action on the female student. *Id.* at ¶ 129. Upon information and belief, Brown alleges that NSU "rarely if ever investigates or disciplines females for the conduct Brown was accused of committing." *Id.* at ¶ 130. As a result, Brown alleges that NSU's and the Board's decision to investigate and expel him constituted gender discrimination in violation of Title IX. *Id.* at ¶ 131.

Title IX provides, in part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1986). Title IX may be enforced through an "implied private right of action." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979)). Claims "attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories": (1) selective enforcement, and (2) erroneous outcome. *Id.* at 715. In his memorandum in opposition to defendants' motion to dismiss, Brown asserts he has brought an erroneous outcome Title IX claim. Pl.'s Mem. at 20. To "assess whether a school's disciplinary proceedings produced an erroneous outcome in violation of Title IX, courts typically apply a framework first introduced in *Yusuf*." *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 765 (D. Md. 2015); *see also GMU*, 132 F. Supp. 3d at 732 (same).

An erroneous outcome claim is one in which a plaintiff alleges he was "innocent and wrongly found to have committed an offense" because of his gender. *Yusuf*, 35 F.3d at 715. To make such a claim, Brown must allege the following: (1) "particular facts sufficient to cast doubt on the accuracy of the outcome of the challenged proceeding," and (2) "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *GMU*, 132 F. Supp. 3d at 732.

1. Brown has alleged facts sufficient to cast doubt on the accuracy of the outcome of his conduct conference.

As for the first element of an erroneous outcome claim—requiring plaintiff to allege facts "sufficient to cast doubt on the accuracy of the outcome of the challenged proceeding," *GMU*, 132 F. Supp. 3d at 732, the court in *Yusuf* observed that plaintiff's burden

> is not heavy. For example, a complaint may allege particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of a complainant or witnesses, particularized strengths of the defense, or other reason to doubt the veracity of the charge. A complaint may also allege particular procedural flaws affecting the proof.

Yusuf, 35 F.3d at 715.

For example, in *GMU*, a plaintiff accused of sexual misconduct met the pleading burden of the first element of his erroneous outcome claim by enumerating several procedural flaws regarding his disciplinary hearing and subsequent appeal. *See GMU*, 132 F. Supp. 3d at 718–19, 732 (alleging the failure to consider witness statements, give deference to the reasoned opinion of the initial panel, adhere to GMU's own appellate rules, make a reliable credibility determination, afford plaintiff the ability to oppose the granting of an appeal, and to provide a neutral arbiter without prior involvement in the case).

Similarly, Brown has pleaded multiple procedural flaws that, considered together, satisfy the first element of his erroneous outcome claim. He alleges that NSU and the Board: (1) failed to provide notice of the specific conduct for which Brown was being investigated; (2) did not give Brown adequate time to prepare for his conduct conference; (3) did not give Brown prior notice that he was being charged with a probation violation, but Porter included "probation violation" as a rationale for defendants' decision to expel Brown in the Resolution Letter; (4) did not notify Brown that expulsion was a likely sanction for his alleged misconduct; (5) did not provide Brown

with the procedural safeguards at the June 15, 2017 conduct conference—enumerated in NSU's Code of Student Conduct—afforded to student accused of conduct punishable by "expulsion, suspension and/or removal from housing"; (6) denied Brown a fair and impartial hearing because Porter acted simultaneously as the "investigator, fact finder and decision maker during the proceedings"; (7) held an appeal conference at which Brown was not present and therefore could not present any facts, defenses, or new evidence; (8) in the letter denying Brown's appeal, did not address whether Brown's conduct conference was conducted "fairly and in conformity with prescribed procedures," or whether "new evidence unavailable during the original conduct conference/hearing" was considered; and (9) considered, at the appeal conference, Brown's prior conduct that was "not at issue in the Notice sent by Defendant Porter on June 15, 2017, as well as references to the language and content of Plaintiff Brown's appeal letter."[17] Compl. ¶¶ 46–51, 54–55, 61, 69, 70–72.

Brown's allegations of procedural flaws are numerous, and, collectively, they are sufficient to cast doubt on the accuracy of the outcome of his disciplinary proceeding and on the penalty imposed on him.

2. Brown has not alleged facts sufficient to connect the erroneous outcome of his conduct conference with gender bias.

Having satisfied the first element of his erroneous outcome claim, Brown must now contend with the second element, and allege "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *GMU*, 132 F. Supp. 3d at 732.

As the *Yusuf* court explained, "allegations of a procedurally or otherwise flawed proceeding

[17] Brown alleges other procedural flaws, but he pleads them so ambiguously that this Court cannot, even when considering the facts in the light most favorable to Brown, *Nemet*, 591 F.3d at 253, factor them into its analysis. *See* Compl. ¶¶ 47–50.

that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Yusuf*, 35 F.3d at 715. The "fatal gap" is the "lack of a particularized allegation relating to a causal connection between the flawed outcome and gender bias." *Id.* Therefore, a plaintiff must satisfy the second element by alleging "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Id.* "Sufficiently particularized allegations of gender discrimination might include, *inter alia*, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Salisbury*, 123 F. Supp. 3d at 766 (quoting *Yusuf*, 35 F.3d at 715).

Even if a plaintiff is only able to allege facts for the second element "upon information and belief," this is a "permissible way to indicate a factual connection that a plaintiff reasonably believes is true but for which the plaintiff may need discovery to gather and confirm its evidentiary basis." *Id.* at 768; *see* Fed. R. Civ. P. 11(b) advisory committee's note to the 1993 amendment; 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1224 (3d ed.) ("[A]llegations in this form have been held to be permissible, even after the *Twombly* and *Iqbal* decisions."); *see also Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard . . . does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant . . . or where the belief is based on factual information that makes the inference of culpability plausible.") (internal citations and quotations omitted). That being said, a plaintiff may not "rely exclusively on conclusory allegations of unlawful conduct, even where alleged 'upon information and belief.'" *Salisbury*, 123 F. Supp. 3d at 768.

In *Yusuf*, the court found sufficient plaintiff's allegation that "males accused of sexual harassment at Vassar are 'historically and systematically' and 'invariably found guilty, regardless of the evidence, or lack thereof.'" *Yusuf*, 35 F.3d at 716. The court noted that the "allegation that males invariably lose when charged with sexual harassment at Vassar provides a verifiable causal connection similar to the use of statistical evidence in an employment case." *Id.*

But *Yusuf* was decided prior to the Supreme Court's holdings in *Twombly* and *Iqbal*. *See GMU*, 132 F. Supp. 3d at 732. Therefore, "mimicking the *Yusuf* plaintiff's allegations is not necessarily sufficient to survive a motion to dismiss." *Id.* Consequently, a plaintiff must now "plead facts sufficient to support a plausible inference of liability." *Id.*

In *Salisbury*, male university students accused of sexual misconduct alleged that the university "created an environment in which male students accused of sexual assault . . . are fundamentally denied due process as to be virtually assured of a finding of guilt." *Salisbury*, 123 F. Supp. 3d at 755, 766. Additionally, plaintiffs supported their allegation by attaching to their complaint eleven exhibits supposedly evidencing the school's gender bias against male students.[18] *Id.* at 766. Plaintiffs also alleged the following "upon information and belief": (1) "SU possesses communications evidencing Defendants' deliberate indifference in imposing wrongful discipline on Plaintiffs on the basis of their gender"; (2) "SU possesses communications evidencing SU's intent to favor female students alleging sexual assault over male students like Plaintiffs who are accused of sexual assault"; and (3) "Defendants' deliberate indifference was taken to demonstrate to the United States Department of Education and/or the general public that Defendants are

[18] Some examples of the exhibits include public notices and newsletters "informing the student body writ large about the risk of sexual assault on college campuses," and the court ultimately found that the eleven exhibits were "presented in a gender-neutral tone, addressed to all students, and published to improve campus safety for both men and women." *Salisbury*, 123 F. Supp. 3d at 766–67.

aggressively disciplining male students accused of sexual assault." *Id.* at 768. From these three allegations, the court held that plaintiffs had pleaded "*specific factual allegations*," and therefore presented a "facially plausible claim of erroneous outcome sex discrimination in violation of Title IX." *Id.*

In contrast, the court in *GMU* found that plaintiff, accused of sexual misconduct, had not sufficiently alleged facts that causally connected the flawed outcome of his disciplinary proceeding with gender bias. *GMU*, 132 F. Supp. 3d at 733. After twice being granted leave to amend his complaint, plaintiff alleged the following: (1) that during his appeal, "[t]he findings of responsibility . . . can be based *only* on the unjustified and discriminatory decision to credit Jane Roe's testimony, as the complaining female, over the testimony of John Doe, the responding male"; (2) "[t]he *only* explanation for such a rash, unreasoned, and unsupported decision is [defendants'] desire to help a complaining female when the system had found a respondent male not responsible"; and (3) that "[s]exual misconduct violations are more likely than others to result in the most severe sanctions the University may impose . . . . The vast majority of respondents in the University's sexual misconduct investigations and the disciplinary proceedings are male," and, "[r]espondents charged with Sexual Misconduct at the University are historically and systematically discriminated against." *Doe v. George Mason Univ.*, No 1:15cv209 (E.D. Va. Apr. 7, 2015) (Second Amended Complaint ¶¶ 178, 184, 187, 189–90, ECF No. 27) (emphasis added). Considering them collectively, the court held that "plaintiff's two allegations that gender bias is the 'only' explanation for the outcome of his proceeding are entirely conclusory and entitled to no weight under *Twombly*." *GMU*, 132 F. Supp. 3d at 732–33. Further, the court found that, "in total context an inference of gender bias is certainly *conceivable or possible*, the question is whether the [second amended complaint's] factual allegations make that inference cross the line from

conceivable to *plausible*." *Id.* at 733. The Court concluded that plaintiff's complaint "falls short" of plausible *Id.*

Brown makes two allegations supporting his Title IX erroneous outcome claim: (1) "Over a year prior to Brown's expulsion, Brown complained to NSU officials that a female student had violated the student conduct policy with threatening behavior. [] Upon information and belief, no investigation or disciplinary action was ever taken against the aforementioned female student"; and (2) "Upon information and belief, NSU rarely if ever investigates or disciplines females for the conduct Brown was accused of committing."[19] Compl. ¶¶ 128–30. As with the plaintiff's complaint in *Salisbury*, Brown's allegations present a "close call." *Salisbury*, 123 F. Supp. 3d at 766. Ultimately, however, the Court finds that Brown's allegations fall short of the plausibility requirement. *See, e.g.*, *GMU*, 132 F. Supp. 3d at 733. Brown does not allege that the Commonwealth of Virginia, NSU, or the Board have in their possession any communications, documents, or any other evidence that could substantiate Brown's allegations of gender discrimination. *Salisbury*, 123 F. Supp. 3d at 768. Instead, Brown proffers a conclusory statement similar to the plaintiff's allegation in *GMU*, that NSU rarely "if ever investigates or disciplines" women accused of similar misconduct. Compl. ¶ 130.

Brown does allege that, a year prior to his own conduct conference, he complained that NSU had failed to investigate and discipline a female student accused of violating the same part of the student code as Brown. Compl. ¶¶ 128–29. While this claim is far less conclusory than his

[19] Although Brown alleges an erroneous outcome claim under Title IX, upon the Court's review, the allegations appear, in part, to be more similar to a selective enforcement claim. *See Yusuf*, 35 F.3d at 715 ("Such a claim [of selective enforcement] asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender."). Yet, regardless of the claim—either erroneous outcome or selective enforcement—the outcome is the same. Brown has not sufficiently pled facts which, even taken in the light most favorable to him, establish grounds for either claim.

general allegation that NSU rarely investigates or disciplines women for threatening behavior, it still does not meaningfully advance Brown's claim across "the line from conceivable to *plausible*." *GMU*, 132 F. Supp. 3d at 733. Even if proven true, this isolated incident does not make Brown's claim plausible. As one court indicated, "there are a number of possible explanations for any disparate treatment, of which gender-motivated bias is only one." *GMU*, 132 F. Supp. 3d at 733. Brown's contention that the school did not investigate and/or discipline one female student allegedly accused of threatening behavior may conceivably be motivated by gender bias—but it may also be motivated by dozens of other factors, discriminatory or non-discriminatory. As the court in *GMU* concluded, "in the absence of any specific factual allegations pointing to such [gender] bias on the part of the defendants, it cannot be said that the discriminatory motive explanation is plausible rather than just conceivable." *Id.* at 733.

For these reasons, this Court **RECOMMENDS** that Brown's erroneous outcome Title IX claim (count III) against defendants NSU and the Board be **DISMISSED** for failure to state a claim.

H. Count IV's claim of religiously-based gender discrimination under Title IX fails to state a claim upon which relief can be granted.

Brown brings his religiously-based gender discrimination claim against the Commonwealth of Virginia, NSU, and the Board, contending that their agents inappropriately asked about his religion, and based the expulsion decision on his gender and religious affiliation.[20]

Brown alleges that Title IX forbids religiously-based discrimination "by institutions such as NSU when it is partially based on gender, ethnicity or national origin." Compl. ¶ 136. Brown

[20] For the same reasons Brown could not bring his Title IX gender discrimination claim (count III) against the Commonwealth of Virginia, Brown cannot bring count IV against the Commonwealth. *See* 20 U.S.C. § 1681 (1986).

alleged that, during the conduct conference on June 15, 2017, at the NSU campus police station, Porter asked Brown whether he is Muslim, and Brown responded affirmatively. *Id.* at ¶ 44–46. From this, Brown contends that Porter and Johnson based their decision to expel Brown "in part or in whole upon his religious status as a Muslim." *Id.* at ¶ 137. "Upon information and belief," Brown alleges that Porter and Johnson would have been "less likely to expel Brown had Brown been of a different religious conviction." *Id.* at ¶ 138. Brown alleges that "Defendants' interest in Brown's status as a Muslim during investigation and expulsion proceedings stems from a negative stereotype of Muslim males as being prone to violence." *Id.* at ¶ 139. Consequently, Brown alleges that defendants "would have been less likely to expel Brown had Brown been a Muslim female." *Id.* at ¶ 140.

In support of his claim, Brown cites to a 2004 "Dear Colleague"[21] letter issued by the Office of Civil Rights ("OCR"). Pl.'s Mem. 21 (citing Dear Colleague Letter from Kenneth L. Marcus, Deputy Assistant Secretary for Enforcement, Office for Civil Rights, U.S. Dep't of Education (Sept. 13, 2004) ("Dear Colleague Letter")).[22] In the letter, Marcus explains that, while OCR "lacks jurisdiction to prohibit discrimination against students based on religion per se, [it] will aggressively prosecute harassment of religious students who are targeted on the basis of race or gender, as well as racial or gender harassment of students who are targeted on the basis of religion." Dear Colleague Letter; *see also* Pl.'s Mem. at 21 (describing Marcus's letter). For the reasons noted below, the Dear Colleague letter is neither binding nor persuasive authority, and, without

[21] A "Dear Colleague" letter is an "official correspondence distributed in bulk to Members in both chambers" of Congress. *See* R. Eric Petersen, Cong. Research Serv., RS21667, "Dear Colleague" Letters: A Brief Overview 1 (2005). Typically, Members of Congress author "Dear Colleague" letters to "persuade others to cosponsor or oppose a bill." *Id.*

[22] Kenneth L. Marcus's letter is available at the following website: https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html (last visited Nov. 26, 2019).

more, it is insufficient to overcome defendants' motion to dismiss.

Brown cites to *T.E. v. Pine Bush Cent. Sch. Dist. et al.*, 58 F. Supp. 3d 332, 355 (S.D.N.Y. 2014), as a "parallel" to Marcus's Dear Colleague letter that claimed OCR would expand enforcement of Title IX to include religiously-based discrimination. Pl.'s Mem. at 21. In *Pine Bush*, the court questioned whether Title VI—which prohibits a "recipient of federal funds from discriminating on the basis of race, color, or national origin," 42 U.S.C. § 2000d—proscribed discrimination against Jewish students. 58 F. Supp. 3d. at 353–54. The students in *Pine Bush* endured extreme "anti-Semitic harassment and discrimination" at the hands of other students. *Id.* at 354. While the court noted the harassment amounted to obvious religious discrimination, it also found that anti-Semitic harassment constituted racial discrimination. *Id.*

In reaching its conclusion, the court did not determine "whether religious bias alone can form the basis of a Title VI claim or anti-Semitism can provide a basis for national origin discrimination." *Id.* Rather, the court found that Judaism was both a religious practice and a distinct race, and therefore came "within Title VI's protection." *Id.* Ultimately, plaintiffs' amended complaint asserted that the harassment plaintiffs faced "did not concern Plaintiffs' religious beliefs or practices, but rather drew on hackneyed stereotypes, bigoted 'jokes,' and painful references to the Holocaust and Naziism [sic]. In short, the harassment alleged is rooted in Plaintiffs' actual or perceived national origin or race rather than just Plaintiffs' faith or religious practices." *Id.* Because the harassment plaintiffs suffered amounted to racial discrimination, the court concluded that plaintiffs' harassment fell under Title VI's protection. *Id.*

The holding in *Pine Bush* is not relevant here. As Brown does in this case, the *Pine Bush* court also cited to a Dear Colleague letter,[23] but only to help clarify the ambiguity of Title VI as it pertains to the intersection of religion and race/national origin. The same ambiguity does not exist between religion and gender. Identifying as Muslim, as Brown has, does not entitle one to come within the protection of Title IX, and he has presented the Court with no case law to suggest otherwise. While it may be irrelevant and inappropriate to question a student about his religion during a conference regarding the student's conduct, it does not—without more information—suggest gender discrimination and trigger Title IX protections.

For the reasons stated above, this Court **RECOMMENDS** that Brown's religiously-based gender discrimination claim (count IV) against defendants, the Commonwealth of Virginia, NSU, and the Board, be **DISMISSED** for failure to state a claim.

I. Count V's breach of contract claim fails to state a claim upon which relief can be granted.

Brown brings his breach of contract claim, count V, against defendants NSU and the Board, alleging that defendants breached either an express or implied contract that existed between students like Brown and NSU.

Brown alleges that either an express or implied contract existed between himself and NSU during Brown's enrollment. Compl. ¶ 144. First, Brown argues that, as a student, he has a contractual relationship with NSU, and that, "by paying his tuition, maintaining his grades, and abiding by NSU's policies to the best of his ability and understanding," Brown fulfilled his

[23] *See* Dear Colleague Letter from Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Education (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html (explaining that "anti-Semitic harassment can trigger responsibilities under Title VI . . . when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices") (last visited Nov. 26, 2019).

contractual obligations to NSU. *Id.* at ¶ 145. Moreover, when NSU expelled Brown, who had not violated any of the contractual terms stated above, NSU allegedly violated the express or implied contract between itself and Brown. *Id.* at ¶ 149. Second, Brown contends that NSU's disciplinary policies, which NSU makes accessible to students and the larger public online, "constitute contractual terms between NSU and students like Brown." *Id.* at ¶¶ 24, 147. Similarly, Brown argues that the "procedures, safeguards, and rights contained within NSU's disciplinary procedures constitute contractual rights of NSU's students." *Id.* at ¶ 148. Therefore, Brown alleges that, by failing to adhere to the contractual terms stated within its "posted disciplinary procedures," NSU breached "one or more of Brown's contractual rights during its investigation and expulsion of him in June of 2017." *Id.* at ¶¶ 56–58, 149.

Brown's complaint characterizes NSU's disciplinary procedures as binding contractual terms. Compl. ¶ 147. At this stage, it is not for the Court to decide whether NSU's disciplinary procedures, and the "procedures, safeguards, and rights contained within" them constituted a binding contract, Compl. ¶ 148—it just needs to be plausible that they do. *See e.g.*, *Twombly*, 550 U.S. at 570. The Court cannot determine the plausibility of Brown's breach of contract claim, because Brown has failed to state anything beyond a "naked assertion [] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678.

Brown alleged that NSU published its disciplinary procedures online, that the disciplinary procedures outlined a formal resolution process with procedural safeguards for students accused of conduct punishable by expulsion, and that Brown did not receive these procedural safeguards. Compl. ¶¶ 24, 56–58. Brown also attached to his complaint a section of NSU's disciplinary procedures. *See* Compl. Ex. 6. Even though Brown has provided the Court with the disciplinary procedures themselves, Brown does not provide any facts to support his assertion that those

disciplinary procedures constitute contractual terms—and without such facts, his breach of contract claim does not meet the pleading standards required for a 12(b)(6) motion to dismiss. *See Iqbal*, 556 U.S. at 678.

Additionally, in a recent 2018 decision, this Court ruled unambiguously that, "[u]nder Virginia law, a University's student conduct policies are not binding, enforceable contracts; rather, they are behavior guidelines that may be unilaterally revised by Marymount at any time." *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 587–88 (E.D. Va. 2018). The *Marymount* court cited to *Brown v. Rectors and Visitors of the Univ. of Va.*, which affirmed there was no contract between the student and the university, "because [plaintiff's] complaint contained only conclusory allegations that the Graduate Student Handbook constituted a contract between himself and UVA, and that assertion was unsupported by the terms of the Handbook." 361 F. App'x 531, 534 (4th Cir. 2010).

Brown's allegations in the current matter appear just as conclusory. Some of the cases cited in *Marymount* hold that, for there to be a binding legal contract between a student and university, there must be an "absolute mutuality of engagement," so that each party has the right to hold the other to a positive engagement. *Marymount*, 297 F. Supp. 3d at 587 n.20 (citing *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *7 (W.D. Va. Aug. 3, 2017), and *Doe v. Washington and Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996, at *11 (W.D. Va. Aug. 5, 2015) (quoting *Smokeless Fuel Co. v. W.E. Seaton & Sons*, 52 S.E. 829, 830 (Va. 1906))). Brown has not provided any factual support to show that the code of student conduct creates a "mutuality of engagement" such that NSU's actions in investigating and expelling Brown could be characterized as a breach of contract. *See* Compl. ¶¶ 143–52.

To further support his claim that an express or implied contractual relationship exists between a student and the university the student attends, Brown cites to a 2015 Norfolk Circuit Court case. Pl.'s Mem. at 23 (citing *Doe v. Va. Wesleyan Coll.*, Nos. CL14-6942-01, CL14-6942-00, 2015 WL 10521466, at *1 (Va. Cir. June 20, 2015)). In *Wesleyan*, Doe, a female student at Virginia Wesleyan College, alleged that a male student, Roe, raped and sexually assaulted her in a college dorm room. *Id.* at *1. Doe alleged that, prior to her assault, she had attended an on-campus party "sponsored" by school employees, at which she consumed alcohol "spiked with an agent designed to incapacitate [Doe and others] and render them vulnerable to sexual assault." *Id.* After Doe left the party, she alleged that Roe followed her and forced her into his dorm room where he raped and sexually assaulted her. *Id.* Doe filed a lawsuit against the college, and the college later filed a third-party complaint against Roe, alleging that Roe had breached his contract with the college. *Id.* Roe then filed a demurrer to the college's third-party complaint, arguing that the "alleged contracts disclaim contractual liability." *Id.* at *2.

In assessing the college's breach of contract claim, the court clarified that, at the demurrer stage, it would not determine "whether the [purported contracts] are binding legal contracts for purposes of this demurrer." *Id.* at *14, n.13. Therefore, the court assumed, "without deciding that the purported contracts are in fact valid contracts," leaving it to the fact finder to determine the validity of the "contracts." *Id.* Because this case arose in a Virginia circuit court, it is not binding on this Court. Further, because the circuit court only assumed for purposes of the demurrer that the "purported contracts" were valid contracts, it would not be appropriate to rely on this tentative authority, even at the motion to dismiss stage.

In *Marymount*, a male university student accused of sexual misconduct brought suit against the university, alleging that the school breached an "implied contract with Doe by suspending him

from school without just cause." 297 F. Supp. 3d at 576, 580. In addressing a motion to dismiss, the Court was tasked with deciding whether paying tuition to the university "vested Doe with certain implied procedural protections that were ultimately breached by Marymount." *Id.* at 580. Noting that the parties had not cited a single "Supreme Court of Virginia decision holding that an implied contract is created between a student and his or her university merely through the payment of tuition," the court refused to "impermissibly expand Virginia law without any input from Virginia's highest court." *Id.* at 588.

Further, the Court reasoned that, even assuming "without deciding that an implied contract existed between Doe and Marymount," the contractual terms "between these two parties are exceptionally narrow." *Id.* The only possible binding, "implied term" was that Doe could not "be suspended for an arbitrary and capricious reason or no reason at all." *Id.* Even if the outcome of Doe's "disciplinary proceeding was erroneous," Marymount "did not act arbitrarily or capriciously by suspending Doe and therefore did not breach the only term of the implied contract." *Id.*

In this case, while Brown may have alleged facts sufficient to show that NSU and the Board—through its employees, Porter and Johnson—did not provide all the procedural safeguards enumerated in the code of student conduct, he has not alleged facts indicating that they acted in a way that was arbitrary and capricious. Porter notified Brown in advance that he was being investigated for violating a specific section of the student code of conduct and that a conduct conference would be held to determine whether Brown was responsible for the alleged violation. Compl. Exs. 1–2. Further, Brown was given an opportunity, and ultimately exercised his right to appeal NSU and the Board's decision to expel him by submitting an appeal letter. Compl. ¶ 64. Johnson responded to Brown's appeal letter with an appeal response and rationale, explaining the decision to deny Brown's appeal. *Id.* at ¶¶ 67–69. NSU and the Board allegedly may have

bypassed or neglected to afford Brown every procedural safeguard listed in the code of student conduct, but Brown has not pled facts sufficient to indicate that they acted in such an extreme way that their actions were arbitrary or capricious. Therefore, Brown has failed to state a claim for breach of contract.

For the reasons stated above, the Court **RECOMMENDS** that Brown's breach of contract claim (count V) against defendants NSU and the Board be **DISMISSED without prejudice.**

IV. RECOMMENDATION

Accordingly, the Court **RECOMMENDS** the following:

(1) Although Brown has sufficiently pled and stated a due process claim, the Commonwealth of Virginia, NSU, and the Board are immune from suit under the Eleventh Amendment and sovereign immunity, and the individual defendants, Porter and Johnson, are entitled to qualified immunity. Therefore, defendants' motion to dismiss Brown's due process claim should be **GRANTED** and count I should be **DISMISSED with prejudice.**

(2) Defendants' motion to dismiss Brown's free speech claim (count II) against Porter and Johnson for failure to state a claim should be **GRANTED.**

(3) Defendants' motion to dismiss Brown's Title IX gender discrimination claim (count III) against the Commonwealth of Virginia, NSU, and the Board for failure to state a claim should be **GRANTED.**

(4) Defendants' motion to dismiss Brown's Title IX religiously-based gender discrimination (count IV) against the Commonwealth of Virginia, NSU and the Board for failure to state a claim should be **GRANTED.**

(5) Defendants' motion to dismiss Brown's breach of contract claim (count V) against NSU and the Board for failure to state a claim should be **GRANTED.**

(6) Plaintiff be **PROVIDED** with leave to amend counts II through V within fourteen days of the final order addressing the motion to dismiss.

V. REVIEW PROCEDURE

By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date of mailing of this report to the objecting party, *see* 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. Rule 6(d) of the Federal Rules of Civil Procedure permits an extra three (3) days, if service occurs by mail. A party may respond to any other party's objections within fourteen (14) days after being served with a copy thereof. *See* Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

/s/
Robert J. Krask
United States Magistrate Judge

Robert J. Krask
United States Magistrate Judge

Norfolk, Virginia
November 26, 2019

Appendix F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOSEPH COVELL BROWN,

Plaintiff,

v. ACTION NO. 2:19cv376

MARCUS PORTER, in his individual capacity,
NORFOLK STATE UNIVERSITY,
THE BOARD OF VISITORS OF NORFOLK STATE UNIVERSITY,
THE COMMONWEALTH OF VIRGINIA, and
TRACCI K. JOHNSON, in her individual capacity,

Defendants.

UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter comes before the Court on the motion to dismiss plaintiff's amended complaint for lack of subject matter jurisdiction and for failure to state a claim, filed by defendants Marcus Porter, Norfolk State University ("NSU"), the Board of Visitors of Norfolk State University ("the Board"), the Commonwealth of Virginia, and Tracci K. Johnson ("defendants"). ECF No. 36. The motion was referred to the undersigned United States Magistrate Judge on June 10, 2020, pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). ECF No. 45. For the reasons discussed below, the undersigned **RECOMMENDS** that the motion to dismiss be **GRANTED**.

I. PROCEDURAL HISTORY

The underlying facts and procedural history are more fully set forth in the report and recommendation, ECF No. 14, addressing the first motion to dismiss and memorandum order, ECF No. 19, adopting the report and recommendation.

Joseph Covell Brown ("Brown") filed an amended complaint against all defendants on February 20, 2020, alleging violations of his right to free speech, gender discrimination in violation of Title IX, and breach of contract—which Brown has numbered counts II, III, and V to correspond to the original complaint. ECF No. 20 ("Am. Compl.").[1] After being granted leave to file a response out of time, defendants filed a motion to dismiss Brown's amended complaint with a memorandum in support on May 13, 2020. ECF Nos. 36–37. Brown filed a memorandum in opposition on May 27, 2020, to which defendants replied out of time on June 3, 2020. ECF Nos. 38, 44. This matter is ready for decision.

II. FACTUAL BACKGROUND[2]

Brown attended NSU, a public institution receiving federal funds, from August 2014 through June 2017. Am. Compl. ¶¶ 5, 9–10. Prior to the incident in this matter, Brown completed a period of disciplinary probation for the 2016 to 2017 academic year, which ended in May 2017. *Id.* ¶¶ 17–19.

On June 11, 2017, Brown and his roommate, Davonte' Smith ("Smith") were engaged in

[1] Brown voluntarily withdrew count IV of the original complaint, his religiously-based gender discrimination claim. *See* Pl.'s Mem. in Opp. to Mot. to Dismiss Am. Compl. ("Pl. Opp."), ECF No. 38 at 1–2.

[2] The factual history detailed below is based on Brown's amended complaint, consistent with the standard of review detailed below.

an argument through text, and exchanging insults about food and dirty dishes in their room.[3] *Id.* ¶¶ 32–33, 112, 118. During the argument, Smith and Brown were both in their shared dorm room, either in the same or adjoining rooms. *Id.* ¶ 113. A witness, Caleb Wright, was also present in the dorm room during the texting conversation, and reportedly "sensed no hostility from either Plaintiff Brown or Smith."[4] *Id.* ¶¶ 115–16.

During this argument, Brown sent Smith the text at issue, stating, "Text me again and im [sic] breaking your jaw." *Id.* ¶ 119. Brown clarifies that he did not intend to break Smith's jaw or for Smith to interpret the text as a serious threat. *Id.* ¶¶ 120–22, 137. Less than three minutes after receiving Brown's text, Smith responded, "No chick b. Your shit getting ate if its [sic] on my pan again. All facts." *Id.* ¶ 126. Brown alleges Smith's quick response is "evidence that [Smith] was in fact not taking [Brown's text] or any of the conversation seriously." *Id.* ¶ 131. Brown interpreted the phrase, "[y]our shit getting ate," as a threat of imminent stabbing or attack, but was not put in fear of that attack because he was not taking the conversation seriously. *Id.* ¶¶ 127–29. Despite their conversation, Brown and Smith "continued their cohabitation of the dorm room peacefully and without incident." *Id.* ¶ 133.

Although the timeline is unclear, Smith waited between one and three days before reporting Brown's text message to his Resident Hall Director, Anthony Tillman ("R.A. Tillman"). *Id.* ¶¶ 134, 142(i). Smith reportedly stated, "there has been no real problem in the room," but "[Brown] is using [Smith's] items more often especially during the summer," and they "had a

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[3] At this time, Brown was suffering from sciatica in his left hip and "could barely walk." Am. Compl. ¶¶ 20, 123. Brown asserts he had a "reasonable belief" that Smith knew of Brown's sciatica. *Id.* ¶ 124.

[4] Wright's impression is presented through an appeal letter authored by Brown. Am. Compl. ¶ 116. It is not clear whether Wright ever provided a witness statement.

'playful' argument about [Brown] using [Smith's] items" and that, "[a]s a response to Smith saying, 'if you keep using my stuff, then I'm expecting that food to be mine too,' Brown stated[,] 'you're all talk, I'll break your jaw.'"[5] *Id.* ¶ 134.

On June 14, 2017, after NSU officials were made aware of Brown's text message, Marcus Porter ("Porter"), the Assistant Director of Student Conduct, informed Brown via email that he had violated NSU's Code of Student Conduct and instructed him to vacate his dorm room immediately. *Id.* ¶¶ 7–8, 39–42. Brown was expelled from NSU on June 15, 2017, following a hearing held that day. *Id.* ¶¶ 47–70.

On June 22, 2017, Brown appealed his expulsion to defendant Tracci K. Johnson ("Johnson"), NSU Dean of Students, requesting the following on appeal: (1) a determination of whether the hearing was conducted fairly and in conformity with NSU disciplinary procedures; (2) consideration of new evidence, including the presence of a witness during the incident at issue; and (3) consideration of whether the sanction imposed, expulsion, was proportionate to Brown's misconduct. *Id.* ¶¶ 71–73, 144–48; ECF No. 20-9. Brown attached his appeal letter as an exhibit to his amended complaint. ECF No. 20-9. The appeal letter directs "frustrated and disrespectful language" at Porter and Johnson,[6] Am. Compl. ¶ 151, and states, in part:

> Now you want to use the campus police as your personal militia to harass, follow and intimidate over words I used to defend myself from Devonte Smith who willingly failed to comprehend numerous warnings to cease contact with me. You saw the evidence and still chose to have selective hearing, eyesight and deduction skills. That will be your misfortune, Mr. Porter.

ECF No. 20-9 at 3.

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[5] Brown uses quotation marks in the amended complaint, but there is no indication that he is directly quoting Smith.

[6] In his appeal letter, Brown asserts Porter is, among other things, an idiot, a jackass, deceitful, and a "lying, brown-nosing piece of shit . . . . [who] deserve[s] to be fired." ECF No. 20-9 at 2–4.

On June 28, 2017, Johnson denied Brown's appeal. Am. Compl. ¶¶ 74–79, 153–54. The appeal response, also attached as an exhibit to the amended complaint, listed the following grounds for upholding the expulsion:

> The student was a threat to the Norfolk State University community. He threatened to break his roommate's jaw. In his previous conduct case he punched someone in the face. Based on the language and content of his appeal letter, I felt that his behavior was volatile and I did not want to compromise the safety of the student body.

ECF No. 20-5.

Brown alleges that, "[u]pon information and belief," he "wrote one or more articles available to the university community that brought to light one or more problems he saw with NSU and/or its officials." Am. Compl. ¶ 170. Additionally, Brown asserts that, "[u]pon information and belief," he "spoke to other members of the university community about one or more problems he saw with NSU and/or its officials." *Id.* ¶ 171.[7]

The amended complaint contains three counts. Count II alleges that defendants Porter and Johnson violated Brown's right to free speech under the United States and Virginia Constitutions by basing the decisions to expel Brown and deny his appeal on three acts of constitutionally-protected speech: the text message, his appeal letter, and his articles or conversations regarding problems at NSU. *Id.* ¶¶ 106–76. Count III alleges that the Commonwealth of Virginia, NSU, and the Board discriminated against Brown based on his gender, in violation of Title IX, by expelling him when they "rarely if ever" investigated or disciplined females for sending text messages. *Id.* ¶¶ 177–200. Lastly, count V alleges that NSU and the Board breached Brown's contractual rights during its investigation and expulsion of Brown. *Id.* ¶¶ 201–62.

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[7] Brown does not specify the dates on which these acts took place, or clarify the content or subject of these articles or conversations. *See* Am. Compl. ¶¶ 170–74.

III. ANALYSIS

A. The standard of review for a Rule 12(b)(6) motion to dismiss.

Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint"; it does "not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (internal quotation marks and citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While plausibility "is not akin to a 'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

When reviewing a motion to dismiss, the Court must "assume all [well-pled facts] to be true" and "draw all reasonable inferences in favor of the plaintiff," but it does not "need [to] accept the legal conclusions drawn from the facts, and [] need not accept as true unwarranted inferences, unreasonable conclusions or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citations and internal quotation marks omitted). Accordingly, the Court should only grant a Rule 12(b)(6) motion if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards*, 178 F.3d at 244.

A motion to dismiss under Rule 12(b)(6) must be considered in light of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a complaint to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This statement must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Additionally, when considering a motion to dismiss for failure to state a claim, a court may only consider the pleadings, which include "documents attached as exhibits or incorporated by reference." *Carrington v. HSBC Bank USA, N.A.*, 760 F. Supp. 2d 589, 592 (E.D. Va. 2010); *see also Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165–66 (4th Cir. 2016) ("[O]ur evaluation is . . . generally limited to a review of the allegations of the complaint itself.").

B. The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction where a party is entitled to immunity.

Rule 12(b)(1) permits a defendant to move for dismissal of a claim based on a court's lack of subject-matter jurisdiction. *A.W. ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 548 F. Supp. 2d 219, 221 (E.D. Va. 2008). "[S]overeign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject [] matter jurisdiction." *Cunningham v. Gen. Dynamics. Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018); *see also Drewrey v. Portsmouth City Sch. Bd.*, 264 F. Supp. 3d 724, 727 (E.D. Va. 2017) (noting that the Eleventh Amendment "inhibit[s] the exercise" of a court's subject matter jurisdiction (citation and internal quotation marks omitted)).

"A defendant may challenge the court's subject matter jurisdiction in one of two ways: (1) the defendant may raise a 'facial challenge' by arguing that the facts alleged in the complaint are not sufficient to confer subject matter jurisdiction on the court or (2) the defendant may raise a 'factual challenge' by arguing that the jurisdictional allegations made in the complaint are not

true." *Brunelle v. Norfolk S. Ry. Co.*, No. 2:18cv290, 2018 WL 4690904, at *2 (E.D. Va. Sept. 28, 2018) (quoting *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009)). "In a facial challenge, the court evaluates the facts in a complaint using the same standard used for a Rule 12(b)(6) motion to dismiss,"—namely, "all alleged facts are taken as true and the motion must be denied if the complaint alleges facts that, if proven, would be sufficient to sustain jurisdiction." *Id.* (citing *Kerns*, 485 F.3d at 192).

In this case, defendants challenge count II of Brown's amended complaint pursuant to Rule 12(b)(1) by relying only on the allegations noted on the face of the complaint. *See* ECF No. 37 at 19 ("The Amended Complaint illustrates that the constitutional right Brown alleges was violated was not clearly defined within the factual situation at hand. Accordingly, Porter and Johnson are entitled to qualified immunity and this Court should dismiss Count II with prejudice for lack of subject matter jurisdiction pursuant to Rule 12(b)(1)."). Therefore, the Court concludes that defendants have raised a facial challenge to subject matter jurisdiction and, "will accept as true all facts alleged in [Brown's amended complaint] for the purposes of determining whether the court has subject matter jurisdiction over this claim." *Brunelle*, 2018 WL 4690904, at *2.

C. Brown's free speech claims premised on Brown's text message and appeal letter, brought against defendants Porter and Johnson in their individual capacities in count II, are barred by qualified immunity.

In count II, Brown alleges that government officials, Porter and Johnson, expelled him in retaliation for exercising his right to free speech under the First Amendment of the United States Constitution and article I, section 12 of the Constitution of the Commonwealth of Virginia.[8] Am.

[8] "The Supreme Court of Virginia has held that 'Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment.'" *Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597, 607 (E.D. Va. 2015) (quoting *Elliott v. Commonwealth*, 593 S.E.2d 263, 269 (Va. 2004)).

Compl. ¶¶ 107–08, 175. Defendants move for dismissal of count II for lack of subject matter jurisdiction on the grounds of qualified immunity. Mem. in Support of Defs.' Mot. to Dismiss at 16–19, ECF No. 37. Porter and Johnson are shielded by qualified immunity because it is not clearly established that expelling a student for communicating a threat to his roommate, and upholding that decision on appeal, violates the student's constitutional right to free speech.

Government officials sued in their individual or personal capacities may be entitled to qualified immunity. *See, e.g.*, *Lane v. Franks*, 573 U.S. 228, 243 (2014). When government officials perform "discretionary functions," they are entitled to qualified immunity from liability for any civil damages—but only "to the extent that 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).[9] The defense of qualified immunity may be raised in a motion to dismiss. *See Tobey v. Jones*, 706 F.3d 379, 393–94 (4th Cir. 2013); *Willis v. Blevins*, 966 F. Supp. 2d 646, 652 (E.D. Va. 2013).

"Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wilson*, 141 F.3d at 114 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). In this way, if "the contours of the constitutional right asserted are not sufficiently clear, the defending state actor has an absolute defense of qualified immunity." *See Herron v. Va.*

[9] Brown contends defendants were performing ministerial functions when they decided to deny him the due process rights specified in the student conduct code when considering his expulsion and appeal. Pl. Opp. at 15 (citing *Ministerial Function*, Black's Law Dictionary 457 (3d Pocket Ed. 2006)). The decisions to expel a student and to deny his appeal are clearly discretionary. *See Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984) (rejecting employee's argument that violation of a personnel regulation constituted the breach of a ministerial duty to follow certain procedures before terminating his employment, and finding the decision to discharge was discretionary).

Commonwealth Univ., 366 F. Supp. 2d 355, 361 (E.D. Va. 2004). Furthermore, "even if a clearly-established constitutional right is implicated, a defense of qualified immunity may still apply if it was objectively reasonable for the state actor to believe that the conduct was lawful under the circumstances." *Id.* The burden of establishing entitlement to qualified immunity rests upon a defendant who invokes it. *Henry v. Purnell*, 501 F.3d 374, 377–78 (4th Cir. 2007).

There are two prongs to the qualified immunity analysis. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The court determines "whether, viewed in the light most favorable to the plaintiff, the defendant violated the constitutional rights of the plaintiff." *Wood v. Bd. of Educ. of Charles County*, No. GJH-16-00239, 2016 WL 8669913, at *6 (D. Md. Sept. 30, 2016). If a constitutional right has been violated, the court considers "whether that right was 'clearly established,' such that 'a reasonable official would understand what he [or she] is doing violates that right.'" *Id.* (quoting *Cole v. Buchanan Cty. Sch. Bd.*, 328 F. App'x 204, 208 (4th Cir. 2009)) (internal citations omitted). Courts may "grant qualified immunity without first deciding whether a [constitutional] violation occurred so long as the right claimed to be violated was not clearly established." *Cole*, 328 F. App'x at 207; *see also Wood*, 2016 WL 8669913, at *6 (finding that "fixed adherence to the two-step inquiry" may result in depleting scarce judicial resources).

For a right to be "clearly established," some "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also Brickey v. Hall*, 828 F.3d 298, 303 (4th Cir. 2016). To determine whether a right is clearly established, a court in the Fourth Circuit "look[s] ordinarily to 'the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.'" *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279–80 (4th Cir. 2004) (quoting *Edwards*, 178 F.3d at 251). Further, to determine whether the right was "clearly established at the time of the defendants' alleged

conduct," the focus is "not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Zepp v. Rehrmann*, 79 F.3d 381, 385 (4th Cir. 1996) (citing *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992)).

Brown contends he engaged in, and defendants retaliated against him for, three separate acts of protected First Amendment activity: (1) his text message; (2) his appeal letter; and (3) written articles and conversations with members of the NSU community about "one or more problems he saw with NSU and/or its officials." Am. Compl. ¶¶ 106–76. In determining whether qualified immunity applies to the first two acts, the Court must determine whether a reasonable official would have understood that expelling a student for threatening his roommate in a text message, and upholding that decision on appeal, violated the student's First Amendment rights.[10]

1. Brown's text conversation

Brown alleges defendants expelled and thereby retaliated against him for constitutionally-protected speech in his text conversation with Smith. *Id.* ¶ 110.

The Supreme Court has made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506, 513 (1969), but it has also clarified that "public schools may proscribe speech without running afoul of the First Amendment if necessary to protect students and to support their educational mission." *Doe v. Rector & Visitors of George Mason Univ.* ("GMU"), 132 F. Supp. 3d 712, 729–30 (E.D. Va. 2015) (citing *Tinker*, 393 U.S. at 513). More specifically, public schools and school officials may suppress student speech if they "reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"

[10] The third portion of count II, alleging retaliation in response to Brown's articles and conversations, will be addressed in section III. D.

Morse v. Frederick, 551 U.S. 393, 403 (2007) (quoting *Tinker*, 393 U.S. at 513). The First Amendment has been found to protect students for expressing social and political beliefs, and to prevent public schools from shutting down the "marketplace of ideas." *See Tinker*, 393 U.S. at 505–14 (concerning the suspension of students for wearing black armbands to school to peacefully protest the Vietnam War); *Healy v. James*, 408 U.S. 169, 180–94 (1972) (regarding a college's attempt to ban the organization of a local political chapter).

The First Amendment right to freedom of speech "includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right."[11] *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). To prevail on a First Amendment free speech retaliation claim, "a plaintiff 'must allege that: (1) he engaged in protected First Amendment activity, (2) the defendant[s] took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and the defendant[s'] conduct.'" *Martin v. Duffy*, 858 F.3d 239, 249 (4th Cir. 2017) (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005)).

While the First Amendment right to free speech is broad, its protections "are not absolute," and the Supreme Court has "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). "[T]rue threats of violence constitute a category of speech falling outside the protections of the First Amendment." *GMU*, 132 F. Supp. 3d at 729 (citing *Black*, 538 U.S. at 343). A true threat is a statement in which the "speaker means to communicate a serious expression of an intent to

[11] The First Amendment of the United States Constitution is made applicable to the states through the Fourteenth Amendment. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

commit an act of unlawful violence to a particular individual," although the speaker "need not actually intend to carry out the threat." *Black*, 538 U.S. at 359–60. True threats are excepted from constitutional protection to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012) (internal quotation and citation omitted). The Fourth Circuit has adopted an objective test to determine whether a statement is a true threat: "a statement is a true threat 'if an ordinary reasonable recipient who is familiar with the context . . . would interpret [the statement] as a threat of injury.'" *GMU*, 132 F. Supp. 3d at 729 (quoting *White*, 670 F.3d at 507). Because the standard of review is objective, the "context of the communication is essential to determine whether it is protected by the First Amendment." *In re White*, No. 2:07cv342, 2013 WL 5295652, at *44 (E.D. Va. Sept. 13, 2013). Contextual factors relevant to the analysis include the language itself, and the "context in which [the threat] was made, including not only the forum in which the statement was communicated, but also the reaction of the audience upon its utterance." *Id.* at *44–45.

In his amended complaint, Brown alleges that, at the time he texted Smith "[t]ext me again and im [sic] breaking your jaw," both he and Smith "were equally aware that they were . . . acting without animosity towards each other despite whatever words they typed into their phones." Am. Compl. ¶¶ 119, 125. Brown alleges he did not intend to break Smith's jaw, and did not expect Smith to interpret the text as a serious threat. *Id.* ¶¶ 120–21. As evidence that Smith did not consider Brown's text message to be a threat, Brown alleges Smith responded to the text in "less than three minutes," stating, "No chick b. Your shit getting ate if its [sic] on my pan again. All facts." *Id.* ¶¶ 126, 131. Brown understood Smith's text to be a "threat of imminent stabbing or attack," and he was "annoyed but not put in fear" of any harm because he "was not taking the

conversation seriously." *Id.* ¶¶ 127–30, 132.

Brown alleges he and Smith continued living in the same dorm room "peacefully and without incident" for one to three days before Smith reported Brown's text to R.A. Tillman. *Id.* ¶¶ 133–36. Even when Smith reported the text message, Brown alleges Smith reported that it was sent in response to a "playful" argument about Brown using Smith's items. *Id.* ¶ 134. Brown further asserts that Smith knew Brown was suffering from sciatica and could barely walk. *Id.* ¶¶ 123–24.

While more development of the record may be necessary to determine if Brown's text message constituted a true threat, a reasonable school official viewing the text message could conclude the message was a true threat—a statement in which the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual." *See Black*, 538 U.S. at 359. "At the very least, such a conclusion was not wrong 'beyond debate' at the time of the alleged violation." *GMU*, 132 F. Supp. 3d at 731. Further, a school official could reasonably conclude that allowing such speech would "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513. Brown had previously been disciplined for "punch[ing] someone in the face." ECF No. 20-9. He was expelled because school officials believed he threatened a student and might "compromise the safety of the student body." ECF No. 20-5.

The decision to expel Brown based on his text message, "[t]ext me against and im [sic] breaking your jaw," does not violate any clearly established First Amendment right. Accordingly, Johnson and Porter are entitled to qualified immunity, and defendants' motion to dismiss the portion of count II premised on Brown's text conversation should be **GRANTED**.

2.. Brown's appeal letter

Next, Brown alleges Porter and Johnson retaliated against him in violation of his First Amendment right to free speech by denying his appeal because he included "frustrated and insulting" language in his appeal letter. Am. Compl. ¶¶ 110, 166–67. Brown asserts that he directed such language towards Porter and Johnson in his appeal letter because he believed they "were intentionally committing misconduct as officials at a public university." *Id.* ¶¶ 151–52, 162.

The NSU Dean of Students Office form advised Brown that the appeal letter was to be a "one-page narrative stating the specific grounds for appeal and a summary statement of the facts supporting such grounds." ECF No. 20-9 at 1. The tone Brown strikes in his three-page appeal letter addressed to Porter and "who it may concern" is angry and volatile, with multiple personal insults directed towards Porter. *Id.* at 2–4; *see also supra* note 6 and accompanying text.

The appeal letter was one factor contributing to Johnson's conclusion that Brown "was a threat to the Norfolk State University community." ECF No. 20-5. In upholding the expulsion decision, Johnson explains she considered a variety of factors: (1) Brown "threatened to break his roommate's jaw"; (2) in a previous case before the Dean of Students, Brown had "punched someone in the face"; (3) Brown's appeal letter, specifically "the language and content of the letter"; and (4) Brown's "volatile" behavior. *Id.* Based on all the above, Johnson explained she "did not want to compromise the safety of the student body." *Id.*

A reasonable school official addressing Brown's appeal could consider the language in Brown's appeal letter, along with the other factors listed in the appeal rationale, without violating any of Brown's clearly established free speech rights. Such consideration is necessary "to protect students and to support their educational mission." *See GMU*, 132 F. Supp. 3d at 729–30 (citing

Tinker, 393 U.S. at 513). Accordingly, Johnson and Porter are entitled to qualified immunity from Brown's claim that they violated his First Amendment right by relying, in part, on the language in his appeal letter to uphold his expulsion. Defendants' motion to dismiss the portion of count II premised on Brown's appeal letter should be **GRANTED** on the grounds of qualified immunity.

D. Brown fails to state a free speech retaliation claim in the portion of count II premised upon his writing articles and speaking to members of the NSU community.

Brown asserts a free speech retaliation claim against defendants Porter and Johnson for "flippantly expelling him" and denying his appeal in part because he published one or more articles and spoke publicly about unsatisfactory conditions at NSU. Am. Compl. ¶ 110.

Brown alleges "[u]pon information and belief," that he "wrote one or more articles available to the university community that brought to light one or more problems he saw with NSU and/or its officials." *Id.* ¶ 170. Additionally, Brown alleges, "[u]pon information and belief," he also "spoke to other members of the [NSU] community about one or more problems he saw with NSU and/or its officials." *Id.* ¶ 171. Brown asserts defendants expelled him and denied his appeal, in part, in retaliation for these constitutionally-protected acts of speech. *Id.* ¶¶ 172–73. For both the articles and conversations, Brown alleges, "[u]pon information and belief," that "evidence . . . exists within the possession and control" of defendants and is only available to him through discovery. *Id.* ¶ 174.

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "Showing" the pleader is entitled to relief entails doing more than making a "blanket assertion." *Twombly*, 550 U.S. at 555 n.3 ("Rule 8(a) 'contemplates the statement of circumstances, occurrences and events in support of the claim presented' and does not authorize a pleader's 'bare averment that he wants relief and is entitled to it.'" (quoting 5 Wright & Miller

§ 1202, at 94–95)).[12] Accordingly, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* Pleading "upon information and belief" "signal[s] that the allegations . . . are tenuous at best," and is only permitted under Rule 8(a) where the plaintiff is "rely[ing] on second-hand information to make a good-faith allegation of fact." *Raub v. Bowen*, 960 F. Supp. 2d 602, 615 (E.D. Va. 2013). Additionally, to plead "upon information and belief," a plaintiff must generally be "in a position of uncertainty because the necessary evidence is controlled by the defendant." *Ridenour v. Multi-Color Corp.*, 147 F. Supp. 3d 452, 456 (E.D. Va. 2015).

Brown's pleadings fall short of the Rule 8(a)(2) and *Twombly* minimum pleading standards. If Brown authored the articles and initiated conversations to bring to light problems at NSU, he should be able to provide some factual support—the subject matter addressed, approximately when and where articles were published or conversations took place, and who took part in the conversations. Brown alleges that he possesses only a vague idea that the acts of speech addressed "problems he saw with NSU and/or its officials" with no further elaboration Am. Compl. ¶¶ 170–71. Brown has failed to allege any speech protected by the Constitution.

Further, Brown fails to explain how any such articles or conversations played a role in his 2017 expulsion. Porter does not refer to Brown's prior speech in any of his emails to Brown. *See* ECF Nos. 20-1, 20-2, 20-3. Nor does Johnson list Brown's prior speech as one of the considerations factoring into her appeal decision and rationale. *See* ECF Nos. 20-4, 20-5.

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[12] Brown admits that without his other two free speech claims regarding his text conversation and appeal letter, this claim would fall short of the *Twombly* pleading standards. Pl. Opp. at 15. Brown pursues this free speech claim pursuant to Rule 18(a) of the Federal Rules of Civil Procedure, which permits joinder of claims. *Id.*

Brown's conclusory allegations do not give rise to a plausible inference that defendants retaliated against him for some unspecified prior constitutional speech when expelling him from NSU and upholding that decision on appeal. *See Iqbal*, 556 U.S. at 679. Accordingly, the portion of count II premised upon "Retaliation for Prior Constitutional Speech" contained in "one or more articles" or conversations with members of the NSU community "about one or more problems" at NSU, Am. Compl. ¶¶ 170–71, should be **DISMISSED** for failure to state a claim.

E. Count III's claim of gender discrimination under Title IX fails to state a claim upon which relief can be granted.

In count III, Brown asserts a gender discrimination claim under Title IX against the Commonwealth of Virginia, NSU, and the Board, alleging he was improperly expelled from NSU and denied an appeal based on his gender.[13] *Id.* ¶¶ 177–200.

NSU is a public university receiving federal funds and is subject to the requirements of Title IX. *Id.* ¶¶ 11–12, 125–26; *see also* 20 U.S.C. § 1681 (2012). Brown alleges he "was investigated and expelled from NSU for sending a text message" in a way that "denied [him] minimal due process protections" and "procedural safeguards required by the Student Disciplinary Process based in part on his gender." Am. Compl. ¶¶ 180–81, 188–89. In contrast, Brown alleges that "NSU rarely if ever investigates [or disciplines] females for sending text messages," or for any other behavior. *Id.* ¶¶ 182–85. Brown further asserts defendants would have provided him minimal due process protections and procedural safeguards, and would not have expelled him over a text message if he were female. *Id.* ¶¶ 190–95. Brown pleads all of these allegations "[u]pon

[13] Brown's claim against the Commonwealth of Virginia is barred because Title IX does not provide a cause of action against the Commonwealth; it only applies to "education[al] program[s] or activit[ies] receiving Federal financial assistance." 20 U.S.C. § 1681. To the extent that Brown brings his claim against NSU, he has clarified that defendant "NSU" is both the university and the Board of Visitors. Am. Compl. ¶ 12.

information and belief," explaining that "information related to gender statistics in NSU disciplinary proceedings are in Defendants' possession and control," and that he could only acquire such information through discovery. *Id.* ¶¶ 186–87.

Title IX provides, in part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. Title IX may be enforced through an "implied private right of action." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979)). The Fourth Circuit has clarified that, in analyzing a claim brought under Title IX, courts should "look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance." *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). Under both Title VII and Title IX, "[p]roof of discriminatory intent is necessary to state a disparate treatment claim." *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 961 (4th Cir. 1997), *aff'd in part, vacated in part on other grounds en banc*, 169 F.3d 820 (4th Cir. 1999); *see also Yusuf*, 35 F.3d at 715 ("[W]holly conclusory allegations [do not] suffice for purposes of Rule 12(b)(6)" for plaintiffs "attacking a university disciplinary proceedings on grounds of gender bias").

Claims "attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories"—selective enforcement and erroneous outcome. *Yusuf*, 35 F.3d at 715. In his amended complaint, Brown does not specify under which category he is proceeding. *See* Am. Compl. ¶¶ 177–200.

Brown has failed to allege a selective enforcement claim. To state a claim for selective enforcement, Brown must allege a comparator, meaning he, "as a male plaintiff[,] must demonstrate that a female was in circumstances sufficiently similar to his own and was treated

more favorably by [NSU]." *John Doe 2 v. Fairfax Cty. Sch. Bd.*, 384 F. Supp. 3d 598, 608 (E.D. Va. 2019) (holding that, although the Fourth Circuit has not addressed whether a selective enforcement claim requires a comparator to sustain the claim, "judges in both the Eastern and Western Districts of Virginia have held that it does") (internal quotations and citation omitted). Nowhere in his amended complaint does Brown allege a specific example of a female student who had been treated more favorably during disciplinary proceedings. Instead, Brown alleges in conclusory fashion that NSU rarely investigates or disciplines female students for sending text messages or for any other reason. Am. Compl. ¶¶ 182–85. Such conclusory allegations do not meaningfully advance Brown's selective enforcement claim across "the line from conceivable to *plausible*." *GMU*, 132 F. Supp. 3d at 733.

This leaves a potential erroneous outcome claim. An erroneous outcome claim is one in which a plaintiff alleges he was innocent of the alleged misconduct and "wrongly found to have committed an offense" because of his gender. *Yusuf*, 35 F.3d at 715; *see Brzonkala*, 132 F.3d at 961–62 (interpreting a claim of disparate treatment under Title IX as falling under the erroneous outcome theory of liability). The *Yusuf* court established a two-part test to determine whether a plaintiff was subjected to gender discrimination in violation of Title IX: (1) a plaintiff must allege "particular facts sufficient to cast doubt on the accuracy of the outcome of the challenged proceeding," and (2) "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *GMU*, 132 F. Supp. 3d at 732 (citing *Yusuf*, 35 F.3d at 715).

In reviewing defendants' first motion to dismiss, the Court concluded Brown had alleged numerous procedural flaws "sufficient to cast doubt on the accuracy of the outcome of his disciplinary proceeding and on the penalty imposed on him." ECF No. 14 at 37; ECF No. 19. Accordingly, Brown has sufficiently met the first *Yusuf* factor in his erroneous outcome claim.

To satisfy the second prong of the erroneous outcome test, Brown needs to allege "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding," which may include, for example, "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *GMU*, 132 F. Supp. 3d at 732.; *see Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 766 (D. Md. 2015) (quoting *Yusuf*, 35 F.3d at 715).

Brown has not alleged any circumstances suggesting he was expelled due to his gender. Brown asserts the "information related to gender statistics in NSU disciplinary proceedings are in Defendants' possession and control," and that he could only acquire such information through discovery. Am. Compl. ¶¶ 186–87. The Fourth Circuit and Federal Rules of Civil Procedure do not permit Brown to obtain discovery based on conclusory pleadings alleging NSU discriminates against males in disciplinary proceedings. *See Johnson v. Am. Towers, LLC*, 781 F.3d 693, 709 (4th Cir. 2015) ("As currently drafted, however, the complaint resembles a prohibited fishing expedition rather than a properly pleaded complaint."); *Willis v. Marchant*, No. 3:12cv843, 2013 WL 12106940, at *2 (W.D.N.C. Feb. 26, 2013) ("Litigants are not entitled to discovery fishing expeditions to determine whether a claim exists. . . . 'Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'") (quoting *Iqbal*, 596 U.S. at 678–79)).

While Brown has added paragraphs to his gender discrimination claim in the amended complaint, he has added no new factual allegations. *See* Am. Compl. ¶¶ 177–200. In his original complaint, Brown alleged, "[u]pon information and belief, NSU rarely if ever investigates or disciplines females for the conduct Brown was accused of committing." ECF No. 1-2 ¶ 130. The Court found this allegation to be conclusory and insufficient to survive a motion to dismiss. ECF

No. 14 at 37–42; ECF No. 19. In his amended complaint, Brown alleges "[u]pon information and belief": (1) "NSU rarely if ever investigates females for sending text messages"; (2) "NSU rarely if ever disciplines females for sending text messages"; (3) "NSU rarely if ever investigates females"; and (4) "NSU rarely if ever disciplines females." Am. Compl. ¶¶ 182–85. Brown's remaining allegations are also conclusory, stating, in effect, that defendants deprived him of due process because he is male and would have afforded him due process if he were female. *Id.* ¶¶ 188–95.

Brown has failed to allege facts in his amended complaint sufficient to establish a causal connection between the flawed outcome of his disciplinary proceedings and gender bias. *See Yusuf*, 35 F.3d at 715 (holding "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss"). As the court in *GMU* indicated, "there are a number of possible explanations for any disparate treatment, of which gender-motivated bias is only one." 132 F. Supp. 3d at 733. Further, "in the absence of any specific factual allegations pointing to such [gender] bias on the part of the defendants, it cannot be said that the discriminatory motive explanation is plausible rather than just conceivable." *Id.*

Accordingly, Brown's Title IX claim, count III, against defendants NSU, the Board, and the Commonwealth of Virginia should be **DISMISSED** for failure to state a claim.

F. Count V's breach of contract claim fails to state a claim upon which relief can be granted.

Brown brings his breach of contract claim, count V, against defendants NSU and the Board, alleging that his expulsion constituted a breach of an express or implied contract with NSU. Am. Compl. ¶¶ 201–62.

The Court dismissed Brown's breach of contract claim in the original complaint due to

Brown's failure to provide factual support for his assertion that NSU's disciplinary procedures constitute binding contractual terms such that his expulsion from NSU resulted in a breach of contract. ECF No. 14 at 46–47; ECF No. 19. Further, the original complaint failed to provide any factual support establishing the code of student conduct creates the "mutuality of engagement" necessary to create a binding legal contract. ECF No. 14 at 47. Brown has amended his complaint to attach the 2016–2017 NSU student handbook, ECF No. 20-7, and the 2019–2020 NSU student handbook, ECF No. 20-8. He also added speculative allegations of potential contracts NSU breached by expelling him. Am. Compl. ¶¶ 202–62.

First, Brown relies on the language in the student handbook to provide the necessary mutuality of engagement between Brown and NSU necessary to form a binding contract. Brown contends that "all regulations and policies published in the Student Handbook, the University Catalog, University bulletins and other University publications . . . constitute[] binding terms of the contract between . . . Brown and NSU upon . . . Brown's acceptance of NSU's offer of admission." *Id.* ¶ 222 (internal quotation marks omitted). This assertion is based on the following language contained in the student handbook: "All students, by accepting admission to Norfolk State University, agree to abide by all regulations and policies published in the Student Handbook, the University Catalog, University bulletins and other University publications, as well as federal, state, and local laws." *Id.* ¶¶ 221–22; ECF No. 20-7 at 19; ECF No. 20-8 at 19. The student handbooks attached to the amended complaint also contain the following language, "[t]he University reserves the right to change, modify, and/or update the Student Handbook at any time and without prior notice." ECF No. 20-7 at 7; ECF No. 20-8 at 7.

"It is well settled that Virginia law requires an absolute mutuality of engagement between the parties to a contract, whereby each party is bound and each party has the right to hold the other

party to the agreement." *Doe v. Washington & Lee Univ.*, 439 F. Supp. 3d 784, 790 (W.D. Va. 2020). For this reason, "generally applicable university conduct policies, such as handbooks and sexual assault policies, do not establish a contract under Virginia law," because "these policies allow for unilateral revision by the university and do not bind the school." *Washington & Lee Univ.*, 439 F. Supp. 3d at 792; *see also Brown v. Rectors & Visitors of Univ. of Va.*, 361 F. App'x 531, 534 (4th Cir. 2010) (holding the University of Virginia's student handbook was not an enforceable contract); *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 587–88 (E.D. Va. 2018) (holding Marymount University's student conduct policies are not binding, enforceable contracts); *Jackson v. Liberty Univ.*, No. 6:17cv41, 2017 WL 3326972, at *5–7 (W.D. Va. Aug. 3, 2017) (holding Liberty University's student handbook was not a contract); *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 337 (E.D. Va. 2005) (finding university course catalog to be an unenforceable contract). NSU's student handbook explicitly states that NSU can modify the handbook "at any time without prior notice." ECF No. 20-7 at 7; ECF No. 20-8 at 7. The facts in the amended complaint and attached student handbooks do not support Brown's assertion that the student handbook contains binding contractual terms, which were breached by NSU's expulsion decision.

Second, Brown has added language to his amended complaint asserting the following contracts exist between himself and NSU: (1) a contract based on Brown's acceptance of NSU's offer of admission and provision of valid consideration in the form of tuition and fees; (2) an express or implied housing contract; (3) an express or implied employment contract due to Brown's participation in a work study program; and (4) contractual obligations stemming from Brown's receipt of financial aid in the form of federal loans and grants from NSU. Am. Compl. ¶¶ 203–27. These allegations are purely speculative, and are similar to the allegations in the original complaint that were dismissed for failure to state a claim. Brown's amendments provide

no factual support for the existence of a binding contract, based on "mutuality of engagement," such that NSU's expulsion of Brown resulted in a breach of contract. *See Twombly*, 550 U.S. at 555 n.3.

Brown's breach of contract claim, count V, against defendants NSU and the Board should be **DISMISSED** for failure to state a claim.

IV. RECOMMENDATION

Accordingly, the Court **RECOMMENDS** the following:

(1) Defendants' motion to dismiss Brown's free speech claim premised on his text message and appeal letter against Porter and Johnson on the grounds of qualified immunity should be **GRANTED**, and this portion of count II should be **DISMISSED WITH PREJUDICE**;

(2) Defendants' motion to dismiss Brown's free speech claim premised on his articles and conversation against Porter and Johnson for failure to state a claim should be **GRANTED**, and this portion of count II should be **DISMISSED WITHOUT PREJUDICE**;

(3) Defendants' motion to dismiss Brown's Title IX gender discrimination claim against the Commonwealth of Virginia for failure to state a claim should be **GRANTED**, and count III should be **DISMISSED WITH PREJUDICE** as to the Commonwealth of Virginia;

(4) Defendants' motion to dismiss Brown's Title IX gender discrimination claim against NSU and the Board for failure to state a claim should be **GRANTED**, and count III should be **DISMISSED WITHOUT PREJUDICE** as to NSU and the Board; and

(5) Defendants' motion to dismiss Brown's breach of contract claim against NSU and the Board for failure to state a claim should be **GRANTED**, and count V should be **DISMISSED WITHOUT PREJUDICE**.

V. REVIEW PROCEDURE

By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date this report is forwarded to the objecting party by Notice of Electronic Filing or mail, *see* 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. Rule 6(d) of the Federal Rules of Civil Procedure permits an extra three (3) days, if service occurs by mail. A party may respond to any other party's objections within fourteen (14) days after being served with a copy thereof. *See* Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

/s/
Robert J. Krask
United States Magistrate Judge

Robert J. Krask
United States Magistrate Judge

Norfolk, Virginia
October 20, 2020

Student Conduct

105A

Violations

1. **Abuse of student conduct system** to include but not limited to providing false information during the student conduct process and/or not completing sanctions within allocated time period.
2. **Abuse of safety equipment** to include but not limited to tampering with or engaging fire alarms, extinguishers or smoke detectors.
3. **Acts of dishonesty** to include but not limited to furnishing false information to University officials or forgery of any University document. For academic dishonesty, refer to Academic Dishonesty Procedures.
4. **Alcohol the use, possession or distribution** of alcoholic beverages or paraphernalia.
5. **Computer Misuse**- Refer to Acceptable Use of Technological Resource Policy.
6. **Conduct that threatens or endangers the health or safety of any person including one's self**.

7. **Gambling** for money, in any form on University property.
8. **Dating Violence**
9. **Domestic Violence**
10. **Drugs the use, possession or distribution** of illegal drugs or misuse of prescription drugs and other controlled substances or drug paraphernalia.
11. **Disruptive behavior** that interferes with University sponsored events/activities; teaching, learning, administration, research; and/or University operations.
12. **Failure to comply** with directions of University employees or law enforcement officers.
13. **Harassment** to include but not limited to bullying/cyber-bullying, intimidation and/or hate crimes.
14. **Hazing**- Hazing includes, but is not limited to any situation which: creates a risk of physical injury; causes embarrassment and/or discomfort; involves harassment and/or humiliation; causes psychological or emotional distress; involves degradation and/or ridicule of an individual or group; involves or includes the willful destruction or removal of public or private property; involves the expectation that new/perspective members will participate in an activity, but full members will not.
15. **Obscene behavior** to include but not limited to public sexual acts or indecent exposure.
16. **Retaliation** against any person or group who makes a complaint, cooperates with an investigation, or participates in the resolution process.
17. **Sexual misconduct** - Refer to BOV Policy # 5 (2014) Sexual Misconduct Policy ; Refer to Admin Policy #
18. **Stalking** is when a person, on more than one occasion, engages in any behavior or conduct directed at another person with the intent to place that other person in reasonable fear of harm, death, criminal sexual assault, or bodily injury to that person or to that person's family or household member. **Cyber-stalking** is form of stalking or harassment that involves the intentional act of using the Internet to cause someone emotional distress
19. **Theft** includes the use, removal or possession of University/individual property without entitlement or authorization.
20. **Threatening behavior** whether written or verbal, towards any member of the University community that causes an expectation of injury or implies a threat to cause fear.
21. **Unauthorized access or entry** to any University building.
22. **Unauthorized recording and/or distribution** to include but not limited to pictures, audio or videos of any person without their explicit permission or consent.
23. **Weapons**-Refer to Violence Prevention Policy.
24. **Vandalism** includes but is not limited to destroying or damaging University property or property of another person.
25. **Violence to persons** includes but is not limited to intentionally or recklessly causing harm to any person.
26. **Violating federal, state or local laws** that legitimately affect the University's interest.
27. **Violating any published Board of Visitors or University policies or rules.**

106A

Procedures

Procedures
The below procedures provide a general overview of student conduct proceedings; however, these procedures are flexible based on the severity of the situation.

Any member of the University community may file a report against a student or student organization for violations of the *Code of Student Conduct*. All allegations should be submitted through an online incident report form or student summons (NSU Police Department). The student

conduct officer may act on notice of a potential violation whether a formal report is made.

Students should be aware the criminal (Police) and student conduct (University) processes are separate but may occur concurrently.

Informal Resolution

Step 1. Investigation

Upon receipt of the incident report, a student conduct officer will begin an investigation that will include interviews of the respondent, the complainant and/or others as necessary. Additionally, all documentary and physical evidence will be obtained and reviewed. Upon completion of the investigation, the following may occur:

- The student conduct officer determines there is insufficient information and the case is closed.
- The student conduct officer determines there is sufficient information and proceeds with scheduling a conduct conference (step 2).

Step 2. Notification

The respondent will receive a formal complaint of a violation through written notice. The notice will be delivered by one or more of the following methods: emailed to the student's University-issued account and/or mailed to the permanent address according to the University's record. The letter of notice will include:

- The reported violation(s) citing the *Code of Student Conduct*.
- The date, time, and location of the conference.
- The rights of the respondent.

Step 3. Conference

During the conference, the student conduct officer will present the findings to the respondent. As a result, the following may occur:

- The respondent is found not responsible and the case is closed.
- The respondent accepts responsibility and/or the findings for the violation and the student conduct officer imposes sanctions./li>
- The respondent denies responsibility and/or rejects the findings for the violation but has the right to appeal the decision and sanctions imposed by the student conduct officer.
- The respondent denies responsibility for the violation and/or rejects the findings and the misconduct could result in expulsion, suspension and/or removal from housing. The student conduct officer will then refer the case to the Student Conduct Board for formal resolution through an administrative hearing.

A respondent placed on interim suspension may request to have their case heard by the conduct officer through a conduct conference or referred to the Student Conduct Board.

The student conduct officer, at his or her discretion, may refer a case to the Student Conduct Board for resolution.

If the respondent fails to attend the conduct conference, the student conduct officer may render a decision based on the evidence available. The respondent will then forfeit their right to appeal the decision and/or sanction(s) imposed by the student conduct officer.

Formal Resolution

The University has established appropriate student conduct panels to provide hearings concerning reported violations of the *Code of Student Conduct* that could result in expulsion, suspension and/or removal from housing.

1. Notification

A notice will be made in writing and delivered by one or more of the following methods: emailed to the student's University-issued email account; mailed to the permanent address according to the University's record. The letter of notice will include:

- The reported violation(s) citing the *Code of Student Conduct*.
- The date, time, and location of the hearing.
- The rights of the respondent.

2. Hearing

The student conduct officer will schedule a hearing with the student conduct panel no more than ten (10) business dates after the conduct conference. This may be extended when reasonably necessary. If the respondent wishes to request a delay, he/she must notify the student conduct staff within two (2) business days of the scheduled hearing.

The student conduct panel for each hearing will be composed of five (5) members from the University to include employees and students. Each student conduct panel must include at least three (3) students. All members of the student conduct panel will be selected from the student conduct board and participate in mandatory training covering all aspects of the conduct process. Members of the University must apply to become a member of the student conduct board. Students serving must be in good academic standing with no serious conduct violations at the University. All appointments are subject to approval by the dean of students or designee and serve one-year renewable terms.

The Chief Justice or designee will serve as the chair for each hearing panel. The chair of the panel will conduct hearings according to the following guidelines:

- Hearings are closed to the public.
- Hearings are tape-recorded; however, deliberations of the hearing panel will remain private.
- Incidents involving more than one respondent, the panel will jointly conduct a hearing. Separate findings will be made for each respondent. At the discretion of the student conduct officer, individual hearings may be permitted.
- The complainant, respondent and advisors will be allowed to attend the entire portion of the hearing except for the deliberation and findings. Only in cases involving violence or sexual misconduct, as it relates to Title IX, will the complainant be advised of the outcome.
  All parties will have the privilege of questioning witnesses. Witnesses will only attend the portion of the hearing in which they are presenting information.
- Advisors are not permitted to speak or participate directly in any student conduct hearing unless permitted by the chair of the panel.
- The panel may only rely on oral and written statements of witnesses and written reports/documents.
- After the hearing, the panel will determine, by majority vote, using a preponderance of the evidence (whether it is more likely than not) the respondent violated the *Code of Student Conduct* and recommend sanctions.

- The chair of the panel will provide a written summary of testimony, findings of facts (evidence), and rationale for the decision. This report will be sent to the student conduct officer within two (2) business days of the hearing. A written decision will be sent to the respondent within two (2) business days after receiving the hearing panel's report.

If the respondent fails to attend the hearing, the Student Conduct Board may render a decision based on the evidence available. The respondent will then forfeit their right to appeal the decision and/or sanction(s) imposed by the Board.

There are certain times of the year and possible extenuating circumstances that may remove the option of the student conduct panel. During this time, a student conduct officer will adjudicate cases. The option of a student conduct panel may be removed on the following occasions:

1. When the student conduct board is participating in training.
2. When the University is not in session.
3. During the final two weeks of the fall or spring semester.
4. During summer sessions.

Appeals

Appeal forms may be submitted online by visiting https://www.nsu.edu/Assets/websites/student-affairs/sa-documents/Student-Conduct-Appeal-Form.pdf. The basis for the appeal must be one (or more) of the reasons shown above. The notice of appeal must contain, at a minimum, a statement of grounds for appeal and a summary statement of the facts supporting such grounds.

Upon receipt of the appeal, the dean of students* will review and provide a written decision within five (5) business days. The respondent may request a meeting with the dean of students to further discuss the appeal; however, the decision is made based on the written information submitted and is final.

*The vice president for student affairs has designated the dean of students as the appellate officer for student conduct matters.

Academic Matters

A formal grievance may be filed in the Dean of Students Office. Every attempt is made to ensure that the complainant has sought resolution of the grievance at the appropriate levels.

Grade Appeals
The instructor has the responsibility for evaluating coursework and determining grades; however, the student has the right to appeal a grade believed to be in error. The appeal process may involve the following steps and may be resolved at any level:

- The student confers with the instructor involved.
- The student and instructor (preferably together) confer with the chairperson of the department offering the course.
- The student and instructor (preferably together) confer with the dean of the school in which the department is housed.
- When the above steps do not resolve the issue, the student may initiate a formal written appeal through the Faculty-Student Grievance Committee to the Provost and Dean of Students Office for its review and recommendation.

Appeals should not be taken lightly by either the student or the instructor. The student is responsible for verifying the accuracy of his or her academic records. Grade appeals should be made immediately after the grade in question is received. No appeals will be considered after one year has elapsed or after graduation, whichever is earlier.

Academic Dishonesty
Cases involving academic dishonesty are immediately sent to the Faculty-Student Grievance Committee if the student denies responsibility. If the student accepts responsibility, the instructor may issue an appropriate grade sanction and notify the Dean of Students Office to place the student on probation.

If it is found that sufficient documentation is present to warrant a hearing, the Dean of Students Office will request to convene a hearing with the Faculty-Student Grievance Committee. The Faculty-Student Grievance Committee is comprised of faculty representatives from the schools and colleges.

The panel for each academic dishonesty hearing will be composed of three (3) members to include two (2) faculty and one (1) student. The chair of the panel (non-voting) will conduct the hearing according to the guidelines established for student conduct hearings. The decision of the Faculty-Student Grievance committee is final and cannot be appealed.

During the Conduct Process

Responsibilities
All students are responsible for being knowledgeable about the information contained in the Code of Student Conduct policy. An electronic version of this policy can be found online at https://www.nsu.edu/president/policies/index. Hard copies are available upon request the office for student conduct located in Suite 316, Student Services Center.

University email serves as the official communication with students. It is the responsibility of all students to maintain and monitor their University email regularly to stay abreast of student conduct proceedings.
Rights of the Accused (Respondent)

- The right to confidentiality of educational records pursuant to Family Educational Rights and Privacy Act (FERPA) of 1974.
- The right to be informed of the charges against him/her in writing.

- The right to have a support person or advisor present during student conduct proceedings. This person may not actively participate in the hearing but may give advice to the complainant.
- The right to request, in advance, a copy of the incident report.
- The right to call a reasonable number of witnesses. Names of the witnesses must be provided to the Dean of Students Office at least one day prior to the hearing.
- The right not to appear or to remain silent at the hearing. In the event the respondent does not appear at the hearing, after proper notification, the evidence in support of the violation will be presented, considered and adjudicated.
- The right to a fair and impartial hearing.

Rights of Victims (Complainant)

- The right to have a support person or advisor present during student conduct proceedings. This person may not actively participate in the hearing but may give advice to the complainant.
- The right to be informed of the outcome in cases involving violence and sexual misconduct as it relates to Title IX.
- The right to a fair and impartial hearing.

Rights of Complainant and Respondent (Title IX/Sexual Misconduct)

- Respondents of sexual misconduct have the right to a student conduct hearing and the right to identify and produce witnesses who may have information relevant to the complaint.
- The parties involved may bring an advocate, advisor or support person to any meeting with the student conduct officer/panel.
- Parties involved may present their case before the hearing panel by submitting documents and other relevant evidence.
- It should be noted that while each party will have the opportunity to present his/her case, the student conduct officer has the responsibility to identify and obtain any additional evidence and/or witnesses relevant to the grievance.
- Attorneys will not be permitted to personally participate in University student conduct proceedings.
- Student conduct hearings do not replace or substitute criminal prosecutions and students who choose student conduct hearings are also encouraged to seek justice through the criminal justice system and/or civil courts as appropriate.

Refer to BOV Policy # 05 (2015) Title IX: Sexual Violence, Discrimination, Harassment, and Retaliation

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Sanctions

Warning: An official written notice that the student has violated the Code of Student Conduct.

Disciplinary Probation: Disciplinary probation is for a specific length of time. Mandatory conditions may be imposed and may include, but not limited to the following: loss of good standing and/or denial of the privilege to hold a position of leadership or responsibility in any University student organization or activity. If the student is found in violation of the Code of Student Conduct while on disciplinary probation, the University may impose additional sanctions.

Educational Project: The requirement to attend, present or participate in a program related to the violation. It may also require writing reflective papers.

Community Service: The requirement to complete supervised service.

Counseling Referral: The requirement to visit the Counseling Center and complete a screening within five (5) business days of the respondent's conference/hearing. Upon completion of the screening, if any additional services are recommended they must be completed within the timeframe provided by the Counseling Center.

Fine: A sum imposed as a result of an offense; the sum must be reasonable and may be imposed depending on the severity of the violation.
Loss of Privilege: The denial of specified privileges for a designated period of time.

Restitution: The repayment for damage to University property or facilities; payment for damage to the property or person of a member of the University community, guests of the University, and/or other appropriate third parties; repayment of misappropriated or misused University funds. Restitution must be paid by cashier's check or money order. A disciplinary hold will be placed on the respondent's record until payment is made; however, if payment is not made by the end of the semester, the respondent's account will be charged.

University Housing Reassignment: The reassignment to another residential hall as determined by the Office of Housing & Residence Life.

University Housing Visitation Restriction: The loss of privilege to host any guests in the lobby of the student's residence hall and/or individual room.

University Housing Removal: The student's privilege to live or visit any residential hall is permanently revoked.

Suspension: Separation from the University for a specified amount of time. The student will be required to vacate the campus with 24 hours of notification of this action. During the suspension period, the student is not permitted on University property, events or activities.

Expulsion: The permanent separation of a student from the University.

Other Sanctions: Additional sanctions may be designed as deemed appropriate to the offense.

Interim Actions: The Dean of Students or designee may impose restrictions and/or separate a student from the University community pending the outcome of a hearing to protect the interests of the health, safety and welfare of the University community, or to ensure the student's safety and well-being. These actions can include but are not limited to no-contact orders, amending a student's schedule, hall relocation and/or interim suspension. Interim suspension is the temporary separation of a student from the University. If an interim suspension is imposed, the respondent may request a meeting with the dean of students or designee to discuss the interim suspension. The Dean of Students may uphold or lift the interim suspension after meeting with the respondent; however, this decision is final. If the interim suspension is upheld, the respondent will be required to vacate the campus immediately. At the discretion of the dean of students or designee, alternative coursework options may be provided.

NORFOLK STATE UNIVERSITY

Dean of Students Office
700 Park Avenue, Suite 318, Norfolk, Virginia 23504
Tel: (757) 823-2152 Fax: (757) 823-2297
Web: www.nsu.edu

June 14, 2017

Joseph Brown (433929)

15 Chester Ave Apt 2
Irvington NJ 07111

Dear Joseph,

On June 14, 2017, it was reported that you violated the *Code of Student Conduct*, specifically, *No. 20.* ***Threatening behavior*** *whether written or verbal, towards any member of the University community that causes an expectation of injury or implies a threat to cause fear.*

You have the right to have your case heard by a conduct officer through a conduct conference or the Student Conduct Board through a formal hearing. Please contact Marcus Porter at 823-2336 to further discuss. It is the responsibility of the respondent to notify witnesses of the date, time, and location of any conduct proceedings.

In the interests of the health, safety, and welfare of the University community, you have been placed on interim hall removal (effective immediately) pending the outcome of your conduct matter. If you are in the residence halls without permission or a police escort, you will be subject to arrest for trespassing. **You must move out of housing by 7:00pm today, June 14, 2017.**

We recognize that the receipt of this letter may cause some students to experience anxiety. Please examine our website which will provide additional information about the student conduct process to include student rights, possible outcomes, and sanctions. This information can be found at www.nsu.edu/student-affairs/student-judicial/.

Sincerely,

Marcus Porter, Student Conduct Officer

Cc: Dr. Michael Shackleford, Vice President of Enrollment Management and Student Affairs
Tracci Johnson, Dean of Students
Dr. Faith Fitzgerald, Executive Director, Housing & Residence Life
Anthony Tillman, Resident Hall Director, Spartan Suites
Mecca Marsh, Director of Housing Operations, Spartan Suites
University Police, Investigations

COMPLAINT EXHIBIT 1

NORFOLK STATE UNIVERSITY

Dean of Students Office
700 Park Avenue, Suite 307, Norfolk, Virginia 23504
Tel: (757) 823-2152 Fax: (757) 823-2297
Web: www.nsu.edu

June 15, 2017

Joseph Brown,

I am writing to schedule a meeting to discuss the investigation of a report submitted to the Dean of Students Office.

On June 14, 2017, it was reported that you violated the following section(s) of the *Code of Student Conduct*:

- No. 20- *Threatening Behavior*

I have scheduled a student conduct conference for June 15, 2017, at 10:00 am at the NSU Campus Police Station. If the scheduled time is in direct conflict with a class, please call me at 757-823-2152 to reschedule. At this meeting, you may ask any questions regarding the student conduct process. If you fail to attend, a decision may be reached in your absence. If you are found responsible for the misconduct, a sanction will be issued at that time.

We recognize that the receipt of this letter may cause some students to experience anxiety. Please examine our website which will provide additional information about the student conduct process to include student rights, possible outcomes, and sanctions. This information can be found at www.nsu.edu/student-affairs/student-judicial/.

Sincerely,

Marcus Porter
Student Conduct Officer

COMPLAINT EXHIBIT 2

NORFOLK STATE UNIVERSITY

Dean of Students Office
700 Park Avenue, Suite 318, Norfolk, Virginia 23504
Tel: (757) 823-2152 Fax: (757) 823-2297
Web: www.nsu.edu

RESOLUTION

June 15, 2017

Joseph Brown
433929

15 Chester Avenue Apt 2
Irvington, NJ 07111

Dear Joseph,

I have concluded your case of a reported violation of the *Code of Student Conduct* specifically, *No.20-Threatening Behavior (Probation Violation).* I have found you responsible. As such, the following sanctions are imposed:

> ***Expulsion:*** *Effective immediately, you are permanently separated from Norfolk State University.*
>
> **You must notify Norfolk State University Campus Police at 757-823-8102 prior to any campus visits.*

You have five days from the date of this letter to appeal this decision. An appeal form has been attached for your convenience. Please return your appeal to deanofstudents@nsu.edu.

Sincerely,

Marcus Porter
Student Conduct Officer

Cc. Dr. Michael Shackleford, Vice President of Student Affairs and Enrollment Management
Tracci Johnson, Dean of Students
Dr. Faith Fitzgerald, Executive Director, Housing & Residence Life
Anthony Tillman, Resident Hall Director, Housing & Residence Life
Mecca Marsh, Director of Housing Operations, Spartan Suites
Chief Troy Covington, University Police
Cassondra Gwathney, Acting Director of Financial Aid
Mike Carpenter, Registrar
Sandra Riggs, Bursar
Cary Lazarus, SpartanCard Manager
Dr. Vanessa Jenkins, Counseling Center

COMPLAINT EXHIBIT 3