APPLICATION EXHIBITS

EXHIBIT 1

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 31, 2023
Lyle W. Cayce
Clerk

No. 21-20625

BRONSON MCCLELLAND,

Plaintiff–Appellant,

versus

KATY INDEPENDENT SCHOOL DISTRICT; KENNETH GREGORSKI; JUSTIN GRAHAM; HENRY GAW; ROBERT KEITH MEIER; KEN TABOR; STEPHANIE FULGENCIO; KATY INDEPENDENT SCHOOL DISTRICT POLICE DEPARTMENT; KISD BOARD OF TRUSTEES; GARY JOSEPH; JOAN MCPHERSON; COURTNEY DOYLE; ASHLEY VANN; ASHLY DARNELL; LESLIE HAACK; RICK HULL,

Defendants–Appellees.

Appeal from the United States District Court
for the Southern District of Texas
Civil Action No. 4:21-cv-00520

Before WIENER, HIGGINSON, and WILSON, *Circuit Judges.*

JACQUES L. WIENER, JR., *Circuit Judge*:

Plaintiff-Appellant Bronson McClelland appeals the district court's dismissal of his (1) 42 U.S.C. § 1983 claims against Defendants-Appellees on the basis of qualified and sovereign immunity; (2) overbreadth and void-for-vagueness claims; and (3) substantive and procedural due process claims. We AFFIRM.

I. BACKGROUND

A. *The Snapchat Video Incident*

On October 3, 2019, following a particularly heated football game between Katy High School ("KHS") and Tompkins High School, Plaintiff-Appellant Bronson McClelland sent a video to Jose Hernandez. At the time, McClelland was a student at KHS and the starting quarterback of its football team. Hernandez was a student at Tompkins High School but not on its football team. After that game, McClelland, Hernandez, and other students gathered at an off-campus Whataburger restaurant and taunted each other in person and digitally via the Snapchat social media platform.[1] While outside of the restaurant, McClelland recorded and sent a three-second video to Hernandez via Snapchat wherein McClelland stated, "[We'll] put your mother[ ]cking ass in the hospital, n[ ]gga'. What the f[ ]ck." Hernandez recorded that video using his phone, then sent it to several friends. Tunmise Adeleye, a Black student and football player at Tompkins High School, received the video and posted it to his personal Twitter page, so that it allegedly appeared that he received it directly from McClelland. The video quickly circulated and began attracting media attention.

The next day, McClelland and his parents met with Defendants-Appellees Rick Hull, KHS's Principal, and Gary Joseph, the KHS football coach. Hull and Joseph determined that McClelland would be suspended for two games and would immediately cease to be team captain. After that meeting, McClelland posted an apology on his personal Twitter account, explaining that he had been stripped of his captain position and suspended for two games. Within hours of this post, Hull and Joseph allegedly contacted McClelland's father and demanded that McClelland remove the apology or

[1] Snapchat allows users to share images and videos with their other "friends" on the Snapchat platform. The photos and videos typically disappear after recipients have viewed them.

revise it to state that McClelland had been "suspended indefinitely." McClelland alleges that Hull demanded the retraction because he did not want it to appear as though KISD had "rushed the investigation." Defendant-appellee Katy Independent School District ("KISD") then released its own statement about the incident, explaining that "a KHS student-athlete posted a video of himself on social media in which he used racially charged language to taunt a student-athlete on the opposing team." KISD's statement also said that "[t]he student responsible will face disciplinary consequences in accordance with the Katy ISD Discipline Management Student Code of Conduct and Athletic Code of Conduct."

McClelland alleges that KISD "promoted the false-narrative that Plaintiff was a racist" because KISD had full knowledge that McClelland did not send the video directly to a Black student or to a student on the opposing football team. McClelland also alleges that several days after the incident, in early October 2019, Joseph held a team meeting during which he admitted that he had previously tolerated the use of the N-word, but then announced a new rule prohibiting the use of that word. McClelland and his parents requested that KISD rescind or correct its public statement, but it refused to do so. McClelland claims that, as a result of this refusal, the NCAA recruitment efforts were suspended. In the months following the incident, McClelland and KISD corresponded back and forth in efforts to resolve the fallout from the alleged false statement. McClelland informed KISD that he would pursue legal remedies if the matter remained unresolved after September 18, 2020.

B. *The Vehicle Search*

On September 17, 2020, a canine unit with the KISD Police Department identified McClelland's car in an allegedly random search of KHS's parking lot. Defendant-appellee Officer Stephanie Fulgencio commenced a search and located .04 grams of a "green leafy substance" on the rear floor mat of the vehicle. Fulgencio summoned McClelland to the

vehicle, where McClelland explained that he and his brother shared the vehicle. McClelland also denied ownership, knowledge, or possession of the presence and the nature of the green leafy substance. Before any testing was done to confirm the nature and quantity of the substance, defendant-appellee Assistant Principal Ashly Darnell, acting on behalf of KHS and KISD, charged McClelland with possession of marijuana under the Texas Health & Safety Code.

On September 18, 2020, Hull held a disciplinary hearing during which Fulgencio stated that an "unusable amount" of the green leafy substance was found and would need to be tested for its tetrahydrocannabinol concentration. Three days later, Fulgencio confirmed that the substance was marijuana, and she and the KISD Police Department Assistant Chief Kevin Tabor (also a defendant-appellee) issued a supplemental police report reflecting this. McClelland was suspended for three days and placed in the Disciplinary Alternative Education Program ("DAEP") for forty-five days. McClelland alleges that Fulgencio and Tabor falsified their supplemental report because the substance had only been tested for the existence of marijuana but not for its potency, which is required to establish that it exceeded the legal threshold for marijuana.

Soon afterwards, McClelland sought to transfer out of the school district. He also challenged his DAEP placement through an appeal to KISD. McClelland and KISD eventually agreed to resolve the dispute and entered into a settlement agreement (the "Settlement") on September 29, 2020. The Settlement contained a "complete and general release of claims by [McClelland's] family" and a covenant not to sue, which would not be binding on McClelland if he were (1) denied admission to a transfer school or (2) not cleared by California regulations to participate in varsity sports because of the events at issue. The Settlement further provided that if McClelland were to enroll in KISD in the future, the disciplinary abatement would be null and void, and he would still be required to complete his time in

the DAEP. The Settlement also required KISD to prepare forms stating that McClelland was not subject to discipline for the marijuana-related incident. KISD Superintendent (and a defendant-appellee) Dr. Ken Gregorski issued an official letter which stated that (1) McClelland did not intend to possess the substance on campus and (2) McClelland's brother had come forward and admitted to possessing the substance found in their shared vehicle.

After the Settlement was executed, McClelland attempted to transfer to a high school in California and then to Manor Senior High School in Texas. McClelland alleges that KISD provided erroneous transcripts to the California school which prevented him from transferring there. McClelland then enrolled at Manor High School but could not get his varsity sports eligibility reinstated because of various residency requirements. McClelland reenrolled at KHS on October 29, 2020. On McClelland's return, Gregorski, Hull, and Justin Graham initiated an additional appeal concerning the marijuana offense. The three-member appeals panel determined that McClelland had violated the Texas Health & Safety Code for possession of marijuana. As a result, McClelland was placed back into the DAEP, preventing him from returning to KHS or its football team.

II. PROCEDURAL HISTORY

In January 2021, McClelland sued Forensic Laboratory, Inc., KHS, the KISD Police Department, the KISD Board of Trustees ("KISD Board"), and a number of KHS, KISD, and KISD Police Department employees in their individual and official capacities. That suit was filed in the state district court in Fort Bend County, Texas. McClelland alleged (1) violations of 42 U.S.C. § 1983; (2) violations of his procedural and substantive due process rights; and (3) various state law claims, including defamation, spoliation, and civil conspiracy. The case was removed to the Southern District of Texas on

February 17, 2021. After limited motions practice, Defendants-Appellees[2] filed a motion to dismiss all claims under Rule 12(b)(6) and to dismiss some claims under Rule 12(b)(1).

In a twenty-seven-page Memorandum and Order issued on November 1, 2021, the district court granted Defendants-Appellees' motion to dismiss and denied several other pending motions.[3] Without fully reaching the merits of McClelland's First Amendment claims, the district court held that each defendant-appellee was entitled to either qualified or sovereign immunity. The court explained that McClelland's First Amendment rights were not clearly established at the time of the Snapchat incident because "there was no general rule that could have placed Defendants on notice that it would be unconstitutional to discipline Mr. McClelland for his off-campus speech." The court further held that McClelland failed to state a claim for municipal liability because he did not "sufficiently connect the policymaker—here, the KISD Board—to the allegedly unconstitutional policy."

The district court also ruled that McClelland failed to state a void-for-vagueness claim because he did not show that he was deprived of a protected property right or liberty interest. The court further held that McClelland failed to show that his procedural and substantive due process rights were violated in connection with the discipline he received for possessing marijuana and to state an overbreadth claim because he could not point to other examples of conduct that would be unconstitutional under the Athletic

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[2] The moving parties comprised a smaller group than was originally sued. The movants (now Defendants-Appellees) included: KISD, KHS, Gregorski, Graham, Gaw, Meier, Tabor, Fulgencio, KISD Police Department, KISD Board, Joseph, McPherson, Doyle, Vann, Darnell, Haack, and Hull. Their motion to dismiss was supplemented shortly after filing to add KHS, which had been omitted inadvertently.

[3] The other pending motions were (1) Defendants-Appellees' motion to quash deposition notices; (2) McClelland's motion to unseal the motions to quash deposition notices; and (3) McClelland's motion to strike Defendants-Appellees' affirmative defense. Only Defendants-Appellees' motion to dismiss is at issue in this appeal.

Code of Conduct. Finally, the district court declined to exercise supplemental jurisdiction over McClelland's state law claims and dismissed them without prejudice. McClelland timely appealed.

III. STANDARD OF REVIEW

We review a motion to dismiss *de novo*, accepting all well-pleaded facts as true and drawing all inferences in favor of the plaintiff.[4] "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.'"[5] The district court is limited to the contents of the pleadings, including any attachments.[6] Conclusional allegations, naked assertions, and "a formulaic recitation of a cause of action's elements will not do."[7] When the defense of qualified immunity is raised in a motion to dismiss, "the [trial] court has an 'obligation . . . to carefully scrutinize [the complaint] before subjecting public officials to the burdens of broad-reaching discovery.'"[8]

IV. ANALYSIS

McClelland contends that the district court erred by dismissing his free-speech related § 1983 claims on the basis of qualified immunity because (1) Hull's regulation of McClelland's off-campus speech was unconstitutional; (2) McClelland's free speech rights were clearly established at all relevant times; and (3) McClelland sufficiently pleaded *Monell* liability. McClelland also asserts that the district court erroneously dismissed his claims for vagueness and due process violations because he

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[4] *Marks v. Hudson*, 933 F.3d 481, 485 (5th Cir. 2019).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[6] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000).

[7] *Bell*, 550 U.S. at 555.

[8] *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 263–64 (5th Cir. 2019) (quoting *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)).

pleaded facts demonstrating that he was deprived of specific property and liberty interests as a result of Defendants-Appellees' conduct. Finally, McClelland alleges that the district court erred in ruling that he had not stated a remediable overbreadth claim since he pleaded facts showing that "third parties would be damaged by [KISD's] broad-sweeping regulations."

A. McClelland's First Amendment claims arising under 42 U.S.C. § 1983

"To state a claim under 42 U.S.C. § 1983, a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by someone acting under color of state law."[9] However, "[t]he doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal."[10] Once the defense of qualified immunity has been raised, the plaintiff has the burden of demonstrating that "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time."[11] Courts may decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[12] Once a court determines that the right asserted was not clearly established, it need not reach the more difficult constitutional question.[13]

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[9] *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252–53 (5th Cir. 2005), *abrogated on other grounds*, *Delaughter v. Woodall*, 909 F.3d 130 (5th Cir. 2018) (citations omitted).

[10] *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc).

[11] *Benfield v. Magee*, 945 F.3d 333, 337 (5th Cir. 2019) (quoting *Morgan*, 659 F.3d at 371)).

[12] *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

[13] *Id.* at 242; *see also Camreta v. Greene*, 563 U.S. 692, 707 (2011) (recognizing that "courts should think hard, and then think hard again, before turning small cases into large ones"); *Morgan*, 659 F.3d at 384 ("Because we have granted immunity to the [defendants] at step two of the qualified-immunity analysis, it is within our discretion to decline entirely to address the constitutionality of the defendants' conduct.").

i. *Overview of First Amendment free speech jurisprudence*

In 1969, the Supreme Court solidified public students' free speech rights in *Tinker v. Des Moines Independent Commission School District*.[14] The Court protected such students' right to engage in passive protests of the Vietnam War with black armbands, declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15] The Court cautioned that public students' free speech is not without limits, however, because of the "special characteristics of the school environment."[16] The Court held that schools have a special interest in regulating student conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[17] To satisfy this standard, schools must demonstrate that the speech in question actually caused, or may reasonably be forecast to cause, a "substantial disruption of or material interference with school activities."[18] In arriving at this decision, the Court balanced the students' freedom of expression against the need to maintain a safe, effective learning environment.[19]

Since *Tinker* was decided, the Supreme Court has recognized three narrow exceptions to the substantial disruption/material interference standard based on specific contents of student speech.[20] These exceptions cover (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds;[21] (2) speech that promotes "illegal drug use" at

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[14] 393 U.S. 503 (1969).

[15] *Id.* at 506.

[16] *Id.* at 506, 512–13.

[17] *Id.* at 513.

[18] *Id.* at 514.

[19] *Id.*

[20] *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 390 (5th Cir. 2015) (en banc).

[21] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 275, 683 (1986).

a school-sponsored event;[22] and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as speech in a school-sponsored newspaper.[23] In all three cases, the Court affirmed the schools' right to censor the speech at issue without providing a forecast of substantial disruption.[24] In justifying these carveouts, the Court explained that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[25]

The Supreme Court more recently offered guidance for off-campus speech in its June 2021 decision in *Mahanoy Area School District v. B.L. ex rel Levy*.[26] In that case, the Court held that a disgruntled cheerleader's off-campus Snapchat posts, which stated "F[ ]ck school f[ ]ck softball f[ ]ck cheer f[ ]ck everything," were constitutionally-protected speech.[27] The Court explained that there are "three features of off-campus speech" which "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway."[28] These features are: (1) "a school, in relation to off-campus speech, will rarely stand *in loco parentis*"; (2) "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day"; and (3) "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[29] The Court declined to adopt a bright line rule or test to

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[22] *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

[23] *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

[24] *Morse*, 551 U.S. at 409; *Hazelwood*, 484 U.S. at 271; *Fraser*, 478 U.S. at 683.

[25] *Morse*, 551 U.S. at 396–97 (quoting *Fraser*, 478 U.S. at 682).

[26] 141 S. Ct. 2038 (2021).

[27] *Id.* at 2043.

[28] *Id.* at 2046.

[29] *Id.*

distinguish protected versus unprotected off-campus speech, noting that "[w]e leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."[30]

In the decades since *Tinker*, this court has grappled with whether—and to what extent—*Tinker* applies to off-campus speech. The ubiquity of social media has blurred the lines between off- and on-campus speech, causing increased difficulty for schools and parents alike. We have addressed the reach of *Tinker* to off-campus speech in three key cases: *Porter v. Ascension Parish School Board*[31] (2004); *Bell v. Itawamba County School Board*[32] (2015); and *Longoria ex rel M.L. v. San Benito Independent Consolidated School District*[33] (2019).

In *Porter*, we applied *Tinker* to the disciplinary action taken for a sketch drawn off-campus depicting a violent siege of a school.[34] The sketch was drawn by a former student at his home and was inadvertently brought to campus by his younger brother two years later, where it was discovered by school officials.[35] As a result, the younger brother was suspended, and the older brother was summoned to the office of his high school's resource officer, where a search of his bookbag revealed a box cutter, a fake ID, and notebooks containing disturbing depictions.[36] The high school officials recommended expulsion, and the older brother was jailed for four days for "terrorizing the school and carrying an illegal weapon." This court held that the sketch was constitutionally-protected because it was: (1) created and

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[30] *Id.*

[31] 393 F.3d 608, 618 (5th Cir. 2004).

[32] 799 F.3d 379 at 401–02.

[33] 942 F.3d 258, 264 (5th Cir. 2019).

[34] 393 F.3d at 611, 619.

[35] *Id.* at 611–12.

[36] *Id.* at 612.

stored off-campus, (2) displayed only to the artist's family members, and (3) not intentionally taken on-campus or "publicized in a way certain to result in its appearance" at the school.[37] We also held that the school principal was entitled to qualified immunity, concluding that Porter's free speech rights had not been clearly established at the time of the incident, given the "unsettled nature of First Amendment law as applied to off-campus student speech inadvertently brought on campus by others."[38] This court went on to note that, even if Porter's rights were clearly established during the relevant timeframe, the principal's determination was objectively reasonable.[39] We explained that "qualified immunity recognizes that school officials, such as Principal Braud, must be allowed to make reasonable mistakes when forced to act in the face of uncertainty."[40]

In *Bell*, this circuit held, en banc, that *Tinker* definitively applied to off-campus speech directed at the school community.[41] *Bell* involved a student who created and posted a rap video to his personal Facebook and YouTube pages while he was off-campus, resulting in his suspension.[42] The video contained threats, profanity, and intimidating language directed at two teachers in the student's school.[43] Qualified immunity was not contested on appeal, so we only examined whether the student's speech was constitutionally protected.[44] In applying *Tinker*'s "substantial disruption" test, this court focused on the nexus between the speech in question and the

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[37] *Id.* at 620.

[38] *Id.*

[39] *Id.* at 621.

[40] *Id.*

[41] 799 F.3d at 383.

[42] *Id.* at 383–84.

[43] *Id.* at 384.

[44] *Id.* at 389.

school community.[45] Concluding that the student had intentionally directed the video at the school community, we held that "a school official reasonably could find Bell's rap recording threatened, harassed, and intimidated the two teachers; and a substantial disruption reasonably could have been forecast, as a matter of law."[46] We further noted that the school's Administrative Policy "demonstrates an awareness of *Tinker*'s substantial-disruption standard, and the policy's violation can be used as evidence supporting the reasonable forecast of a future substantial disruption."[47] We acknowledged that our "precedent is less developed" regarding off-campus speech, but declined to adopt a specific rule to apply moving forward.[48]

Recently, in *Longoria*, this circuit decided an off-campus speech dispute on the basis of qualified immunity.[49] *Longoria* involved a former head varsity cheerleader who was disciplined by her school for posting profanity and sexual innuendo on her personal Twitter account.[50] The cheerleader asserted that her Tweets were constitutionally protected because they were posted off-campus and were not directed at the school community.[51] We first analyzed whether the cheerleader's free speech rights were clearly established during the relevant timeframe.[52] Recognizing that we had recently declined to adopt a "specific rule" applicable to all off-campus speech, this court held that the cheerleader's First Amendment rights were

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[45] *Id.*

[46] *Id.* at 391.

[47] *Id.* at 399.

[48] *Id.* at 394.

[49] 942 F.3d at 261.

[50] *Id.*

[51] *Id.* at 264.

[52] *Id.* at 265.

not clearly established.[53] We chose to forego the constitutional-violation inquiry, holding that the school officials were entitled to qualified immunity.[54] Referencing *Bell*, this court noted that "the 'pervasive and omnipresent nature of the internet'" raises difficult questions about what it means for a student using social media to direct his or her speech towards the school community.[55] We further explained that "a more defined rule will be left for another day."[56]

ii. *Qualified Immunity as to Hull*

In this appeal, McClelland contends that the district court erred in holding that Hull, KHS's principal during the relevant timeframe, was entitled to qualified immunity. Citing no case law in support, McClelland alleges that his First Amendment rights were clearly established at the time of the Snapchat incident. McClelland further asserts that the district court incorrectly based its qualified immunity analysis on whether the violation of McClelland's rights was based on the Athletic Code of Conduct ("ACC"). McClelland contends that, in doing so, the district court "overlooked the plainly alleged and pleaded violations of the First Amendment in retaliation and compelled speech."

1. Whether McClelland's free speech rights were clearly established

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood]

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[53] *Id.* at 267.

[54] *Id.* at 270–71.

[55] *Id.* at 269–70 (quoting *Bell*, 799 F.3d at 395, 403).

[56] *Id.*

that what he is doing violates that right.'"[57] Courts "do not require a case directly on point," but school officials are entitled to qualified immunity unless "existing precedent . . . placed the statutory or constitutional question beyond debate."[58] In other words, if "insufficient precedent existed to provide school officials with 'fair warning' that the defendants' conduct violated the First Amendment," the rights were not clearly established.[59]

Here, the district court first analyzed whether McClelland's First Amendment free speech rights were clearly established at the time of the Snapchat incident. That court reviewed relevant First Amendment jurisprudence and concluded that the Supreme Court and the Fifth Circuit had not clearly demarcated the limits of off-campus speech regulation. Quoting *Longoria*, the district court noted that "the Fifth Circuit's cases have 'failed to clarify the law governing school officials' actions in disciplining off-campus speech.'"[60] The district court concluded that "there was no general rule that could have placed Defendants on notice that it would be unconstitutional to discipline Mr. McClelland for his off-campus speech." Specifically, the court held that there was no clearly established rule stating that discipline for a "threat of violence apparently stated in jest" is unconstitutional. The district court went on to hold that the individual Defendants-Appellees were entitled to qualified immunity and did not reach the merits of whether McClelland's free speech rights were violated.[61]

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[57] *Ashcroft*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[58] *Id.*

[59] *Jackson v. Ladner*, 626 F. App'x 80, 89 (5th Cir. 2015).

[60] (quoting *Longoria*, 942 F.3d at 267).

[61] The district court did not address whether the individual Defendants-Appellees were entitled to qualified immunity as to McClelland's First Amendment compelled speech and retaliation claims. This is because McClelland abandoned these claims by failing to defend them in his opposition to the motion to dismiss, which is discussed further below.

The district court correctly concluded that there is no clearly established rule that could have placed Hull on notice that disciplining McClelland for his off-campus speech was unconstitutional. Our developing jurisprudence has not yet resulted in a rule that would have given fair warning to Hull and to "every 'reasonable official'"[62] in Hull's position that suspending McClelland for his video was unconstitutional. Even *Mahanoy*, which was decided after the underlying incidents here, offers little assistance. In *Mahanoy*, the Supreme Court held that "[w]e leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."[63] Here, McClelland's free speech rights at the time of the Snapchat incident were not clearly established so as to defeat qualified immunity for Hull.

2. Whether McClelland's speech was constitutionally-protected

The district court ended its qualified immunity analysis after concluding that McClelland's free speech rights were not clearly established in relation to the Snapchat incident. As discussed above, it is entirely within the district court's discretion to forego the constitutionality question after concluding that the rights at issue are not clearly established.[64] The district court did not err in choosing to forego the constitutional inquiry.

This court too may forego the more difficult constitutional inquiry. When the Supreme Court relaxed its strict adherence to the two-part qualified immunity protocol, it noted that engaging in the constitutional

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[62] *Ashcroft*, 563 U.S. at 741 (quoting *Anderson*, 483 U.S. at 640); *see also Longoria*, 942 F.3d at 269–70.

[63] 141 S. Ct. at 2046.

[64] *See, e.g.*, *Pearson*, 555 U.S. at 241; *Camreta*, 563 U.S. at 707; *Morgan*, 659 F.3d at 384.

inquiry may be advantageous in some situations and detrimental in others.[65] For example, it is helpful in the development of constitutional precedent and "especially valuable for questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[66] At the pleading stage, however, this inquiry "may create a risk of bad decisionmaking,"[67] since "the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed."[68] In *Longoria*, for example, we chose to forego the constitutional question altogether after determining that the student's rights were not clearly established.[69] *Longoria* also involved the review of a motion to dismiss.

Here, the district court's determination of qualified immunity as to defendant-appellee Hull was sound. This court will not engage in the constitutional inquiry because (1) it is evident that McClelland's free speech rights were not clearly established at the time of the incident; and (2) the underlying case was disposed of at the motion-to-dismiss stage, before the facts were developed.

3. McClelland's First Amendment retaliation and compelled speech claims against Hull

McClelland correctly points out that the district court did not examine his First Amendment retaliation and compelled speech claims in its memorandum and order dismissing this case. Defendants-Appellees contend that McClelland abandoned these claims by failing to defend or reassert them in his opposition to the motion to dismiss and subsequent briefing. In fact, McClelland did not defend or clearly mention these claims in his opposition

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[65] *Pearson*, 555 U.S. at 239–40.

[66] *Id.* at 236.

[67] *Id.* at 239.

[68] *Id.* (quoting *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 70 (1st Cir. 2002)).

[69] 942 F.3d at 265.

to the motion to dismiss, his supplemental reply regarding qualified immunity, or his motion to alter or amend the district court's judgment. McClelland asserts that he never abandoned these claims, and that he did not brief them in his response to the motion to dismiss because Defendants-Appellees only alluded to them in their motion to dismiss. However, in their motion to dismiss, Defendants-Appellees clearly stated that they were "mov[ing] to dismiss all of Plaintiff's claims" and even listed "free speech retaliation" as one of those claims.

This circuit's well-settled precedent instructs that a party abandons a claim by failing to defend it in response to motions to dismiss and other dispositive pleadings.[70] Here, McClelland failed to defend or reassert his retaliation and compelled speech claims on three separate occasions prior to this appeal. Defendants-Appellees moved to dismiss *all* claims, and the district court dismissed *all* claims in its judgment. McClelland thus abandoned his First Amendment retaliation and compelled speech claims on appeal.

iii. *Sovereign Immunity as to the KISD Board*

Under 42 U.S.C. § 1983, municipalities cannot be held vicariously liable for the acts of their employees unless the plaintiff's allegations satisfy particular requirements.[71] In *Monell v. Department of Social Services*, the Supreme Court held that a plaintiff asserting municipal, or "*Monell*," liability must demonstrate that "(1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a

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[70] *See, e.g.*, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006) (plaintiff abandoned claim by failing to defend it in response to motion to dismiss); *Magee v. Life Ins. Co. of N. Am.*, 261 F. Supp. 2d 738, 748 n.10 (S.D. Tex. 2003) ("The Fifth Circuit makes it clear that when a party does not address an issue in his brief to the district court, that failure constitutes waiver on appeal."); *Vela v. City of Houston*, 276 F.3d 659, 679 (5th Cir. 2001) (defendant abandoned limitations defense by failing to raise it in summary judgment response).

[71] *Monell v. Dept. Soc. Servs. Of City of New York*, 436 U.S. 658, 691 (1978).

constitutional right."[72] Since "the identity of the policymaker is a question of law . . . a plaintiff is not required to single out the specific policymaker in his complaint."[73] The "plaintiff need only plead *facts* that show that the defendant or defendants acted pursuant to a specific official policy, which was promulgated or ratified by the legally authorized policymaker."[74] Here, the parties agree that Texas law establishes the KISD Board as KISD's final policymaker.[75]

McClelland argues that he sufficiently pleaded *Monell* liability because he alleged facts that allowed the district court "to reasonably infer that the Board either (1) adopted policy that caused injury or (2) delegated to a subordinate officer authority to adopt such a policy." McClelland contends that, by adopting the ACC, the KISD Board "was directly involved" in violating his constitutional rights. He points out that, at the motion-to-dismiss stage, he only needed to plead that the ACC was ratified or promulgated by the KISD Board. Finally, McClelland asserts that he pleaded facts demonstrating that KISD's public announcement "*was signed by Katy ISD* and announced that discipline to be meted out was *due to official policy*" of the KISD Board. He thus contends that the district court erred in holding that the KISD Board was entitled to sovereign immunity.

The district court analyzed whether the KISD Board could be held liable vicariously for the acts of the individual Defendants-Appellees under *Monell*. That court examined the first and second prongs of *Monell*, looking for "facts that sufficiently connect the policy maker—here, the Board of

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[72] *Hicks-Fields v. Harris Cnty.*, 860 F.3d 803, 808 (5th Cir. 2017) (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)).

[73] *Groden v. City of Dallas, Texas*, 826 F.3d 280, 282 (5th Cir. 2016).

[74] *Id.*

[75] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (explaining that "whether a particular official has 'final policymaking authority' is a question of *state law*") (internal citation omitted).

Trustees—to the allegedly unconstitutional policy," and concluded that McClelland had not pleaded facts connecting the KISD Board to the alleged violations of his First Amendment rights. Citing *Longoria*, the district court explained that McClelland did not plead facts demonstrating that the KISD Board had delegated policymaking authority to the individual Defendants-Appellees, who were, at best, "decisionmakers." The court explained that McClelland's allegations "fail to meet the requirement that Defendants themselves exercise policymaking authority."

The district court correctly concluded that the KISD Board cannot be held liable vicariously for the individual Defendants-Appellees' actions. *Monell* instructs district courts to examine whether the policymaker either adopted an injury-causing policy or delegated the authority to adopt such a policy.[76] The policy at issue here is the ACC, a copy of which was attached to McClelland's complaint. McClelland did not allege facts demonstrating that the KISD Board had ratified the ACC, and the ACC itself does not indicate that it was ratified by the Board. In fact, the ACC appears to distinguish itself from "the board-approved *Discipline Management Plan and Student Code of Conduct*." McClelland has also failed to show that KISD's signature on its October 4, 2019 announcement constituted ratification or delegation. That announcement simply stated that a student would face consequences pursuant to the ACC and the Katy ISD Discipline Management Student Code of Conduct. McClelland did not allege any other facts that show the KISD Board had delegated policymaking authority to the individual Defendants-Appellees in connection with the disciplinary action. Therefore, McClelland has not shown that the KISD Board promulgated a policy that caused injury, so the KISD Board cannot be held liable for violations of McClelland's free speech under *Monell*.

[76] *Groden*, 826 F.3d at 286.

B. McClelland's constitutional overbreadth claim

"A regulation is constitutionally overbroad if it (1) prohibits a substantial amount of constitutionally-protected freedoms, when judged in relation to the regulation's 'plainly legitimate sweep' . . . and (2) is not susceptible to a limiting construction that avoids constitutional problems."[77] The overbreadth doctrine recognizes that "a broadly-written statute may have such a deterrent effect on free expression that it should be subject to a facial challenge even by a party whose own conduct may be unprotected."[78] In other words, that doctrine "enables a plaintiff to challenge a statute where it infringes on *third parties* who are not parties to the action."[79] However, an overbreadth claim is "not permitted where a party raises only situations that are essentially coterminous with their own conduct."[80]

McClelland asserts that particular provisions of the ACC are overbroad in violation of the First Amendment. McClelland points out that the ACC requires student athletes "to display/model behaviors associated with positive leaders both in the school and in the community" and "exhibit good citizenship at all times." Citing *Mahanoy*, McClelland takes issue with the fact that these provisions pertain to both on- and off-campus conduct. McClelland alleges that another student-athlete could find himself in the same disciplinary situation, "even if that student-athlete engaged in other activities (i.e. not using a racially-charged term)." McClelland concludes that

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[77] *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 669 (S.D. Tex. 1997) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)).

[78] *Int'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Roug*e, 876 F.2d 494, 499 (5th Cir. 1989); *see also Broadrick*, 413 U.S. at 612 (explaining that the overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech would be chilled in the process).

[79] *Chalifoux*, 976 F. Supp. at 669.

[80] *Seals v. McBee*, 898 F.3d 587, 599 (5th Cir. 2018) (internal quotation marks and citation omitted).

"the possibility and potential for wide-sweeping and heavy-handed regulation of student-athlete's speech outside the school doors is distressingly obvious."

The district court dismissed McClelland's overbreadth claim, concluding that his allegations only "contain[] a general statement of the law on overbreadth challenges, untethered to the well-pleaded facts that could survive a Rule 12(b)(6) motion." The district court stressed that McClelland failed to show that the rights of third parties would be threatened in situations that are different from his own.

The district court correctly analyzed McClelland's overbreadth claim and did not err in dismissing it. The Supreme Court has instructed that a plaintiff who asserts an overbreadth claim must show that a challenged policy prohibits a "broad range of protected conduct," and that there must be "a realistic danger that the [policy] itself will significantly compromise recognized First Amendment protections of parties not before the Court."[81] McClelland has only shown that his own conduct (which is arguably unprotected) is prohibited by the ACC. Additionally, his second amended complaint is devoid of facts demonstrating that the ACC is so overreaching that it will infringe on other student-athletes' free speech rights. His complaint only seeks a declaration that the ACC is "overbroad and constitute[s] viewpoint discrimination." The district court did not err in dismissing McClelland's overbreadth claim.

C. McClelland's void-for-vagueness claim

"A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory

[81] *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796, 801 (1984).

enforcement."[82] This standard is heightened in the context of education, "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process."[83] A regulation is void for vagueness when it is so unclear that people "of common intelligence must necessarily guess at its meaning and differ as to its application."[84] This circuit's precedent instructs that a facial challenge may only be sustained "if the enactment is impermissibly vague in all of its applications."[85] Since a void-for-vagueness challenge is ultimately a due-process claim,[86] a plaintiff must allege that he was deprived of a constitutionally-protected property or liberty interest.[87]

McClelland asserts that the ACC is void for vagueness because particular provisions "were unduly and unconstitutionally vague." He specifically alleges that the provisions requiring student-athletes to "conduct [themselves] as gentlemen and ladies at all times"; "exhibit good citizenship at all times"; and "display/model behaviors associated with positive leaders both in the school and in the community" are unconstitutional. McClelland asserts that the district court erred by not analyzing the merits of vagueness, instead deciding this question on the existence of a protected property interest.

The district court did not reach either the merits of vagueness or whether a facial challenge to the ACC could be sustained. Instead, that court

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[82] *A.M ex rel. McAllum v. Cash*, 585 F.3d 214, 224–25 (5th Cir. 2009) (quoting *Women's Med. Ctr. of N.W. Houston v. Bell*, 248 F.3d 411, 421 (2001)).

[83] *Fraser*, 478 U.S. at 676.

[84] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

[85] *Home Depot, Inc. v. Guste*, 773 F.2d 616, 627 (5th Cir. 1985) (quoting *Vill. of Hoffman Ests. v. Flipside*, 455 U.S. 489, 495 (1982)).

[86] *Cash*, 585 F.3d at 225.

[87] *Longoria*, 942 F.3d at 270 (citing *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999)).

analyzed whether McClelland had properly alleged the deprivation of protected property or liberty interests as a result of the ACC. The district court referenced *Chalifoux v. New Caney Independent School District*, which held that vagueness may only be invoked in the educational context when students "faced a potential deprivation of their property interests in attending a public school."[88] The district court concluded that McClelland had failed to state a claim for vagueness since "[n]either participation in football nor team captainship constitutes a property or liberty right of which Plaintiff was deprived."

The district court correctly analyzed McClelland's void-for-vagueness claim and did not err in dismissing it. It is well settled, in the educational context, that a plaintiff *must allege* a protected property interest. McClelland's second amended complaint is devoid of any such allegations. And, even if he had alleged lack of participation on the football team or team captainship in connection with vagueness, he still would not prevail. This court has held that "[a] student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement."[89]

D. McClelland's procedural and substantive due process claims

The Fourteenth Amendment provides that state actors may not deprive "any person of life, liberty, or property without due process of law."[90] "The first inquiry in every due process challenge—whether procedural or substantive—is whether the plaintiff has been deprived of a protected interest in property or liberty."[91] Moreover, "[t]o have a property

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[88] 976 F. Supp. at 668.

[89] *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159 (5th Cir. 1980).

[90] U.S. CONST. AMEND. XIV.

[91] *Edionwe v. Bailey*, 860 F.3d 287, 292 (5th Cir. 2017).

interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . [He] must, instead, have a legitimate claim of entitlement to it."[92]

In his second amended complaint, McClelland alleged that KISD, Gregorski, Hull, and Graham violated his due process rights throughout the marijuana-related disciplinary process and his resulting placement in the DAEP. He now appeals the district court's dismissal only as to KISD. McClelland asserts that KISD violated his due process rights by imposing discipline "without establishing the three required elements of the charged statute: usable quantity, intent to possess, and that the substance was properly tested, prior to imposing discipline, to be certain that the substance was legally marijuana as opposed to hemp." McClelland claims that KISD's "wrongful conviction" resulted in the destruction of his liberty interests. He also alleges that his due process rights were violated when KISD reinstated the discipline that it had imposed before he attempted to transfer schools. McClelland takes issue with the fact that the district court did not analyze the merits of his due process claims, instead basing its opinion on whether McClelland had alleged a deprivation of protected interests.

We disagree with McClelland. The district court first analyzed whether he had sufficiently alleged deprivation of his property and liberty interests. In doing so, the court looked to *Nevares v. San Marcos Consolidated Independent School District*, in which this circuit held that a student's placement in an alternative education program violated no protected property interest.[93] The district court also relied on this circuit's opinion in *Doe v. Silsbee Independent School District*, which held that students "do not possess a constitutionally protected interest in their participation in

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[92] *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

[93] 111 F.3d 25, 26–27 (5th Cir. 1997).

extracurricular activities."[94] The district court concluded that this circuit's well-settled precedent instructed against finding any violation of a protected property or liberty interest on the basis of McClelland's placement in DAEP or his suspension from the football team.

The district court did not err in dismissing McClelland's substantive and procedural due process claims because McClelland did not allege the deprivation of his property or liberty interests. As noted above, this circuit has held that students do not have a protected property or liberty interest in participating in extracurricular activities.[95] We have also held that students are not deprived of a protected property or liberty interest when they are placed in alternative education programs, such as the DAEP.[96] McClelland thus failed to allege the deprivation of a protected property or liberty interest, so the district court did not need to reach the merits of his procedural or substantive due process claims.

V. CONCLUSION

We AFFIRM the district court's dismissal of McClelland's (1) 42 U.S.C. § 1983 claims against Defendants-Appellees on the basis of qualified and sovereign immunity; (2) overbreadth and void-for-vagueness claims; and (3) substantive and procedural due process claims.

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[94] 402 F. App'x 852, 854 (5th Cir. 2010) (quoting *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005)).

[95] *Id.*

[96] *Nevares*, 111 F.3d at 26-27; *see also Harris ex rel. Harris v. Pontotoc Cnty. Sch. Dist.*, 635 F.3d 685, 690 (5th Cir. 2011) ("A student's transfer to an alternate education program does not deny access to public education and therefore does not violate a Fourteenth Amendment interest.").

EXHIBIT 2

United States Court of Appeals for the Fifth Circuit

No. 21-20625

BRONSON MCCLELLAND,

Plaintiff—Appellant,

versus

KATY INDEPENDENT SCHOOL DISTRICT; KENNETH GREGORSKI; JUSTIN GRAHAM; HENRY GAW; ROBERT KEITH MEIER; KEN TABOR; STEPHANIE FULGENCIO; KATY INDEPENDENT SCHOOL DISTRICT POLICE DEPARTMENT; KISD BOARD OF TRUSTEES; GARY JOSEPH; JOAN MCPHERSON; COURTNEY DOYLE; ASHLEY VANN; ASHLY DARNELL; LESLIE HAACK; RICK HULL,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-520

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before WIENER, HIGGINSON, and WILSON, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled

on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRONSON MCCLELLAND,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:21-CV-00520**
	§	
KATY INDEPENDENT SCHOOL DISTRICT, *et al.*,	§	
	§	
	§	
Defendants.	§	

MEMORANDUM & ORDER

Pending before the Court are (1) Defendants' Motion to Dismiss all claims, (2) Plaintiff's Motion to Strike Defendants' affirmative defense that Plaintiff released all claims accruing before September 29, 2020, by signing a contested settlement agreement; (3) six Motions to Quash deposition notices served by the plaintiff against individual Defendants and witnesses who are, or may be, under criminal investigation; and (4) Plaintiff's Motion to Unseal.

The Court held a hearing on October 20, 2021, on the motions then pending. It took those motions under advisement, after which the Parties filed supplemental briefing and an additional motion.

For the reasons set forth below, the Court now **GRANTS** the Motion to Dismiss, **DENIES AS MOOT** the Motion to Strike and Motions to Quash, and **DENIES** the Motion to Unseal.

I. BACKGROUND

A. Factual Background

Plaintiff Bronson McClelland is a former student of Katy High School. He was the starting quarterback and team captain of the school's high-performing football team.

1. Snapchat Incident

On October 3, 2019, the Katy High School football team narrowly defeated rival Tompkins High School. After the game, students from both schools went to a local Whataburger, where students from Tompkins High were allegedly taunting Katy High students. Plaintiff and several teammates arrived at the scene. During this off-campus altercation, Plaintiff sent a Snapchat[1] video from his friend's phone to Jose Hernandez, a Tompkins High student who was not a member of the football team. In this video, Mr. McClelland stated: "[We'll] put your motherf*cking ass in the hospital, n*gga'. What the f*ck."

Mr. Hernandez recorded[2] the video and sent it to several of his friends, including Tunmise Adeleye, an African American Tompkins High football player. Mr. Adeleye uploaded the video to his personal Twitter page, which Plaintiff states "g[ave] the illusion or appearance that McClelland sent the video to Adeleye." Plaintiff's Second Amended Complaint, Doc. 37 ¶ 17.

On October 4, 2019, Defendant Gary Joseph, the coach of the football team, called Plaintiff's father to discuss the video, which was rapidly circulating and garnered substantial media attention. Plaintiff and his parents met with Coach Joseph and Katy High School Principal Rick Hull, and the school officials stated that Plaintiff would be disciplined for his involvement in the Snapchat incident. Specifically, he would be suspended for the following two games and would be stripped of his position as captain of the team.

Plaintiff then released a public apology regarding his social media conduct in which he noted the discipline imposed on him. Defendants Hull and Joseph allegedly contacted Plaintiff's

[1] Snapchat is a social media application that allows users to share images and videos meant to disappear after recipients have viewed them.
[2] It appears Mr. Hernandez screen-recorded the video outside of the Snapchat application. Screen-recording allows the recipient of a Snapchat message or video, which would otherwise be ephemeral, to keep a copy of the media.

father demanding that Plaintiff remove or amend his apology, lest it appear that that Hull and Katy High School "rushed the investigation." *Id.* ¶ 23. Plaintiff refused. Defendant Katy Independent School District ("Katy ISD") thereafter released its own statement:

> *On the evening of Thursday, October 3, 2019 . . . a KHS student-athlete posted a video of himself on social media in which he used racially charged language to taunt a student-athlete on the opposing team. Campus administration, Katy ISD police and local law enforcement thoroughly investigated the video incident. The student responsible will face disciplinary consequences in according with the Katy ISD Discipline Management Student Code of Conduct and Athletic Code of Conduct. However, it is important to note there are other related incidents that continue to be under investigation that would lead to additional consequences for any student found to be involved . . . .*

Defendants' Motion to Dismiss, Doc. 43, at 4-5. Plaintiff alleges that Katy ISD, through Hull and Katy ISD Deputy Superintendent Haack, knew that Mr. McClelland had not sent the video to "a student-athlete on the opposing team," but rather to a non-African American student who was not on the Tompkins High football team. Nonetheless, Plaintiff alleges, Katy ISD knowingly "promoted the false-narrative that Plaintiff was a racist and notified the media and general public that Plaintiff would be punished for his off-campus speech." Plaintiff's Second Amended Complaint, Doc. 37 ¶ 26.

Plaintiff further states that, after this series of events, Coach Joseph held a team meeting where he discussed the discipline imposed on Plaintiff, noted that he had regularly tolerated the use of the N-word at practices and in the weight room (without disciplining any other students), and announced a new rule prohibiting future use of the N-word at on-campus and school-related events under his supervision.

Plaintiff further alleges that Katy ISD refused to amend its statement even after confirmation that the video was in fact sent to Mr. Hernandez, despite Mr. McClelland and his family's concern that any public impression that he directed the video toward a Black student would negatively impact his academic and athletic prospects. Plaintiff alleges that several large

universities informed him that he was not recruitable until Katy ISD's statements were rescinded or corrected. After Mr. McClelland exhausted the administrative process to seek resolution of the alleged false statement, he and Katy ISD ultimately agreed that Katy ISD would have until September 18, 2020, to resolve the matter before Plaintiff would pursue legal remedies.

2. Marijuana Incident

On the eve of this deadline, September 17, a Katy ISD police canine unit identified Plaintiff's car in an allegedly random search while it was parked in Katy High's parking lot. Police officer Stephanie Fulgencio found 0.04 grams of a "green leafy substance" on the back floor mat of the vehicle. She later noted in her official report that this was not a "useable amount." When Plaintiff was summoned to his car, he denied ownership, possession, and knowledge of the presence or nature of the substance. (At the time, Mr. McClelland shared the vehicle with his older brother, who later admitted during Plaintiff's disciplinary proceedings that the substance belonged to him.) Defendants charged Plaintiff with possession of marijuana, suspended him for three days, and sent him to a Disciplinary Alternative Education Program ("DAEP") under TEX. EDUC. CODE §37.006(a)(2)(C)(i).

Section §37.006(a)(2)(C)(i) provides that "[a] student shall be removed from class and placed in a disciplinary alternative education program as provided by Section 37.008 if the student . . . sells, gives, or delivers to another person or possesses or uses or is under the influence of . . . marihuana or a controlled substance, as defined by Chapter 481, Health and Safety Code, or by 21 U.S.C. Section 801 *et seq*." As Plaintiff emphasizes, TEX. HEALTH & SAFETY CODE §481.121(a) provides that "a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana" (emphasis added). Further, Texas law exempts "hemp" from its definition of "marihuana," meaning that cannabis with a 0.3% concentration or less of

tetrahydrocannabinol ("THC") may be lawfully possessed. *See* TEX. HEALTH & SAFETY CODE §443.201; TEX. AGRICULTURE CODE §121.001.

At a disciplinary hearing the following day, Officer Fulgencio allegedly informed Principal Hull that she located an "unusable amount" of the substance. She allegedly also stated that a substance must have a THC level above 0.3% to be considered unlawful marijuana, so the substance had to be tested as to its THC potency. Plaintiff alleges that Principal Hull, disregarding the "usable quantity" requirement of TEX. HEALTH & SAFETY CODE §481.121(a) and without knowing the concentration of THC in the substance, determined that Plaintiff was in possession of marijuana and initiated the process to transfer him to the DAEP.

On September 21, three days later, at Defendant Hull's request, Officer Fulgencio conducted a presumptive field test on the substance; Plaintiff alleges that this test can only determine the existence of THC, but not its potency. Officer Fulgencio and her supervisor, Assistant Chief Kevin Tabor, prepared a supplemental police report concluding that the substance had a "presence of THC, this was in fact marijuana." That day, Plaintiff was sent to the DAEP for 45 days.

Plaintiff challenged his DAEP placement. He also decided that he wanted to leave Katy ISD. The parties agreed to resolve the disciplinary dispute, and, on September 29, 2020, the parties signed a settlement agreement. The settlement agreement provided for the abatement of the disciplinary process. It further stated that Katy ISD, "[i]f asked about discipline by another education institution out of the State of Texas . . . will refer them to [a] letter [on the status of the discipline] and indicate that no discipline consequences remain." Settlement Agreement, Doc. 37-4, at 4. The following provisions are also relevant here:

- Sec. II(A), which provides for a complete and general release of claims by Plaintiff's family;
- Sec. II(B), the family's covenant not to sue, which "shall not be binding upon the Family if Bronson McClelland is not admitted to a transfer school or isn't cleared by California regulations for that school to participate in varsity sports due to the allegations from September 17, 2020"; and
- Section IV(A)(3), which states: "Family understands that the discipline is being abated; however, if Bronson McClelland re-enrolls at Katy ISD in the future, that abatement will be null and void and the student will be required to finish the assigned time in the discipline alternative campus (DAEP). Should this happen, the Family would still be permitted to a hearing in front of a District Level Committee as defined by the Student Discipline Management plan. This is the same hearing process that was scheduled for September 29,2020."

Settlement Agreement, Doc. 37-4, at 2, 4.

Mr. McClelland unsuccessfully attempted to transfer to a school in California, allegedly "as a result of Katy ISD providing erroneous transcripts to the receiving school." Doc. 37 ¶ 52. He then enrolled at Manor Senior High School in Manor, Texas. While at Manor High, he sought to have his eligibility to play varsity sports reinstated, which required that Katy High School complete the University Interscholastic League ("UIL") Previous Athletic Participation Form. On that form, as required by the Settlement Agreement, Coach Joseph indicated no disciplinary issues or any reason McClelland could not participate.

On October 29, 2020, having been denied eligibility by UIL to participate in athletics at Manor High School due to residency requirements, Plaintiff re-enrolled at Katy High School. His

discipline was reinstated; he was placed into the DAEP, which prevented him from returning to Katy High School or its football team. Plaintiff graduated from Katy ISD in December 2020 and is now in community college.

B. Procedural History

This case was removed from Fort Bend County, TX, on February 17, 2021. The Second Amended Complaint, the one at issue here, was filed in July 2020. It states claims under the First Amendment, the Fourteenth Amendment, and 42 U.S.C. § 1983. Plaintiff also brings various state law claims, seeking damages and injunctive relief for defamation; a declaration that Katy ISD cannot now claim that Plaintiff committed the offense of possession of marijuana because it previously (allegedly) took the position that Plaintiff did not commit the offense; a declaration that certain individual defendants acted *ultra vires*; and damages for conspiracy.

Defendants have filed a Motion to Dismiss and several Motions to Quash Deposition Notices of individual Defendants and witnesses who are, or may be, under criminal investigation.[3] Plaintiff, on the other hand, filed a Motion to Strike Defendants' Affirmative Defense that Plaintiff, by signing the Settlement Agreement, released all claims accruing before September 29, 2020. Finally, Plaintiff filed a Motion to Unseal the Motions to Quash that Defendants filed under seal. The Court addresses each of these motions below.

II. MOTION TO DISMISS

Defendants move to dismiss all of Plaintiff's claims under 12(b)(6). They also seek dismissal of some claims on jurisdictional grounds under 12(b)(1).

[3] Plaintiff's family approached the Fort Bend District Attorney's Office about potential criminal charges against several of the Defendants and/or witnesses named in this lawsuit.

A. Legal Standard

1. 12(b)(6)

Rule 12(b)(6) provides for dismissal of a cause of action based on the plaintiff's failure to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(6). The burden is on the movant to show that the plaintiff has failed to state a legally cognizable claim. *Constr. Cost Data, LLC v. Gordian Grp., Inc.*, No. CV H-16-114, 2017 WL 2266993, at *3 (S.D. Tex. Apr. 24, 2017), *report and recommendation adopted*, No. 4:16-CV-114, 2017 WL 2271491 (S.D. Tex. May 22, 2017). "In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

"Under Rule 12(b)(6), a claim should not be dismissed unless the court determines that it is beyond doubt that the plaintiff cannot prove a plausible set of facts that support the claim and would justify relief." *Lane v. Halliburton,* 529 F.3d 548, 557 (5th Cir. 2008). All well-pleaded facts will be taken as true and viewed in the light most favorable to the plaintiff. *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 461 (5th Cir. 2010). But any allegations in the complaint which are conclusory will not be afforded a presumption of truth. *Johnson v. E. Baton Rouge Fed'n of Teachers*, 706 F. App'x 169, 170 (5th Cir. 2017) (per curiam). Therefore, a complaint must contain sufficient factual matter that states a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). Legal conclusions that are "naked assertions devoid of further factual enhancement" or mere "formulaic recitation of [a claim's] elements" are not enough. *Id.* Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Turner v.*

Lieutenant Driver, 848 F.3d 678, 684-685 (5th Cir. 2017) (quoting *Iqbal*, 556 U.S. at 678). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted).

2. 12(b)(1)

A party may move for a court to dismiss a plaintiff's cause of action on the basis that the court lacks subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Unlike motions to dismiss under Rule 12(b)(6), where the plaintiff's allegations are taken as true and viewed under the most favorable light, the plaintiff bears the burden of proof that jurisdiction exists under Rule 12(b)(1). *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam) ("The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction."). Courts must consider a jurisdictional attack under Rule 12(b)(1) prior to considering other grounds for dismissal. *Ramming*, 281 F.3d at 161 (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) ("When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits.")). In considering whether it has subject matter jurisdiction, a court may consider matters of fact that are either in dispute or outside the pleadings. *Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986); *Ambraco Inc. v. Bossclip B V*, 570 F.3d 233, 238 (5th Cir. 2009) (noting that both 12(b)(1) and (b)(3) allow courts to look past the pleadings to resolve disputed facts). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his

claim that would entitle plaintiff to relief." *Ramming*, 281 F.3d at 161. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)).

B. Discussion

1. First Amendment—Off-Campus Speech

Defendants seek to dismiss Plaintiff's claim that Katy ISD's disciplinary action against him for his off-campus speech violated his rights under the First Amendment. The Court begins by discussing the applicable caselaw.

In 1969, the Supreme Court famously declared 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 (1969). Still, while the First Amendment's protections apply to the school environment, "those rights must be tempered in the light of a school official's duty to, *inter alia*, 'teach[ ] students the boundaries of socially appropriate behavior' and 'protect those entrusted to their care.'" *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 389-90 (5th Cir. 2015) (first quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); then quoting *Morse v. Frederick*, 551 U.S. 393, 408 (2007)). When determining the contours of a student's free speech rights, the Court must keep in mind the "special characteristics of the school environment," acknowledging that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Morse*, 551 U.S. at 396–97 (quoting *Fraser*, 478 U.S. at 682)).

The Supreme Court first addressed the limits of school discipline of student expression in *Tinker*. In evaluating the constitutionality of the school district's suspension of students for wearing black armbands to protest the Vietnam War, the Court balanced the need to maintain school order and promote a safe learning environment against the students' right to express their opinions. 393 U.S. at 740–41. The Court held that the students' speech, which neither "interrupted school activities nor . . . intrude[d] in the school affairs or the lives of others," was protected by the First Amendment. *Id.* at 740. Only where a student's speech actually causes or reasonably might be projected to cause a "substantial disruption of or material interference with school activities" may a school impose discipline for student speech. *Id.*; *see also Bell*, 799 F.3d at 390 (observing that the *Tinker* standard may be satisfied "either by showing a disruption has occurred, or by showing 'demonstrable factors that would give rise to any reasonable forecast by the school administration of 'substantial and material' disruption" (emphasis omitted) (quoting *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 974 (5th Cir. 1972))).

Since *Tinker*, the Supreme Court has considered the reach of the First Amendment in schools on three occasions. In each of these cases, it articulated a "narrow exception[ ] to the general *Tinker* standard based on certain characteristics, or content, of the speech." *Bell*, 799 F.3d at 390. First, in *Fraser*, the Supreme Court held that a school was constitutionally permitted to discipline a student for utilizing vulgar and offensive terms and sexual innuendo during an on-campus event. *Fraser*, 478 U.S. at 683. The Court noted that the student's speech took place during an "official high school assembly attended by 600 students," and held that it was an appropriate function of a school to "prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 681; *see also id.* at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."). Next, in

Hazelwood v. Kuhlmeier, the Supreme Court upheld the right of a school district to "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. 260, 273 (1988). And finally, in *Morse v. Frederick*, the Supreme Court held that a school official may suppress speech conducted during a school-sponsored event that "promote[s] illegal drug use." 551 U.S. 393, 410 (2007).

Each of these cases represents an exception to the substantial-disturbance test articulated in *Tinker*. In affirming the schools' right to discipline the speech at issue in those cases, the Supreme Court did not require the school officials to forecast a substantial disruption to the classroom environment or other school activities. Instead, the Court held that the district could discipline the students because of the "special features of the school environment" and the particularly harmful aspects of the speech at issue in each case. *Bell*, 799 F.3d at 392 (quoting *Morse*, 551 U.S. at 425, 127 S.Ct. 2618 (Alito, J., concurring)).

Recognizing that *Fraser*, *Hazelwood*, and *Morse* exemplify three narrow exceptions to the *Tinker* standard, the Fifth Circuit held in *Bell* that "threats against, and harassment and intimidation of, teachers" must be analyzed under the *Tinker* rule. 799 F.3d at 392.8 In *Bell*, a high school student posted a rap recording to his personal Facebook page, and later to YouTube, while he was "[a]way from school or a school function and without using school resources." *Id.* at 383. The recording contained threatening, profane, and intimidating language directed towards two teachers, accusing them of sexually harassing students at the high school. *Id.* at 384. When the school became aware of the recording, the student was suspended. *Id.* at 385. On appeal, the Fifth Circuit upheld the district's disciplinary actions. *Id.* at 394. Though the student's speech was conducted off-campus, it was "intentionally direct[ed] at the school community," and the

speech could reasonably be understood "by school officials to threaten, harass, and intimidate a teacher." *Id.* at 396. These unique features of the speech in *Bell* allowed the school to reasonably forecast "a substantial disruption," justifying school discipline. *Id.* at 398.

"*Bell*, however, did not articulate a generally-applicable standard for the discipline of all off-campus speech." *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 267 (5th Cir. 2019). The Fifth Circuit noted in *Bell* that it was declining to adopt a "specific rule" that would apply to all circumstances under which off-campus speech may be restricted. *Id.* at 394. Instead, the Fifth Circuit limited itself to the facts of that case, observing only that "Bell's admittedly intentionally directing at the school community his rap recording containing threats to, and harassment and intimidation of, two teachers permits *Tinker*'s application in this instance." *Id.* In synthesizing the school speech law above, the Fifth Circuit wrote:

> *First, nothing in our precedent allows a school to discipline non-threatening off-campus speech simply because an administrator considers it "offensive, harassing, or disruptive."* Bell*, 799 F.3d at 402 (Elrod and Jones, JJ., concurring);* see also id. *(observing that "the First Amendment does not, for example, allow a public school to punish a student for 'writ[ing] a blog entry defending gay marriage' from his home computer, even if the blog entry causes a substantial disruption at the school" (citing* Snyder*, 650 F.3d at 939 (Smith, J., concurring))). Second, it is "indisputable" that non-threatening student expression is entitled to First Amendment protection, even though the extent of that protection may be "diminished" if the speech is "composed by a student on-campus, or purposefully brought onto a school campus."* Porter*, 393 F.3d at 618–19. And finally, as a general rule, speech that the speaker does not intend to reach the school community remains outside the reach of school officials.* See id. *at 615 (holding that a student drawing that was "completed in [the student's] home, stored for two years, and never intended by him to be brought to campus" does not "constitute[ ] student speech on the school premises");* see also Bell*, 799 F.3d at 395. Because a school's authority to discipline student speech derives from the unique needs and goals of the school setting, a student must direct her speech towards the school community in order to trigger school-based discipline. We acknowledge, however, that the "pervasive and omnipresent nature of the Internet" raises difficult questions about what it means for a student using social media to direct her speech towards the school community.* Id. *. . . We recognize that the articulation of these rules still leaves many questions unanswered, and a more defined rule will be left for another day.* Bell*, 799 F.3d at 403. Given these principles, however,*

> *we hope to give some guidance to schools for the future, with the important reminder that "a broad swath of off-campus student expression" remains fully-protected by the First Amendment. Id. at 402 (Elrod and Jones, JJ., concurring).*

Longoria, 942 F.3d at 267–69.

More recently, the Supreme Court has indicated that the *Tinker* standard continues to apply and that certain circumstances may preclude First Amendment protection of even off-campus speech. *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021). In *Mahanoy*, the Supreme Court clarified that special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus. Circumstances that may implicate a school's regulatory interests include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices. *Id.* at 2044-45. However, the Supreme Court explained, three features of off-campus speech often, even if not always, distinguish schools' efforts to regulate off-campus speech: First, a school will rarely stand *in loco parentis* when a student speaks off campus. Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy. Taken together, these three features of much off-campus speech mean that the

leeway the First Amendment grants to schools, considering their special characteristics, is diminished. *Id.* at 2045-47.

The Court decides this case on grounds of qualified immunity as to the individual Defendants and governmental immunity as to Katy ISD.

a. Qualified Immunity

When a defendant asserts a qualified-immunity defense in a motion to dismiss, the court has an "obligation . . . to carefully scrutinize [the complaint] before subjecting public officials to the burdens of broad-reaching discovery." *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986); *see also Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995) ("[I]mmunity means more than just immunity from liability; it means immunity from the burdens of defending a suit, including the burdens of pretrial discovery."). A defendant is entitled to qualified immunity if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "This is not to say that an official action is protected by qualified immunity unless the very act 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." *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 618 (5th Cir. 2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). If, at the time of the events underlying the litigation, "insufficient precedent existed to provide school officials with 'fair warning' that the defendants' conduct violated the First Amendment," the defendants are entitled to qualified immunity. *Jackson v. Ladner*, 626 F. App'x 80, 88 (5th Cir. 2015) (quoting *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008)).

In the traditional two-step approach to qualified immunity, a court first determines that the plaintiff's alleged facts stated a claim for the violation of a constitutional right, then analyzes whether the right at issue was clearly established at the time of the defendant's actions. *Longoria*, 942 F.3d at 264. This two-step inquiry, however, is not mandatory. *Id.* As the Supreme Court decided in *Pearson v. Callahan*, courts have discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. 223, 236 (2009). If the court determines that the right asserted by the plaintiff was not clearly established, it need not reach the more difficult constitutional question. *Camreta v. Greene*, 563 U.S. 692, 707 (2011); *see also City of Tahlequah, Oklahoma v. Bond*, ___ S.Ct. ___, 2021 WL 4822664 at *2 (2021) ("We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law."); *Morgan v. Swanson*, 659 F.3d 359, 384 (5th Cir. 2011) ("Because we have granted immunity to the [defendants] at step two of the qualified-immunity analysis, it is within our discretion to decline entirely to address the constitutionality of the defendants' conduct."). Indeed, the Supreme Court has "detailed a range of circumstances in which courts should address only the immunity question," and has admonished courts to "think hard, and then think hard again, before turning small cases into large ones" by engaging in unnecessary constitutional analysis. *Camreta*, 563 U.S. at 707.

The Fifth Circuit recently addressed the issue of qualified immunity as to off-campus speech in *Longoria*. There, the plaintiff liked, reposted, and responded to Tweets apparently in violation of the Cheerleading Constitution she and her parent signed. There, the Fifth Circuit held that, "[b]ecause *Bell* . . . did not articulate a generalized rule that could have applied to [the

plaintiff] M.L.'s speech, it d[id] not constitute clearly-established binding law that should have placed the defendants on notice about the constitutionality of their actions." *Longoria*, 942 F.3d 258, 267. It highlighted two other cases to underscore that much of the law on the boundaries of off-campus speech remained unclear at the time that M.L. was dismissed from the cheerleading team. In *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004), the Fifth Circuit granted qualified immunity to a school official after a student's sketch depicting a "violent siege" on his high school community was inadvertently brought to school by his younger brother. *Id.* at 611, 620. The Fifth Circuit noted that the contours of the First Amendment "as applied to off-campus student speech inadvertently brought on campus by others" was "unsettled." *Id.* at 620. Because of the uncertainty in the law and the lack of clear precedent that could have guided official conduct, it held that the school official's actions were reasonable. *Id.* at 621.

Since *Porter*, the Fifth Circuit's cases have "failed to clarify the law governing school officials' actions in disciplining off-campus speech." *Longoria*, 942 F.3d 258, 267. In *Jackson v. Ladner*, 626 F. App'x 80 (5th Cir. 2015), a case applying pre-*Bell* authority, the Fifth Circuit granted qualified immunity to a school official who suspended a cheerleader from the cheer squad based on messages she sent to another member of the team on Facebook. *Id.* at 81, 88–89. It noted that its cases "had sent 'inconsistent signals' with regard to 'how far school authority to regulate student speech reaches beyond the confines of the campus,'" and therefore failed to provide school officials with "fair warning" about the boundaries of on-campus speech. *Id.* at 88–89 (quoting *Porter*, 393 F.3d at 620).

The Fifth Circuit similarly concluded that the Supreme Court's cases had not clearly established the constitutionality of the defendants' actions because the Supreme Court "ha[d] not had the occasion to articulate a rule that sets forth the limits of school discipline of off-campus

speech." *Longoria*, 942 F.3d 258, 267. Its most recent case on the matter, *Mahanoy*, has still fallen short of doing so. *Mahanoy* delineated three features of much off-campus speech that mean "that the leeway the First Amendment grants to schools in light of their special characteristics is diminished." *Mahanoy*, 141 S. Ct. 2038, 2046 (2021). But the Supreme Court explicitly "le[ft] for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference." *Id.* The Supreme Court listed circumstances that "may implicate a school's regulatory interests," *id.* at 2040 (emphasis added) but declined to provide any definitive criteria. And in any event, *Mahanoy* was decided on June 23, 2021, after the events that precipitated this lawsuit.

Though courts "do[] not require a case directly on point" to defeat a qualified-immunity defense, a school official is entitled to immunity from suit unless "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added); *see also Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) ("[C]learly established law comes from holdings, not dicta."). Here, there was no general rule that could have placed Defendants on notice that it would be unconstitutional to discipline Mr. McClelland for his off-campus speech, which included a threat of physical violence against another student.[4] Thus, the Court finds as a matter of law that Mr. McClelland's free speech rights were not clearly established when he was disciplined for the Snapchat video.

[4] Plaintiff argues that Defendants did not genuinely intend to physically harm the recipient. Even if this were true, it is still not "clearly established" that disciplining a student for a "taunt" or threat of violence apparently stated in jest is unconstitutional. In fact, other courts applying *Tinker* have dismissed First Amendment claims at the pleadings stage even where the student's speech was allegedly meant as a joke. For example, in *C1.G. v. Siegfried*, a student was expelled for posting (off campus) a Snapchat picture of him and his friends wearing hats and wigs, with the caption "Me and the boys bout to exterminate the Jews." 477 F. Supp. 3d 1194, 1200 (D. Colo 2020). The *Siegfried* court dismissed the student's First Amendment claim on a motion to dismiss, finding that whether the student meant the post as a joke and whether he intended to threaten anyone were not material to the analysis. *See id.* at 1209. In *A.S. v. Lincoln County R-III School District*, the court granted judgment on the pleadings under Rule 12(c). 429 F. Supp. 3d 659 (E.D. Mo. 2019). In that case, the plaintiff posted a doctored picture to Snapchat, making it appear that another student had died and was in a casket, and suggested that a visitation would be held at a local funeral home.

Without needing to decide the closer question whether Mr. McClelland sufficiently stated a First Amendment claim, the Court concludes that the individual defendants are entitled to qualified immunity.

b. § 1983

Section 1983 does not make municipalities vicariously liable for the wrongdoing of their employees. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Thus, to hold a municipality liable for a constitutional violation under § 1983, a plaintiff must show that "(1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Hicks-Fields v. Harris County*, 860 F.3d 803, 808 (5th Cir. 2017) (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)). "[T]he identification of policymaking officials is a question of state law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

Under Texas law, the final policymaker for a Texas independent school district is its board of trustees. *See Longoria*, 942 F.3d 258 at 271; *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993); TEX. EDUC. CODE §§ 11.151(b) ("The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district."). Because the "specific identity of the policymaker is a legal question that need not be pled," plaintiffs can state a claim for municipal liability if they plead sufficient facts to allow the court to reasonably infer that the Board either adopted a policy that caused injury or delegated to a subordinate officer the authority to adopt such a policy. *Groden v. City of Dallas*, 826 F.3d 280, 284, 286 (5th Cir. 2016). In short, plaintiffs must plead facts that sufficiently

Id. at 664. Because it found that the *Tinker* standard is an objective one, the court held that "A.S.'s after-the-fact characterization that the meme was meant to be a joke is therefore irrelevant." *Id.* at 670.

connect the policymaker—here, the Board of Trustees—to the allegedly unconstitutional policy. *Id.*

Here, Plaintiff pleads no facts suggesting that its Board of Trustees had any involvement in the incidents underlying this lawsuit. He has not alleged any facts suggesting that the Board of Trustees formally adopted any policies, regulations, bylaws, or ordinances responsible for the alleged violation of his First Amendment rights.

Nor has Plaintiff pled sufficient facts to allow the court to infer that the Board of Trustees delegated policymaking authority to Defendants. "A municipality can be held liable only when it delegates policymaking authority, not when it delegates *decisionmaking* authority." *Longoria*, 943 F.3d at 271 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986); *Jett*, 7 F.3d at 1246–47). The "finality of an official's action does not . . . automatically lend it the character of a policy," *Bolton v. City of Dallas*, 541 F.3d 545, 550 (5th Cir. 2008); *see also Jett*, 7 F.3d at 1246. The Supreme Court's cases "sharply distinguish[ ] between decisionmakers and final policymakers." *Jett*, 7 F.3d at 1247. In this case, Plaintiff points out that Katy ISD issued a statement that "[t]he student responsible will face disciplinary consequences in accordance with the Katy ISD Discipline Management Student Code of Conduct and Athletic Code of Conduct." Doc. 82, at 3. However, allegations that Defendants disciplined Plaintiff *in accordance with* policies directly or indirectly adopted by the Board of Trustees still fail to meet the requirement that Defendants themselves exercise policymaking authority.

Finally, Plaintiff has not alleged that the Board permitted "persistent and widespread practices" or "practices that are permanent and well settled and deeply embedded traditional ways of carrying out policy." *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984). In

fact, the Second Amended Complaint does not mention Katy ISD's Board of Trustees whatsoever, *see generally* Doc. 37.

Additionally, to the extent that the Second Amended Complaint alleged "failure to train" as a method for proving entity liability for a constitutional violation, *see*, *e.g.*, *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006), Plaintiff explicitly waived the claim. Plaintiff's Supplemental Reply Regarding Qualified Immunity, Doc. 82, at 1 ("At oral argument, Plaintiff . . . conceded he was waiving . . . a "failure to train" claim (which he never pled).").

Based on the above, Plaintiff has failed to state a *Monell* claim. The Court need not address the third prong—whether an official policy promulgated by a policymaker was the "moving force" behind a constitutional violation. Because Plaintiff has not stated a claim for either individual or municipal liability, the First Amendment claim as to Plaintiff's off-campus speech is DISMISSED WITH PREJUDICE.

2. Due Process & First Amendment—Athletic Code of Conduct

Plaintiff alleges that Katy ISD's Athletic Code of conduct is unconstitutionally vague and overbroad on its face.

a. Vagueness

Mr. McClelland alleges that the Katy ISD's Athletic Code of Conduct, on its face, is unconstitutionally vague in violation of the First Amendment. Plaintiff specifically raises issue with its requirements that athletes "display/model behaviors associated with positive leaders both in the school and in the community," "exhibit good citizenship at all times," and "conduct themselves as gentlemen and ladies at all times, demonstrating respect for their administrators, teachers, and fellow students." *See* Doc. 37-1, at 43.

"A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 224-25 (5th Cir. 2009). The standard is heightened in the school context. "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

Most importantly here, a void for vagueness challenge is, ultimately, a due process claim. *Cash*, 585 F.3d at 225. To state a void-for-vagueness claim, a plaintiff must allege that he was deprived of a property or liberty right. *See City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). The vagueness doctrine may be invoked in the school context only where students have "faced a potential deprivation of their *property* interests in attending a public school." *Chalifoux v. New Caney Ind. Sch. Dist.*, c, 668 (S.D. Tex. 1997) (emphasis added). The Fifth Circuit has held that "[a] student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement." *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159 (5th Cir. 1980).

In this case, Plaintiff alleges that the discipline imposed on him for the off-campus speech was suspension from two games and stripping of his title as team captain. Neither participation in football nor team captainship constitutes a property or liberty right of which Plaintiff was deprived. Thus, his vagueness claim must fail.

b. Overbreadth

Plaintiff's overbreadth claim is also unavailing. The overbreadth doctrine provides that "a broadly-written statute may have such a deterrent effect on free expression that it should be subject to a facial challenge even by a party whose own conduct may be unprotected." *Int'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494, 500 (5th Cir. 1989). "A regulation is constitutionally overbroad if it (1) prohibits a substantial amount of constitutionally-protected freedoms, when judged in relation to the regulation's 'plainly legitimate sweep' . . . and (2) is not susceptible to a limiting construction that avoids constitutional problems." *Chalifoux*, 976 F. Supp. at 670 (citations omitted).

But critically, "[t]he overbreadth doctrine enables a plaintiff to challenge a statute where it infringes on *third parties* who are not parties to the action." *Id.* (emphasis in original). Courts "generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). In this context, "an overbreadth challenge is not appropriate if the first amendment rights asserted by a party attacking a statute are essentially coterminous with the expressive rights of third parties." *United States v. Petras*, 879 F.3d 155, 167 (5th Cir. 2018) (citation omitted); *see Chalifoux*, 976 F. Supp. at 760 (citing *U.S. v. Hicks*, 980 F.2d 963, 969 (5th Cir.1992)) (rejecting overbreadth claim against school policy where students also raised substantive challenge as applied to their own First Amendment rights).

The First Amendment rights asserted by Plaintiff in this case are "essentially coterminous" with the expressive rights of third parties. Mr. McClelland has not alleged that the rights of third parties would be threatened in a manner different from the alleged threat to his

rights. His Response only contains a general statement of the law on overbreadth challenges, untethered to well-pleaded facts that could survive a Rule 12(b)(6) motion. *See*, *e.g.*, *Longoria as next friend of M.L. v. San Benito Consol. Indep. Sch. Dist.*, No. 1:17-CV-160, 2018 WL 6288142, at *18 (S.D. Tex. July 31, 2018), *report and recommendation adopted*, No. 1:17-CV-00160, 2018 WL 5629941 (S.D. Tex. Oct. 31, 2018), *aff'd sub nom. Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258 (5th Cir. 2019) (dismissing overbreadth claim upon Rule 12(b)(6) motion). Therefore, the overbreadth claim, like the vagueness claim, is DISMISSED WITH PREJUDICE.

3. Due Process (Procedural and Substantive)

Plaintiff alleges that the District, Superintendent Gregorski, Principal Hull, and Justin Graham (Katy ISD's General Counsel) violated his due process rights by disciplining him for possessing marijuana on school property. He further contends that Defendants violated his substantive due process rights by reinstating his discipline for possessing marijuana on school property, since Superintendent Gregorski had allegedly overturned his discipline and made a final determination that Plaintiff did not intend to possess the substance on campus.

Under the Fourteenth Amendment, state actors may not deprive "any person of life, liberty, or property without due process of law." U.S. CONST. AMEND. XIV. "The first inquiry in every due process challenge—whether procedural or substantive—is whether the plaintiff has been deprived of a protected interest in property or liberty." *Edionwe v. Bailey*, 860 F.3d 287, 292 (5th Cir. 2017). Further, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Here, Plaintiff alleges that Defendants deprived him of a protected interest by placing him in a DAEP, which damaged his reputation and scholastic record, and prevented him from participating in football at Katy ISD. However, in *Nevares v. San Marcos Consolidated Independent School District*, the Fifth Circuit held that students do not have a protected right to a specific curriculum or to placement at a particular school; accordingly, an assignment to an alternative education program does not deprive a student of any protected property rights or liberty interests. 111 F.3d 25, 26-27 (5th Cir. 1997); *see also Harris ex rel. Harris v. Pontotoc Cnty. Sch. Dist.*, 635 F.3d 685, 690 (5th Cir.2011) ("A student's transfer to an alternate education program does not deny access to public education and therefore does not violate a Fourteenth Amendment interest."); *C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist.*, No. 4:14-CV-646-A, 2015 WL 136379, at *3 (N.D. Tex. Jan. 8, 2015), *aff'd*, 641 F. App'x 423 (5th Cir. 2016).[5] Similarly, students "do not possess a constitutionally protected interest in their participation in extracurricular activities." *Doe v. Silsbee Ind. Sch. Dist.*, 402 Fed. Appx. 852, 854 (5th Cir. 2010) (quoting *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005)). The Fifth Circuit has rejected attempts to classify extracurricular activities as protected interests implicating the safeguards of due process. *Walsh*, 616 F.2d at 159; *Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1031 (5th Cir. 1983); *see also Khan v. Fort Bend Indep. Sch. Dist.*, 561 F. Supp. 2d 760, 764-65 (S.D. Tex. 2008).

[5] Following *Nevares*, numerous Texas courts have held that a DAEP referral does not deprive a student of due course of law under Article I, Sec. 19 of the Texas Constitution. *See*, *e.g.*, *Stafford Mun. Sch. Dist. v. L.P.*, 64 S.W.3d 559, 562-63 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Northwest Indep. Sch. Dist. v. K.R.*, 2020 WL 4907331, *4-5 (Tex. App.—Fort Worth 2020, no pet.) ("[D]istrict and appellate courts have no jurisdiction to review the decision to place a student in DAEP."); *Stephens v. Trinity ISD*, 2012 WL 5289346, *3-4 (Tex. App.—Tyler 2012, no pet.) ("[T]he alleged damage is to the student's reputation and the harm that flows from unsubstantiated DAEP placement, particularly, harm to the student's standing with fellow pupils and teachers, as well as interference with opportunities for higher education and employment . . . [D]amage to the reputation of the student alone is not enough to establish a due process violation.").

The facts Plaintiff alleges as to the marijuana-related disciplinary proceedings initiated against him, if accepted as true, raise substantial concerns. Those concerns, however, are not for the courts to address. As a matter of law, the Court concludes that Plaintiff cannot state a claim for a violation of due process, whether procedural or substantive, because he was not deprived of any protected property rights or liberty interests. Plaintiff's due process claims are DISMISSED WITH PREJUDICE.

4. State Claims

Because the Court dismisses Plaintiff's federal claims, no federal question remains before the district court. But this fact does not divest the court of jurisdiction; instead, the court must exercise its discretion whether to exercise supplemental jurisdiction over Mr. McClelland's state law claims. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection(a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction"). When a court dismisses all federal claims before trial, the general rule is to dismiss any pendent claims. *Bass v. Parkwood Hosp.* 180 F.3d 234, 246 (5th Cir. 1999) (citing *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989)). However, the dismissal of the pendent claims should expressly be *without* prejudice so that the plaintiff may refile his claims in the appropriate state court. *Bass*, 180 F.3d at 246. Therefore, Plaintiff's state claims here are DISMISSED WITHOUT PREJUDICE.

III. MOTION TO STRIKE MOTIONS TO QUASH DEPOSITION NOTICES

Because the Court dismisses all claims, it need not rule on the Motion to Strike and Motions to Quash Deposition Notices. These motions are DENIED AS MOOT.

IV. MOTION TO UNSEAL

Plaintiff moved to unseal the Motions to Quash that Defendants filed under seal. At the oral hearing, Defendants argued that individuals Defendants and witnesses have been or are likely to be subject to public harassment related to this case. While the public has an interest in accessing court documents, those interests are outweighed in this case by the privacy and safety interests of the individuals at issue. Therefore, Plaintiff's Motion to Unseal is DENIED.

V. CONCLUSION

The Court is not insensitive to Plaintiff's circumstances. His educational career and his hopes for a future in college athletics suffered significant injury, largely due to a moment's worth of juvenile and shameful misconduct. Nevertheless, sympathy for a young man's plight does not license any court to countermand well-established law or to offload ultimate responsibility from the individual to educational authorities.

* * *

The Court **GRANTS** the Motion to Dismiss as follows: Plaintiff's First Amendment and Due Process claims are **DISMISSED WITH PREJUDICE**, and his claims under state law are **DISMISSED WITHOUT PREJUDICE**.

The Motion to Strike and Motions to Quash are **DENIED AS MOOT**.

Lastly, the Motion to Unseal is **DENIED**.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on November 1, 2021.

Keith P. Ellison
United States District Judge